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A TREATISE

ON THE LAW OF

INSTRUCTIONS TO JURIES

IN CIVIL AND CRIMINAL CASES

WITH FORMS OF INSTRUCTIONS
APPROVED BY THE COURTS

BY THE
EDITORIAL STAFF OF THE WEST PUBLISHING COMPANY
UNDER THE SUPERVISION OF
HENRY E. RANDALL

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PUBLISHER'S PREFACE

OUT of the dim and distant past in juridical history there has come, and now abides with us, the Jury System, impregnably intrenched in constitutional guaranty. In civil actions, and in criminal prosecutions, one of the greatest elements of the contest is involved in the inquiry, What are the Facts? The wisdom of mankind has reached the definite and decisive conclusion that the determination of questions of fact rests, not with the jurist, but with a body of laymen, possessing no intimate knowledge of the law, but endowed with the faculties and experience of the common and average man. This body, known as the Common-Law Jury, is intrusted with the task of sifting the truth from circumstances, the frailties of human memory, the passions and evil designs of factions, and the defects of understanding. This task is made the Function of the jury, and the law, in positive and certain terms, declares that that function shall not be invaded by the trial judge. But the Law of the Case is to be pronounced by the judge in Instructions, couched in plain and unambiguous terms. In these instructions the judge is required rigidly to refrain from expressing his own views as to the facts, from intimating to the jury the weight to be given to particular testimony, and from assuming the existence of facts not clearly admitted by both parties to the litigation. To accomplish this result the judge is required to resort to a most adroit and painstaking literary effort, and to produce a Charge which will withstand the assaults of counsel for the unsuccessful party in the appellate court.

The supervising editor, for more than a generation, has constantly watched the stream of current decisions which has steadily flowed into the reservoir of reported cases; he has observed the questions debated and decided in these cases; and one thing that has been borne in upon him is the fact that almost one-half of the legal warfare inscribed on the pages of these opinions deals with the subject of the Province of the Court and Jury, and the delimitation of that province in the Instructions of the trial judge in the court below. In this stream of opinions he has seen the same case come several times before the same appellate court, indicating tragic consequences in the administration of justice, due wholly to the failure of the trial judge to instruct the jury according to

the established law. These conceptions moved him to bring about the production of a work on Instructions that might tend to clarify the turgid waters of jury trial litigation, and stand as a guide for correct instructions on all of the subjects of the law. To this task he bent his energies for several years, and applied to the subject the most painstaking care. He has employed in the supervision of the work the full measure of his long experience. With a corps of skilled assistants, working under his supervision, he has gathered together and assimilated the general rules applicable to instructions to the jury, and has culled from the whole mass of adjudicated cases all of the forms of instructions in particular cases which have received the approval of the courts of last resort. His sincere hope is that this work will be of utility to the bench and bar of the Nation in resolving the eternal, the vital, and the ever-present question: The form and sufficiency of Instructions in jury trials.

January, 1922.

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†

INSTRUCTIONS TO JURIES

PART ONE

RULES GOVERNING THE GIVING OR REFUSAL OF INSTRUCTIONS

CHAPTER I

DEFINITIONS, DISTINCTIONS, AND GENERAL CONSIDERATIONS

§ 1. Significance and purpose of instructions.
2. Importance of definition of province of court and jury.
3. Difficulties of administering jury system.
4. Province of court with respect to the facts at common law.
5. Province of the court with respect to the facts under constitutional and statutory provisions.

§ 1. Significance and purpose of instructions

The word "instructions," as used to describe the directions given by the judge* to the jury on the trial of a civil or criminal case, has a tendency to mislead, in that it seems to imply some degree of subordination on the part of the body instructed to that instructing. The word may, perhaps, suggest the relation of principal and agent—a principal who evolves from his own breast rules of conduct for an agent who owes his existence solely to the act of the principal. The analogy is not a true one. The jury is in no sense the agent of the judge. They both derive their origin from the same high source, and the judge in laying down rules to guide the jury in their deliberations, merely acts as the mouthpiece of the law for the purpose of marking out a definite and clearly ascertained path by which the ends of justice are attained. That this is so becomes more apparent when it is seen that even in those actions at law in which the judge acts without the aid of a jury, a party has a right to demand that the principles of law applicable to the facts found by the court shall be declared by it as distinctly as in instructions to a jury,[1] and that such declarations should as in cases tried before a jury, avoid comment upon the weight and probative effect of the evidence.[2]

The province of instructions to juries may be said to be to state and apply the law to the facts in a particular case, so that it may readily be

[1] Harbison v. School Dist. No. 1, 1 S. W. 30, 89 Mo. 184.

[2] Patterson v. Kansas City, Ft. S. & M. R. Co., 47 Mo. App. 570; King v. Allemania Fire Ins. Co., 37 Mo. App. 102.

* In this book "court" or "judge," for convenience, will be used as convertible terms.

understood by the mind untrained in the law.[3] Accordingly the purpose of such instructions should be to present the issues of the case in the most intelligible form,[4] notice the claims of the parties, suggest so far as necessary the principles of evidence and their application,[5] and define for the jury and direct their attention to the legal principles which govern the facts proved or presumed in the case,[6] and, where the evidence is of such a character as may easily lead to the raising of a false issue, the court should guard against such an issue by appropriate instructions.[7] It has been said, however, that the principal benefit to be derived from a charge to the jury is not a statement of the law, but the elimination of irrelevant matters.[8]

§ 2. Importance of definition of province of court and jury

At the very threshold of a work on instructions to juries lies the problem of defining the respective provinces of court and jury, since in every instruction to the jury which is not a mere abstract statement of the law there must necessarily be present in the mind of the court the question how far it can, or should, go without surrendering its own prerogatives or invading those of the jury. The problem, of course, is largely to prevent the jury from being reduced to a mere ministerial agent of the court. While laws have been enacted from time to time confirming and strengthening the status of the jury as a part of our judicial machinery, and courts recognize theoretically that the jury performs functions equal in importance to their own, yet when they come to instruct the jury they frequently fail to visualize that the province of the jury, although not so tangible as an acre of land or a geo-

[3] Carty v. State, 204 S. W. 207, 135 Ark. 169; Pagels v. Meyer, 61 N. E. 1111, 193 Ill. 172.

[4] Owen v. Owen, 22 Iowa, 270; Louisville & N. R. Co. v. King's Adm'r, 115 S. W. 196, 131 Ky. 347.

The court should give the jury all reasonable aid in solving the questions before them, taking care not to overstep the plain boundary that separates the two. Gillett v. Webb, 17 Ill. App. 458.

[5] Souvais v. Leavitt, 15 N. W. 37, 50 Mich. 108.

[6] Nelson v. State, 52 S. E. 20, 124 Ga. 8; Virgin v. Lake Erie & W. R. Co., 101 N. E. 500, 55 Ind. App. 216; St. Louis Southwestern Ry. Co. of Texas v. Cleland, 110 S. W. 122, 50 Tex. Civ. App. 499; State v. Dodds, 46 S. E. 228, 54 W. Va. 289.

Instructions are directions in reference to the law of the case, enabling the jury to better understand their duty and to prevent them from arriving at a wrong conclusion. Hanson v. Kent & Purdy Paint Co., 129 P. 7, 36 Okl. 583; Butler v. Gill, 127 P. 439, 34 Okl. 814; Leavitt v. Deichmann, 120 P. 983, 30 Okl. 423.

What are instructions within statutes requiring them to be in writing, see post, §§ 444–446.

[7] Estes v. Desnoyers Shoe Co., 155 Mo. 577, 56 S. W. 316.

[8] Irvin v. Southern Ry. Co., 80 S. E. 78, 164 N. C. 5.

Teaching law to jury. The object of a charge is not to teach law to the jurors, but to direct their conduct in the controversy they are called on to decide. Lendberg v. Brotherton Iron Min. Co., 42 N. W. 675, 75 Mich. 84.

graphical subdivision, has certain definite frontiers which are to be defended.

§ 3. Difficulties of administering jury system

The fundamental conception of the jury system is a simple one: Two tribunals sitting side by side in the adjustment of human rights and relations, one supreme in the realm of fact, and the other absolute in the realm of law; the composite decision of law and fact being rendered by the jury after being duly instructed in the law by the court. However, it must be admitted that we have here a very delicate piece of mechanism. Embarrassment is pretty certain to arise when one equal is called upon to instruct a coequal as to their respective rights and duties. Human nature being what it is, there is a tendency for the one to be accorded dominance and the other to acquire subserviency. Moreover, in pointing out to the jury the matters they are to pass upon, the boundaries between fact and law must be plainly indicated. Yet it is not always easy even for the trial judge, to fix such boundaries, and not every judge has the power of lucid expression necessary to avoid misapprehension by the juror, or, if the judge has such power, he frequently has not the disposition or opportunity to use it in the hurry of the courtroom. Then, too, the trial judge trained, not only in the law, but in the ability to grasp quickly the meaning of facts, often finds it difficult not to anticipate the conclusions of the jury. It ought not to be a matter of surprise, therefore, that in the trial of cases before a jury instructions, intended to guard against error, become themselves a prolific source of error, and there is often involved much of vexation, annoyance, and hope deferred, which might, perhaps, have been avoided if the trial had been before a single tribunal. But, whatever the defects of the jury system are, it will in all human probability endure as long as our present form of government. It is too broadly buttressed upon political, sociological, and historical reasons to be overthrown by mere considerations of efficiency. When our society is more perfectly organized, perhaps the juror will come to the performance of his duties with an equipment which will enable the court merely to lay down general principles, leaving to the jury their concrete application. Until that time arrives it will be the duty of the profession to eliminate waste and friction by a study of the precedents in the decisions of the courts of last resort, of which there are now a vast number, and which discuss the relations of court and jury from almost every conceivable angle. In this and the immediately ensuing chapters, II–VIII and also to some extent in chapters XXIX and XXX, it has

been sought, from these decisions, to construct a chart of the fundamental principles which should guide the court in giving instructions, so far as their formulation is affected by the necessity of preserving unimpaired the supremacy of court and jury in their respective spheres.

§ 4. Province of court with respect to the facts at common law

Under the common law it is competent for the trial judge to give his opinion upon the facts, as well as upon the law, so long as he leaves it to the jury to find a verdict according to their opinions,[9] and in the federal courts, where the common law prevails, it is the settled doc-

[9] **U. S.** (C. C. A. Iowa) Freese v. Kemplay, 118 F. 428, 55 C. C. A. 258.

Conn. Cullum v. Colwell, 83 A. 695, 85 Conn. 459; Cook v. M. Steinert & Sons Co., 36 A. 1008, 69 Conn. 91; Appeal of Dale, 57 Conn. 127, 17 A. 757; Appeal of Comstock's Com'rs, 55 Conn. 214, 10 A. 559.

Ga. Beall v. Mann, 5 Ga. 456.

Me. Phillips v. Inhabitants of Viazie, 40 Me. 96; Frankfort Bank v. Johnson, 24 Me. 490; Dyer v. Greene, 23 Me. 464; Inhabitants of Phillip v. Inhabitants of Kingfield, 19 Me. 375, 36 Am. Dec. 760; Ware v. Ware, 8 Me. 42.

Mass. Mansfield v. Corbin, 4 Cush. 213; Whiton v. Old Colony Ins. Co., 2 Metc. 1; Davis v. Jenney, 1 Metc. 221; Curl v. Lowell, 19 Pick. 25.

Minn. First Nat. Bank of Decorah v. Holan, 63 Minn. 525, 65 N. W. 952.

N. Y. Hurlburt v. Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482; Powell v. Jones, 42 Barb. 24; Hunt v. Bennett, 4 E. D. Smith, 647, affirmed 19 N. Y. 173; Bulkeley v. Keteltas, 6 N. Y. Super. Ct. 450, reversed 6 N. Y. 384; Gardner v. Picket, 19 Wend. 186; People v. Genung, 11 Wend. 18, 25 Am. Dec. 594.

Ohio. Jaspers v. Mallon, 9 Ohio Dec. 184, 11 Wkly. Law Bul. 166.

Pa. Lappe v. Gfeller, 60 A. 1049, 211 Pa. 462; Didier v. Pennsylvania Co., 146 Pa. 582, 23 A. 801; Hulett v. Patterson, 8 A. 917; Bonner v. Herrick, 99 Pa. 220; Leibig v. Steiner, 94 Pa. 466; Greeley v. Thomas, 56 Pa. 35; Ditmars v. Commonwealth, 47 Pa. 335; Bernstein v. Walsh, 32 Pa. Super. Ct. 392; Knee v. McDowell, 25 Pa. Super. Ct. 641; Oldham v. United States Express Co., 25 Pa. Super. Ct. 549; Rondinella v. Metropolitan Life Ins. Co., 24 Pa. Super. Ct. 293; Wills v. Hardcastle, 19 Pa. Super. Ct. 525; Sampson v. Sampson, 4 Serg. & R. 329; Long v. Ramsay, 1 Serg. & R. 72.

S. C. State v. Smith, 12 Rich. Law, 430; Kirkwood v. Gordon, 7 Rich. Law, 474, 62 Am. Dec. 418; Martin v. Teague's Ex'rs, 2 Speers, 260; Farr v. Thompson, 1 Speers, 93; State v. Bennet, 3 Brev. 514.

Vt. Rowell v. Fuller's Estate, 59 Vt. 688, 10 A. 853; Missisquoi Bank v. Evarts, 45 Vt. 293; Sawyer v. Phaley, 33 Vt. 69; Yale v. Seely, 15 Vt. 221.

Instructions held permissible within rule. A remark of a judge, in his instructions, that he had perceived no evidence in support of a position taken by one of the parties, but still referring it to the jury to settle the case on the evidence, is no ground for exceptions. Cunningham v. Batchelder, 32 Me. 316. It is within the province of a trial judge to tell the jury that a certain case, in its facts, is very like the case at bar, and the fact that he incidentally divulges the circumstance that in that case the jury found for plaintiff is immaterial, where the jury are instructed that they are to find a verdict on the evidence before them. Anderson v. McAleenan, 8 N. Y. S. 483, 15 Daly, 444.

trine, both in civil [10] and in criminal cases,[11] that it is not reversible error for the judge to express his own opinion on the facts, if the rules of law are correctly laid down and all matters of fact are ultimately

[10] **U. S.** Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257; (C. C. A. Ark.) Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 F. 133, 52 C. C. A. 95; (C. C. Cal.) Nome Beach Lighterage & Transp. Co. v. Munich Assur. Co., 123 F. 820; (C. C. A. Del.) Pullman's Palace Car Co. v. Harkins, 55 F. 932, 5 C. C. A. 326; (C. C. A. Fla.) Smith v. St. Louis I. M. & S. R. Co., 214 F. 737, 131 C. C. A. 43; (C. C. A. Ill.) Illinois Cent. R. Co. v. Davidson, 76 F. 517, 22 C. C. A. 306, certiorari denied 17 S. Ct. 994, 166 U. S. 719, 41 L. Ed. 1186; (C. C. A. Iowa) Kerr v. Modern Woodmen of America, 117 F. 593, 54 C. C. A. 655; (C. C. A. Kan.) Vanarsdale v. Hax, 107 F. 878, 47 C. C. A. 31; Chicago, R. I. & P. Ry. Co. v. Stahley, 62 F. 363, 11 C. C. A. 88; (C. C. A. Md.) Fidelity Mut. Life Ass'n of Philadelphia, Pa., v. Miller, 92 F. 63, 34 C. C. A. 211; (C. C. A. Mass.) Provident Sav. Life Assur. Soc. of New York v. Hadley, 102 F. 856, 43 C. C. A. 25, affirming judgment Hadley v. Provident Sav. Life Assur. Soc. of New York (C. C.) 90 F. 390; Doyle v. Boston & A. R. Co., 82 F. 869, 27 C. C. A. 264; (C. C. A. Minn.) Griggs v. Nadeau, 250 F. 781, 163 C. C. A. 113; (C. C. A. Mo.) Aerheart v. St. Louis, I. M. & S. Ry. Co., 99 F. 907, 40 C. C. A. 171; (C. C. A. Ohio) Young v. Corrigan, 210 F. 442, 127 C. C. A. 174; (C. C. A. Pa.) Fuller v. New York Life Ins. Co., 199 F. 897, 118 C. C. A. 227; (C. C. Pa.) Butler v. Barret & Jordan, 130 F. 944; (C. C. A. Pa.) Martin v. Hughes, 98 F. 556, 39 C. C. A. 160; (C. C. A. Tenn.) Treece v. American Association, 122 F. 598, 58 C. C. A. 266.

Illustrations of comment held proper within rule. A statement by the court that the meaning of the term "scalps," as used in the contract between the parties, has not been developed by the testimony. Hansen v. Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746. An instruction, in an action for injuries to a spectator at an amusement park by the bursting of a bomb, discharged as part of certain fireworks, that, if defendant's committee employed a couple of Italians about whom they knew nothing to produce and discharge the fireworks, they did not exercise the prudence which an intelligent man would have exercised, and then stating, "For myself I do not believe for a minute that they did any such thing, but that is a question of fact for you to determine, and not me." (C. C. A. N. Y.) Sebeck v. Plattdeutsche Volksfest Verein, 124 F. 11, 59 C. C. A. 531.

[11] **U. S.** (C. C. A. Cal.) Schulze v. United States, 259 F. 189, affirming judgment United States v. Schulze (D. C.) 253 F. 377; Beyer v. United States, 251 F. 39, 163 C. C. A. 289; (C. C. A. Idaho) Kettenbach v. United States, 202 F. 377, 120 C. C. A. 505; (C. C. A. Ill.) Keller v. United States, 168 F. 697, 94 C. C. A. 368; (C. C. A. Mass.) MacKnight v. U. S. 263 F. 832; (C. C. A. N. Y.) Oppenheim v. United States, 241 F. 625, 154 C. C. A. 383, reversing judgment United States v. Oppenheim (D. C.) 228 F. 220; (C. C. A. Ohio) Shea v. United States, 251 F. 440, 163 C. C. A. 458, writ of certiorari denied 248 U. S. 581, 39 S. Ct. 132, 63 L. Ed. 431; (C. C. A. Pa.) Hart v. United States, 84 F. 799, 28 C. C. A. 612, affirming United States v. Hart (D. C.) 78 F. 868; (C. C. A. R. I.) Balcom v. United States, 259 F. 779, 170 C. C. A. 579, certiorari denied 40 S. Ct. 14, 250 U. S. 669, 63 L. Ed. 1198; (C. C. A. S. C.) Perkins v. United States, 228 F. 408, 142 C. C. A. 638; (C. C. A. Tenn.) Sylvia v. U. S., 264 F. 593; (C C. A. Va.) Morse v. United States, 255 F. 681, 167 C. C. A. 57.

D. C. Maxey v. United States, 30 App. D. C. 63.

Under such rule a statement of a federal judge that he does not see any way in which the defendants can be acquitted, while not to be approved,

submitted to the jury. In some of the state courts, also, this practice still obtains, in criminal [12] as well as in civil cases.[13]

As indicated by the foregoing statement such an expression of opinion will be erroneous, even at common law, unless accompanied by an instruction that the jury are not bound by the opinions of the court, or at least unless the jury are given clearly to understand in some part of the charge, that they are the exclusive judges of the facts.[14] The greatest caution should be used in the exercise of such power of comment, that the jury may be left free and untrammeled in the determination of questions of fact submitted to them.[15] It follows that the

is no ground for reversal. (C. C. A. Alaska) Endleman v. United States, 86 F. 456, 30 C. C. A. 186.

[12] **Conn.** State v. Main, 52 A. 257, 75 Conn. 55.

N. J. State v. Pulley, 82 A. 857, 82 N. J. Law, 579; State v. Schuyler, 68 A. 56, 75 N. J. Law, 487; State v. Simon, 58 A. 107, 71 N. J. Law, 142, affirmed 59 A. 1118.

Pa. Commonwealth v. Ross, 110 A. 327, 266 Pa. 580; Commonwealth v. Marcinko, 89 A. 457, 242 Pa. 388; Commonwealth v. Leyshon, 44 Pa. Super. Ct. 507, 515; Commonwealth v. Scott, 38 Pa. Super. Ct. 303; Commonwealth v. Martin, 34 Pa. Super. Ct. 451; Commonwealth v. Zuern, 16 Pa. Super. Ct. 588; Commonwealth v. Warner, 13 Pa. Super. Ct. 461.

Opinion as to degree of offense. On trial for murder, the question of the degree thereof is for the jury, but the court in its instructions may express its views as to the effect of the evidence, if in them there is no interference with the exclusive right of the jury to determine the degree. Commonwealth v. Frucci, 64 A. 879, 216 Pa. 84.

[13] **Conn.** Miller v. Perlroth, 110 A. 535, 95 Conn. 79; Smith v. Hausdorf, 103 A. 939, 92 Conn. 579; Dick v. Colonial Trust Co., 89 A. 907, 88 Conn. 93; Temple v. Gilbert, 85 A. 380, 86 Conn. 335; Houghton v. City of New Haven, 66 A. 509, 79 Conn. 659; Crotty v. City of Danbury, 65 A. 147, 79 Conn. 379.

Minn. Presley Fruit Co. v. St. Louis, I. M. & S. Ry. Co., 153 N. W. 115, 130 Minn. 121; Larson v. Barlow, 127 N. W. 924, 112 Minn. 246; Bonness v. Felsing, 106 N. W. 909, 97 Minn. 227, 114 Am. St. Rep. 707; Ames v. Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787.

N. J. Chrisafides v. Brunswick Motor Co., 100 A. 196, 90 N. J. Law, 313; W. A. Manda, Inc., v. Delaware, L. & W. R. Co., 98 A. 467, 89 N. J. Law, 327; Merklinger v. Lambert, 72 A. 119, 76 N. J. Law, 806; Foley v. Loughran, 38 A. 960, 39 A. 358, 60 N. J. Law, 464.

Pa. Pool v. White, 175 Pa. 459, 34 A. 801, 38 Wkly. Notes Cas. 253; Fredericks v. Northern Cent. R. Co., 157 Pa. 103, 27 A. 689, 22 L. R. A. 306; Adams v. Uhler, 2 Walk. 96; Pennsylvania Co. v. Allen, 3 Penny. 170.

Vt. Noyes v. Parker, 64 Vt. 379, 24 A. 12.

In Michigan there are decisions which hold that it is not error which will require the reversal of a judgment that a circuit judge indicates his views as to the credibility of a witness or the weight of the evidence, if he expressly directs the jury to decide for themselves without reference to his views. Sheahan v. Barry, 27 Mich. 217. But there are decisions which point the other way. Richards v. Fuller, 38 Mich. 653. A fuller discussion of the position of the Michigan courts with reference to this matter will be found in a subsequent chapter.

[14] (C. C. A. Va.) Anderson v. Avis, 62 F. 227, 10 C. C. A. 347; (C. C. A. Wis.) Nyback v. Champagne Lumber Co., 109 F. 732, 48 C. C. A. 632; Charter v. Lane, 62 Conn. 121, 25 A. 464; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Caldwell v. Kennison, 4 Minn. 47 (Gil. 23), 77 Am. Dec. 499.

[15] (C. C. A. Mo.) Rudd v. United States, 173 F. 912, 97 C. C. A. 462;

manner of expression by the court of its opinions must not be such as to be likely to prevent the jury from acting upon an opposite opinion.[16] Moreover, the expression of such an opinion is only permissible when it is based upon the evidence in the case.[17]

The general rule is that the court is not obliged to exercise such power of comment, and that it may, in its discretion, decline to express an opinion on a matter of fact submitted to the jury.[18] In some jurisdictions, however, both in civil and criminal cases, it is held that some times it may be the duty of the trial judge, within the limitations

(C. C. A. Va.) Foster v. United States, 188 F. 305, 110 C. C. A. 283, reversing judgment (D. C.) United States v. Foster, 183 F. 626, and rehearing denied 192 F. 1022, 112 C. C. A. 665.

[16] Blumeno v. Grand Rapids & I. R. Co., 59 N. W. 594, 101 Mich. 325; Reichenbach v. Ruddach, 127 Pa. 564, 18 A. 432, 24 Wkly. Notes Cas. 476.

Illustrations of instructions obnoxious to rule. An expression of opinion by the judge to the jury that "I do not see, under the law, how you can find that there was adverse possession for any part of this land, except the part where these posts were actually placed." Lindley v. O'Reilly, 46 N. J. Law, 352. An instruction presenting "views which, were the presiding judge in the jury box, would control him in giving his verdict against the plaintiff," is erroneous, although accompanied by the caution that the jury were sole judges of the weight of evidence and the inferences it would bear. Burke v. Maxwell's Adm'rs, 81 Pa. 139. Though a statement by the trial judge that there was little conflict of testimony, and that commonwealth's testimony, if believed, made out murder in the first degree beyond a reasonable doubt, was a proper expression of the judge's opinion, it was error for him thereafter to state that defendant claimed insanity, and that practically the only question for the jury to determine was whether he was insane where the court added that there was no evidence to warrant the jury in concluding that the defendant was insane. Commonwealth v. Berkenbush, 110 A. 263, 267 Pa. 455. It is more than a mere expression of the opinion as to the weight and value of the evidence, and constitutes reversible error, for the trial judge to charge a jury that "in our opinion, under the law and under the facts, the plaintiff is entitled to a judgment, but I leave that matter entirely for your consideration. We are leaving the matter in your hands without express or binding instructions, because, if we err, we can control the matter afterwards." Shipp v. Schmitt & Murphy, 71 Pa. Super. Ct. 496.

Duty not to show partisanship in expressing opinion. In every case which justifies a judge in expressing an opinion the jury should be directly informed that it is his opinion, and that they are not to be bound by it, and the expression of opinion should always be made with the utmost fairness and absence of partisanship. Commonwealth v. Meads, 29 Pa. Super. Ct. 321.

[17] (C. C. A. Ky.) Mullen v. United States, 106 F. 892, 46 C. C. A. 22; Camden & A. R. Co. v. Williams, 40 A. 634, 61 N. J. Law, 646.

[18] **U. S.** (C. C. Mass.) United States v. Burnham, Fed. Cas. No. 14,690, 1 Mason, 57; (C. C. Pa.) Consequa v. Willings, Fed. Cas. No. 3,128, Pet. C. C. 225.

Conn. Appeal of Sturdevant, 42 A. 70, 71 Conn. 392; Cohen v. Pemberton, 53 Conn. 221, 2 A. 315, 5 A. 682, 55 Am. Rep. 101.

Ga. Hillburn v. O'Barr, 19 Ga. 591.

La. Riviere v. McCormick, 14 La. Ann. 139.

N. J. Battschinger v. Robinson, 85 A. 317, 83 N. J. Law, 739.

R. I. Smith v. Rhode Island Co., 98 A. 1, 39 R. I. 146; Tucker v. Rhode Island Co., 69 A. 850.

Vt. Noyes v. Parker, 64 Vt. 379, 24 A. 12.

of the above rule, to tell the jury how the evidence strikes his mind.[19]

§ 5. Province of the court with respect to the facts under constitutional and statutory provisions

Because of the fact that judicial utterances concerning the evidence are apt to be given great moral weight by the jury, sometimes leading them to shirk responsibility by adopting the opinion of the judge and because of the fact that judges have not infrequently evinced partisanship, molding verdicts to their will, the power of the court to comment on the evidence or to charge on the facts has, in the great majority of the states, at various times and in varying degrees, been abridged by constitutional or statutory limitations.[20] Whatever may be said of the

[19] State v. Hummer, 65 A. 249, 73 N. J. Law, 714, affirming judgment 62 A. 388, 72 N. J. Law, 328, and rehearing denied 67 A. 294, 81 N. J. Law, 430; Church v. Delaware, L. & W. R. Co., 95 A. 341, 250 Pa. 21; Jackson v. Hillerson, 59 Pa. Super. Ct. 508; Commonwealth v. Benedick, 39 Pa. Super. Ct. 477; Commonwealth v. Winkelman, 12 Pa. Super. Ct. 497; Devlin v. Kilcrease, 2 McMul. (S. C.) 425.

[20] **Ala.** Lay v. Fuller, 59 So. 609, 178 Ala. 375.

Ariz. Griswold v. Horne, 165 P. 318, 19 Ariz. 56, L. R. A. 1918A, 862.

Ark. St. Louis, I. M. & S. R. Co. v. Devaney, 135 S. W. 802, 98 Ark. 83.

Cal. Seligman v. Kalkman, 8 Cal. 207.

Colo. Garver v. Garver, 121 P. 165, 52 Colo. 227, Ann. Cas. 1913D, 674; Sopris v. Truax, 1 Colo. 89; Kinney v. Williams, Id. 191.

Ga. Bowen v. Smith-Hall Grocery Co., 91 S. E. 32, 146 Ga. 157; Worsham v. Ligon, 87 S. E. 1025, 144 Ga. 707; Scott v. Valdosta, M. & W. R. Co., 78 S. E. 784, 13 Ga. App. 65; Acme Brewing Co. v. Central R. & Banking Co., 42 S. E. 8, 115 Ga. 494; Hudson v. Best, 30 S. E. 688, 104 Ga. 131.

Idaho. Kroetch v. Empire Mill Co., 74 P. 868, 9 Idaho, 277.

Ill. Belt Ry. Co. of Chicago v. Confrey, 111 Ill. App. 473.

Iowa. Russ v. The War Eagle, 9 Iowa, 374.

Md. United Rys. & Electric Co. of Baltimore v. Carneal, 72 A. 771, 110 Md. 211.

Mich. Hine v. Commercial Bank of Bay City, 78 N. W. 471, 119 Mich. 448.

Mo. Webb v. Baldwin, 147 S. W. 849, 165 Mo. App. 240; Leggett v. Louisiana Purchase Exposition Co., 137 S. W. 893, 157 Mo. App. 108; Ford v. Gray, 110 S. W. 692, 131 Mo. App. 240; In re Imboden's Estate, 86 S. W. 263, 111 Mo. App. 220; Meyer Bros. Drug Co. v. McMahan 50 Mo. App. 18; Bowling v. Hax, 55 Mo. 446; Morris v. Morris, 28 Mo. 114; Chouquette v. Barada, Id. 491.

Mont. Hardesty v. Largey Lumber Co., 86 P. 29, 34 Mont. 151.

N. C. Phillips v. Giles, 95 S. E. 772, 175 N. C. 409; Dobbins v. Dobbins, 53 S. E. 870, 141 N. C. 210, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682; Albertson v. Terry, 109 N. C. 8, 13 S. E. 713.

N. D. State v. Barry, 92 N. W. 809, 11 N. D. 428.

S. C. Black v. State Co., 83 S. E. 1088, 99 S. C. 432; Lewis v. Pope, 68 S. E. 680, 86 S. C. 285; Stouffer v. Erwin, 62 S. E. 843, 81 S. C. 541.

Tenn. Fisher v. Travelers' Ins. Co., 138 S. W. 316, 124 Tenn. 450, Ann. Cas. 1912D, 1246; Fitzpatrick v. Fain, 3 Cold. 15.

Tex. Houston & T. C. R. Co. v. Washington, 127 S. W. 1126, 60 Tex. Civ. App. 391; Pennington v. Thompson Bros. Lumber Co. (Civ. App.) 122 S. W. 923; Galveston, H. & S. A. Ry. Co. v. Sullivan, 115 S. W. 615, 53 Tex.

policy of the old common-law rule, it is simple and easy of application. That the barrier set up for the courts by the modern rule has been difficult to observe is attested by the multitude of cases in which its interpretation has been a matter of dispute. These cases will be discussed in the ensuing chapters.

Civ. App. 394; San Antonio & A. P. Ry. Co. v. Dickson, 93 S. W. 481, 42 Tex. Civ. App. 163.

Va. Whitelaw's Ex'r v. Whitelaw, 83 Va. 40, 1 S. E. 407.

Wash. Cook v. Pittock & Leadbetter Lumber Co., 98 P. 1130, 51 Wash. 316; Patten v. Town of Auburn, 84 P. 594, 41 Wash. 644; State v. Hyde, 55 P. 49, 20 Wash. 234.

Wis. Kamp v. Coxe Bros. & Co., 99 N. W. 366, 122 Wis. 206.

CHAPTER II

CREDIBILITY OF WITNESSES AS A JURY QUESTION

§ 6. General rule in civil cases.
7. General rule in criminal cases.
8. Limiting right to disbelieve witnesses.
9. Limiting right to believe witnesses.
10. Negative directions as to consideration of matters bearing on credibility.
11. Positive directions as to matters to be considered in determining question of credibility.
12. Instructions as to comparative credibility of different classes of witnesses.
13. Jury to determine question of interest and the credibility of interested witnesses.
14. Right or duty of jury to consider interest of witness.
15. Credibility of accused as question for jury.
16. Right or duty of jury to consider interest of accused.
17. Lack of corroboration of accused.
18. Testimony of prosecuting witness.
19. Testimony of wife or relative of accused or prosecuting witness.
20. Testimony of detectives and informers.
21. Testimony of accomplices and codefendants in criminal cases.
22. Effect of false testimony of witness on credibility of part of testimony not shown to be false.
23. Determination of question whether witness has made contradictory statements.
24. Effect of contradictory statements of witness.
25. Station in life of witness.
26. Appearance and demeanor of witness.
27. Instructions directed at particular witness or class of witnesses.

Instructions on credibility of witnesses criticized on other grounds than that of invading the province of jury, see post, §§ 146–184.

§ 6. General rule in civil cases

With a qualification to be hereafter stated, the jury is the sole judge of the credibility of witnesses,[1] and it is of the utmost importance that

[1] **Ala.** Southern Industrial Institute v. Hellier, 39 So. 163, 142 Ala. 686.

Ark. Mallory v. Brademyer, 89 S. W. 551, 76 Ark. 538.

Ga. Mills v. State, 30 S. E. 778, 104 Ga. 502.

Ill. Peterson v. Fullerton, 106 Ill. App. 237.

Ind. Stephens v. American Car & Foundry Co., 78 N. E. 335, 38 Ind. App. 414.

Iowa. Hardwick v. Hardwick, 106 N. W. 639, 130 Iowa, 230.

Ky. Louisville & N. R. Co. v. Peltier, 45 S. W. 518, 20 Ky. Law Rep. 169.

Me. Dunning v. Maine Cent. R. Co., 39 A. 352, 91 Me. 87, 64 Am. St. Rep. 208.

Mass. Hankinson v. Lynn Gas & Electric Co., 56 N. E. 604, 175 Mass. 271.

Mich. Stowell v. Standard Oil Co., 102 N. W. 227, 139 Mich. 18.

Mo. Woodard v. Cooney, 85 S. W. 598, 111 Mo. App. 152.

Mont. Holland v. Huston, 49 P. 390, 20 Mont. 84.

N. J. Acolia v. Elizabeth, P. & C. J. Ry. Co. (Sup.) 57 A. 257.

the trial judge, in giving instructions, should not trench upon their province in this regard.[2] Any instruction which limits or qualifies this right of the jury,[3] or tends to hamper the jury in the full exercise of its judgment as to the credibility of witnesses,[4] is error, and it is, of course, proper to refuse such an instruction.[5]

N. Y. Fisher v. Union Ry. Co., 83 N. Y. S. 694, 86 App. Div. 365.

N. C. Craft v. Norfolk, & S. R. Co., 48 S. E. 519, 136 N. C. 49.

Pa. Bartlett v. Rothschild, 63 A. 1030, 214 Pa. 421.

R. I. Lebeau v. Dyerville Mfg. Co., 57 A. 1092, 26 R. I. 34.

Va. Duncan v. Carson, 103 S. E. 665, 127 Va. 306.

W. Va. Young v. West Virginia & P. R. Co., 28 S. E. 932, 44 W. Va. 218.

[2] Norfolk & W. R. Co. v. Poole's Adm'r, 40 S. E. 627, 100 Va. 148.

[3] **Ala.** Skeggs v. Horton, 82 Ala. 352, 2 So. 110; Brooks v. Hildreth, 22 Ala. 469.

Ark. Kansas City Southern Ry. Co. v. Dickerson, 165 S. W. 951, 112 Ark. 607, denying rehearing 165 S. W. 272, 112 Ark. 607.

Ga. Minor v. State, 63 Ga. 318.

Ill. Emmons v. Hilton, 72 Ill. App. 124.

Ind. Unruh v. State, 105 Ind. 117, 4 N. E. 453; Finch v. Bergins, 89 Ind. 360.

Ky. Holloway v. Commonwealth, 11 Bush, 344.

Mich. Linsell v. Linsell, 100 N. W. 1009, 138 Mich. 64; Kelly v. Emery, 75 Mich. 147, 42 N. W. 795; Dibble v. Assurance Co., 37 N. W. 704, 70 Mich. 1, 14 Am. St. Rep. 470.

Miss. Mobile, J. & K. C. R. Co. v. Jackson, 46 So. 142, 92 Miss. 517.

Mo. Rearden v. St. Louis & S. F. Ry. Co., 114 S. W. 961, 215 Mo. 105.

N. H. Holman v. Boston & M. R. R., 84 A. 979, 76 N. H. 496.

N. Y. Dickerson v. Wason, 48 Barb. 412.

N. C. McRae v. Lawrence, 75 N. C. 289.

Pa. Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619.

Tenn. Citizens' St. R. Co. v. Burke, 40 S. W. 1085, 98 Tenn. 650.

Tex. International & G. N. R. Co. v. Schubert (Civ. App.) 130 S. W. 708; Smith v. Fears (Civ. App.) 122 S. W. 433; City Nat. Bank v. Martin-Brown Co., 48 S. W. 617, 20 Tex. Civ. App. 52, modified on rehearing, 49 S. W. 523, 20 Tex. Civ. App. 52.

Wis. Bodenheimer v. Chicago & N. W. R. Co., 123 N. W. 148, 140 Wis. 623; Roberts v. State, 84 Wis. 361, 54 N. W. 580; Lampe v. Kennedy, 60 Wis. 110, 18 N. W. 730.

In New York the court, in commenting on one's testimony, may properly express an opinion of his honesty, but this very cautiously, if the testimony be conflicting. Hoffman v. New York Cent. & H. R. R. Co., 87 N. Y. 25, 41 Am. Rep. 337.

[4] Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

[5] **U. S.** (C. C. A. Kan.) Connecticut Mut. Life Ins. Co. v. Hillmon, 107 F. 834, 46 C. C. A. 668, reversed, 28 S. Ct. 294, 188 U. S. 208, 47 L. Ed. 446.

Ala. Tait v. Murphy, 80 Ala. 440, 2 So. 317.

Cal. In re Gird's Estate, 108 P. 499, 157 Cal. 534, 137 Am. St. Rep. 131.

Mass. Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506.

N. C. Leak v. Covington, 99 N. C. 559, 6 S. E. 241.

Tex. Riggins v. Sass (Civ. App.) 143 S. W. 689.

§ 7. General rule in criminal cases

In criminal cases, too, the general rule is that the jury are the exclusive judges of the credibility of the witnesses,[6] although they may be

[6] **U. S.** (D. C. Kan.) United States v. Pacific Exp. Co., 15 F. 867; (C. C. A. Minn.) Harris v. United States, 249 F. 41, 161 C. C. A. 101, certiorari denied 38 S. Ct. 425, 246 U. S. 675, 62 L. Ed. 933; (C. C. Ohio) United States v. Brown, Fed. Cas. No. 14,667, 4 McLean, 142; (C. C. A. Tenn.) Friedman v. U. S., 260 F. 388, 171 C. C. A. 254, certiorari denied 40 S. Ct. 15, 250 U. S. 671, 63 L. Ed. 1199; Mayer v. United States, 259 F. 216, 170 C. C. A. 284.

Ala. Quinn v. State, 74 So. 743, 15 Ala. App. 635; Stout v. State, 72 So. 762, 15 Ala. App. 206, writ of certiorari denied, 73 So. 1002, 198 Ala. 695; Snead v. State, 61 So. 473, 7 Ala. App. 118; Phelps v. State, 60 So. 537, 6 Ala. App. 58; Davis v. State, 44 So. 561, 152 Ala. 25; Kennedy v. State, 40 So. 658, 147 Ala. 687; Townsend v. State, 34 So. 382, 137 Ala. 91; Ex parte Warrick, 73 Ala. 57.

Ark. Dean v. State, 197 S. W. 684, 130 Ark. 322; Hays v. State, 196 S. W. 123, 129 Ark. 324; White v. State, 194 S. W. 2, 128 Ark. 640; Alexander v. State, 193 S. W. 78, 128 Ark. 35; Paxton v. State, 170 S. W. 80, 114 Ark. 393, Ann. Cas. 1916A, 1239; Spinks v. State, 149 S. W. 54, 104 Ark. 641; Wallace v. State, 28 Ark. 531.

Cal. People v. Stephens, 157 P. 570, 29 Cal. App. 616, rehearing denied in Supreme Court, 157 P. 572, 29 Cal. App. 616; People v. Villalovas, 156 P. 982, 29 Cal. App. 537; People v. Parrish, 143 P. 546, 25 Cal. App. 314; People v. Bauweraerts, 130 P. 717, 164 Cal. 696; People v. White, 90 P. 471, 5 Cal. App. 329; People v. Compton, 56 P. 44, 123 Cal. 403.

Colo. Curl v. People, 127 P. 951, 53 Colo. 578, Ann. Cas. 1914B, 171; Davidson v. People, 4 Colo. 145.

Conn. State v. Ross, 89 A. 163, 87 Conn. 585.

Del. D'Amico v. State, 102 A. 78, 6 Boyce, 598; State v. Dougherty, 86 A. 736, 4 Boyce, 163; State v. Wiggins, 76 A. 632, 7 Pennewill, 127; State v. Dinneen, 76 A. 623, 7 Pennewill, 505; State v. Brinte, 58 A. 258, 4 Pennewill, 551.

Fla. Bailey v. State, 76 Fla. 213, 79 So. 730; West v. State, 68 So. 379, 69 Fla. 400; Knight v. State, 53 So. 541, 60 Fla. 19; Atzroth v. State, 10 Fla. 207.

Ga. Blood v. State, 100 S. E. 761, 24 Ga. App. 344; Mason v. State, 86 S. E. 1072, 17 Ga. App. 377; Smith v. State, 84 S. E. 159, 15 Ga. App. 713; Moody v. State, 58 S. E. 262, 1 Ga. App. 772; Whitten v. Same, 47 Ga. 297; Clarke v. State, 35 Ga. 75.

Idaho. State v. Marren, 107 P. 993, 17 Idaho, 766; State v. Simes, 85 P. 914, 12 Idaho, 310, 9 Ann. Cas. 1216.

Ill. People v. Silver, 286 Ill. 496, 122 N. E. 115; People v. Bond, 118 N. E. 14, 281 Ill. 490, 1 A. L. R. 1397; People v. O'Brien, 115 N. E. 123, 277 Ill. 305; People v. Williams, 88 N. E. 1053, 240 Ill. 633; People v. Whalen, 151 Ill. App. 16; Sullivan v. People, 108 Ill. App. 328; Bowers v. People, 74 Ill. 418.

Ind. Cotner v. State, 89 N. E. 847, 173 Ind. 168; Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211.

Iowa. State v. Clough, 165 N. W. 59, 181 Iowa, 783; State v. Hall, 150 N. W. 97, 168 Iowa, 221; State v. Fishel, 118 N. W. 763, 140 Iowa, 460.

Ky. Wattles v. Commonwealth, 215 S. W. 291, 185 Ky. 486; Ruark v. Commonwealth, 150 S. W. 5, 150 Ky. 47; Fields v. Same, 153 S. W. 29, 152 Ky. 80; Franklin v. Commonwealth, 92 Ky. 612, 18 S. W. 532, 13 Ky. Law Rep. 814; Evans v. Commonwealth, 79 Ky. 414.

La. State v. Hataway, 80 So. 227, 144 La. 138; State v. Folden, 66 So. 223, 135 La. 791.

Minn. State v. Halvorson, 114 N. W. 957, 103 Minn. 265, 14 L. R. A. (N. S.) 947, 123 Am. St. Rep. 326.

Miss. Miller v. State, 35 So. 690; Newcomb v. Same, 37 Miss. 383; Ned v. State, 33 Miss. 364.

Mo. State v. Yocum (App.) 205 S. W. 232; State v. Jackson (Sup.) 186 S. W. 990; State v. Johnson, 145 S. W. 1183, 163 Mo. App. 41; State v. Hubbard, 100 S. W. 586, 201 Mo. 629; State v. Eyermann, 90 S. W. 1168, 115

uncontradicted,[7] or although they may have been impeached,[8] unless their testimony is inherently at variance with the common knowledge

Mo. App. 660; State v. Urspruch, 90 S. W. 451, 191 Mo. 43; State v. Smith, 90 S. W. 440, 190 Mo. 706; State v. McKenzie, 76 S. W. 1015, 177 Mo. 699; State v. Williams, 12 Mo. App. 591.

Mont. State v. Vinn, 144 P. 773, 50 Mont. 27; State v. Jones, 80 P. 1095, 32 Mont. 442.

Neb. Parker v. State, 93 N. W. 1037, 67 Neb. 555.

Nev. State v. Clark, 149 P. 185, 38 Nev. 304, reversing judgment on rehearing 135 P. 1083, 36 Nev. 472.

N. J. State v. Littman, 92 A. 580, 86 N. J. Law, 453, judgment affirmed 96 A. 66, 88 N. J. Law, 392.

N. Y. People v. Walker, 91 N. E. 806, 198 N. Y. 329, reversing judgment 118 N. Y. S. 1132, 134 App. Div. 909; Same v. Stanley, 114 N. Y. S. 395, 130 App. Div. 64; Woodin v. People, 1 Parker, Cr. R. 464.

N. C. State v. Phillips, 100 S. E. 577, 178 N. C. 713; State v. Evans, 98 S. E. 788, 177 N. C. 564; State v. Horner, 94 S. E. 291, 174 N. C. 788; State v. Carlson, 89 S. E. 30, 171 N. C. 818; State v. Wilcox, 44 S. E. 625, 132 N. C. 1120; State v. Hall, 44 S. E. 553, 132 N. C. 1904.

N. D. State v. Brandner, 130 N. W. 941, 21 N. D. 310.

Okl. Jones v. State, 179 P. 619, 15 Okl. Cr. 547; Powell v. State, 150 P. 92, 11 Okl. Cr. 615; Wainscott v. State, 129 P. 655, 8 Okl. Cr. 590; Foster v. State, 126 P. 835, 8 Okl. Cr. 139.

Or. State v. Emmons, 127 P. 791, 63 Or. 535; State v. Lucas, 24 Or. 168, 33 P. 538.

Pa. Commonwealth v. Hanlon, 8 Phila. 401.

S. C. State v. Scott, 1 Bailey, 270.

S. D. State v. Lamb, 164 N. W. 69, 39 S. D. 307.

Tenn. Kinchelow v. State, 6 Humph. 9.

Tex. Surginer v. State, 217 S. W. 145, 86 Tex. Cr. R. 438; Martinez v. State, 207 S. W. 930, 84 Tex. Cr. R. 261; Ricks v. State, 203 S. W. 901, 83 Tex. Cr. R. 440; Sanford v. State, 79 Tex. Cr. R. 346, 185 S. W. 22; Grimes v. State, 178 S. W. 523, 77 Tex. Cr. R. 319; McCue v. State, 170 S. W. 280, 75 Tex. Cr. R. 137, Ann. Cas. 1918C, 674; Christian v. State, 161 S. W. 101, 71 Tex. Cr. R. 566; Ross v. State, 159 S. W. 1063, 71 Tex. Cr. R. 493; Claussen v. State, 157 S. W. 477, 70 Tex. Cr. R. 607; Hamilton v. State, 153 S. W. 331, 68 Tex. Cr. R. 419; Crowell v. State, 148 S. W. 570, 66 Tex. Cr. R. 537; Freeney v. State (Cr. App.) 102 S. W. 113; Elkins v. State, 87 S. W. 149, 48 Tex. Cr. R. 205; Franklin v. State (Cr. App.) 28 S. W. 472; Doss v. State, 21 Tex. App. 505, 2 S. W. 814, 57 Am. Rep. 618.

Va. Broaddus v. Commonwealth, 101 S. E. 321, 126 Va. 733; McCue v. Commonwealth, 49 S. E. 623, 103 Va. 870.

Wash. State v. Miller, 178 P. 459, 105 Wash. 475; State v. Siebenbaum, 177 P. 669, 105 Wash. 157; State v. Gaul, 152 P. 1029, 88 Wash. 295; State v. Littooy, 100 P. 170, 52 Wash. 87, 17 Ann. Cas. 292; State v. Johnson, 78 P. 903, 36 Wash. 294.

Wyo. Murdica v. State, 137 P. 574, 22 Wyo. 196; Starke v. State, 96 P. 148, 17 Wyo. 55, 17 Ann. Cas. 222.

[7] State v. Frederici, 192 S. W. 464, 269 Mo. 689, affirming judgment (App.) 184 S. W. 170; State v. Rucker, 161 P. 337, 22 N. M. 275; Meiggs v. State, 185 P. 450, 16 Okl. Cr. 557; Ritter v. State, 132 P. 913, 9 Okl. Cr. 626; Bayless v. State, 130 P. 520, 9 Okl. Cr. 27.

[8] **Ala.** Addison v. State, 48 Ala. 478.

Ga. Hawkins v. State, 92 S. E. 958, 20 Ga. App. 179; Hunter v. State, 91 S. E. 927, 19 Ga. App. 615; Ware v. State, 89 S. E. 155, 18 Ga. App. 107; Brown v. State, 87 S. E. 155, 17 Ga. App. 402; Edenfield v. State, 81 S. E. 253, 14 Ga. App. 401; Brown v. State, 72 S. E. 537, 10 Ga. App. 50; Cothran v. State, 58 S. E. 544, 2 Ga. App. 437.

Ind. Terry v. State, 13 Ind. 70.

Iowa. State v. Dietz, 143 N. W. 1080, 162 Iowa, 332; State v. Carpenter, 98 N. W. 775, 124 Iowa, 5.

Mo. State v. Brown, 145 S. W. 1180, 163 Mo. App. 30.

and experience of mankind,[9] and that the trial judge cannot take from the jury the right to believe or disbelieve a witness.[10] Instructions in a criminal case, which deprive the jury of the right to make their own deductions and decide for themselves whether witnesses are credible, or which convey or tend to convey the impression that it is the province of the court to pass upon their credibility, are erroneous,[11] and are properly refused,[12] and, subject to the qualification already stated, the general rule is, in criminal as well as in civil cases, that the trial judge should not express or even intimate an opinion as to the credibility of any witness.[13]

§ 8. Limiting right to disbelieve witnesses

In accordance with the above rule [14] it is error to instruct that the jury must believe the evidence,[15] or that it must accept as true the tes-

N. Y. People v. Morano, 183 N. Y. S. 483, 192 App. Div. 432.

Okl. Oelke v. State, 133 P. 1140, 10 Okl. Cr. 49.

Tex. Hays v. State, 204 S. W. 229, 83 Tex. Cr. R. 398; Robertson v. State, 150 S. W. 893, 68 Tex. Cr. R. 243; Chester v. State, 1 Tex. App. 702; Kelly v. State, 1 Tex. App. 628.

[9] Watson v. State, 78 S. E. 1014, 13 Ga. App. 181.

[10] Spivey v. State, 8 Ind. 405; State v. Stout, 31 Mo. 406.

Credibility of impeaching testimony. An instruction which takes from the jury the right to determine the weight and value of impeaching testimony is error. Pryor v. State, 13 So. 681, 99 Ala. 196.

[11] Mullins v. People, 110 Ill. 42; Howell v. State, 85 N. W. 289, 61 Neb. 391; Strong v. State, 84 N. W. 410, 61 Neb. 35; Wilbanks v. State, 10 Tex. App. 642; State v. Sutfin, 22 W. Va. 771.

Instructions erroneous within rule. An instruction that if the jury are convinced beyond a reasonable doubt they should find accused guilty, regardless of what they may think of any of the witnesses for the prosecution, is objectionable, as misleading on the right of the jury to determine the credibility of the witnesses. People v. Gray, 96 N. E. 268, 251 Ill. 431.

[12] **Ala.** Axelrod v. State, 60 So. 959, 7 Ala. App. 61; Fleming v. State, 43 So. 219, 150 Ala. 19; Horn v. State, 98 Ala. 23, 13 So. 329; Green v. State, 97 Ala. 59, 12 So. 416.

Fla. Wolf v. State, 73 So. 740, 72 Fla. 572; Hisler v. State, 42 So. 692, 52 Fla. 30.

Ind. Jones v. State, 64 Ind. 473; Richie v. State, 58 Ind. 355.

Mich. People v. Stewart, 127 N. W. 816, 163 Mich. 1.

Tex. Bonner v. State (Cr. App.) 82 S. W. 1043; Gibbs v. State (Cr. App.) 20 S. W. 919.

[13] **Idaho.** State v. Bouchard, 149 P. 464, 27 Idaho, 500.

Ky. Barnett v. Commonwealth, 84 Ky. 449, 1 S. W. 722.

Mass. Commonwealth v. Barry, 9 Allen, 276.

Okl. Havill v. State, 121 P. 794, 7 Okl. Cr. 22; Slater v. United States, 98 P. 110, 1 Okl. Cr. 275.

Tex. Riojas v. Same, 8 Tex. App. 49; Pharr v. State, 7 Tex. App. 472; Ross v. State, 29 Tex. 499.

In New York, within the limits of sound discretion, the court may comment on the credibility of witnesses, but cannot decide it, for that is the exclusive duty of the jury, and it cannot withdraw any controlling fact which depends on the credibility of witnesses even of the highest character and standing. People v. Walker, 91 N. E. 806, 198 N. Y. 329, reversing judgment 118 N. Y. S. 1132, 134 App. Div. 909.

[14] Ante, §§ 6, 7.

[15] Vaulx v. Campbell, 8 Mo. 224.

Witness best supported by corroborative evidence. An instruction which affirms or assumes that credit must be given to the witness who was

timony of a witness, or a particular part of the testimony of a witness,[16] or that the jury must believe the testimony of a witness, unless the facts testified to are disproved by other evidence.[17] This is true, although the evidence tends very strongly and clearly to establish a given fact.[18] The jury should not be instructed, as a rule of law, to presume that witnesses have spoken truly,[19] and it is error for the court to assume the truth of the testimony of a witness,[20] or to speak favorably of his credibility,[21] or to suggest reasons for believing a witness.[22] Thus it is error to raise a question as to whether it is justifiable to charge witnesses with want of veracity merely because they are inmates of a low theater which is licensed by the authorities.[22a]

Where evidence has been offered to impeach a witness, an instruc-

best, or apparently best, supported by corroborative evidence, without telling the jury that they are the exclusive judges of the weight of the evidence, the credibility of witnesses, and the inferences of fact from the proofs, is erroneous. Comstock v. Whitworth, 75 Ind. 129.

[16] Reed v. McCready, 186 N. W. 488, 170 Mich. 532; State v. Parker, 66 N. C. 624; Watkins v. Bowyer, 173 N. W. 745, 42 S. D. 189.

[17] Southern Exp. Co. v. Wolfe, 41 Miss. 79; Territory v. Leslie, 106 P. 378, 15 N. M. 240.

[18] Rhodes v. Lowry, 54 Ala. 4.

[19] State v. Jones, 77 N. C. 520; State v. Taylor, 35 S. E. 729, 57 S. C. 483, 76 Am. St. Rep. 575.

[20] Battles v. Tallman, 96 Ala. 403, 11 So. 247; Huff v. Cox, 2 Ala. 310.

[21] Travis v. Barkhurst, 4 Ind. 171; Morris v. State, 150 P. 89, 11 Okl. Cr. 630.

Testimony of detectives. In prosecution for violation of state prohibition act, where the only evidence of guilt was the testimony of two detectives that after several unsuccessful efforts to induce they succeeded in persuading defendant to violate law, an instruction as to right of any citizen, independently of state and county officers, to detect illicit sale of intoxicating liquors, and obtain evidence thereof, was an attempt to bolster up credibility of state's witnesses in violation of Constitution prohibiting comment by court upon evidence. State v. Siebenbaum, 177 P. 669, 105 Wash. 157.

Rule in Pennsylvania. In this jurisdiction, where the court may comment on the evidence, it may state in its charge that the reply of a witness seemed to be that of a "manly man." Simmons v. Pennsylvania R. Co., 48 A. 1070, 199 Pa. 232. But where plaintiff testified that before she attempted to alight the car had stopped, and her evidence is corroborated by another witness, but is contradicted by the conductor and other passengers, a submission of the evidence of the plaintiff to the jury by the court with apparent approval, while presenting that of defendant so as to cast doubt upon its truthfulness, is error. Lingle v. Scranton Ry. Co., 63 A. 890, 214 Pa. 500.

[22] Thomas v. State, 95 Ga. 484, 22 S. E. 315; Moore v. State, 85 Ind. 90; People v. Barone, 55 N. E. 1083, 161 N. Y. 451.

Violation of prohibition against charging on matters of fact. In a prosecution for burglary, a charge that it is said the testimony of a certain witness is incredible, because he saw the burglary being committed and did not attempt to stop it, and asking whether the fact that the witness did not attempt to arrest the burglar, it being in the nighttime, was such a dreadfully foolish thing as to make his testimony doubtful for that reason alone, is a charge on a matter of fact. State v. Brown, 33 S. C. 151, 11 S. E. 641.

[22a] People v. Wallace, 89 Cal. 158, 26 Pac. 650.

tion that there is no evidence impeaching him will ordinarily be erroneous;[24] the question of whether a witness has been successfully impeached being for the jury,[25] and an instruction tending to minimize impeaching testimony is error,[26] and it is error to instruct that one witness corroborates another.[27]

It is error to instruct as a matter of law that it is the duty of the jury to accept as true the undisputed testimony of a witness, unless such testimony is of such a conflicting nature as in itself to discredit it.[28] Although it has been held not error to charge that there is a prima facie presumption that witnesses not impeached tell the truth,[29] there is no positive rule that the jury must believe such a witness,[30] and the court should not instruct or intimate that the jury cannot disregard the testimony of unimpeached witnesses,[31] unless such testimony is not discredited by anything in the case,[32] in which event, by the weight

[24] Rambo v. State, 32 So. 650, 134 Ala. 71; Berliner v. Travelers' Ins. Co., 53 P. 922, 121 Cal. 451.

[25] **Ark.** Scoggins v. City of Morrilton, 191 S. W. 914, 127 Ark. 108.

Ga. Griggs v. State, 86 S. E. 726, 17 Ga. App. 301; Smith v. State, 86 S. E. 660, 17 Ga. App. 298; Shropshire v. State, 83 S. E. 152, 15 Ga. App. 345.

Iowa. State v. Mylor, 46 Iowa, 192.

Mich. People v. Hare, 24 N. W. 843, 57 Mich. 505.

Mo. State v. Sharp, 183 Mo. 715, 82 S. W. 134.

[26] State v. Rutledge, 113 N. W. 461, 135 Iowa, 581.

[27] State v. Keerl, 75 P. 362, 29 Mont. 508, 101 Am. St. Rep. 579; Lassiter v. Seaboard Air Line Ry. Co., 88 S. E. 335, 171 N. C. 283; Noland v. State, 19 Ohio, 131.

Qualification of rule. In one jurisdiction such an instruction has been held not to be error if accompanied by an instruction that the jury are to determine what the respective witnesses meant by their testimony, as well as the weight of the evidence and the credibility of the witnesses, and the facts which the whole evidence established. Wilcox v. Majors, 88 Ind. 203.

[28] People v. Mindeman, 121 N. W. 488, 157 Mich. 120.

[29] Cornwall v. State, 91 Ga. 277, 18 S. E. 154.

Impeaching evidence consisting only of unsworn statement of defendant. An instruction to the jury as follows: "Every witness in the case is to be believed until impeached in some one of the modes known to the law. A jury cannot arbitrarily, of their own motion, set aside the evidence of any witness; the presumption of innocence attaches to witnesses, which remains until removed by proof"—has been held proper, in a case where there was no impeaching evidence, except the unsworn statement of defendant, in reference to which the court further charged, "that they were the exclusive judges of the weight that was due to such statement." Jones v. State, 48 Ga. 163.

[30] Chicago Union Traction Co. v. O'Brien, 76 N. E. 341, 219 Ill. 303, affirming judgment 117 Ill. App. 183; State v. Smallwood, 75 N. C. 104.

[31] Chicago & G. T. Ry. Co. v. Foster, 46 Ill. App. 621; Gamble v. Johnson, 9 Mo. 605; Noland v. McCracken, 18 N. C. 594; State v. Norton, 28 S. C. 572, 6 S. E. 820.

Proper to refuse such an instruction. In New York under a statute providing that, in criminal actions, the jury are the exclusive judges of all questions of fact, it is not error for the trial judge to refuse to charge that the jury are bound to believe the testimony of any disinterested witness which is not contradicted, and which is not in itself improbable. People v. Tuczkewitz, 149 N. Y. 240, 43 N. E. 548.

[32] Rowland v. Plummer, 50 Ala. 182.

What constitutes impeachment of witness. Under this rule any conflict with the testimony of a witness

of authority, it will be proper to instruct that the jury cannot arbitrarily disregard the testimony of any witness, in the absence of anything to discredit or contradict it.[33] Any instruction to the contrary would clothe the jury with a supreme arbitrary and irresponsible power[34] and is error.[35] The jury may be instructed that it is their duty to consider the testimony of a witness who has not been contradicted or impeached, and give it such weight, if any, as it is entitled to.[36]

The court should not tell the jury that they cannot reject the testimony of a witness because his statements are in conflict with those of another witness,[37] or are otherwise impeached,[38] nor instruct that slight discrepancies in the testimony of witnesses as to collateral facts will not authorize the jury to discredit it,[39] and a charge that the jury should not discredit the testimony of an impeached witness, if they find that it is corroborated, is erroneous.[40]

It is error to instruct in effect that the testimony of one witness will counterbalance that of another.[41] Thus it is error to instruct that, if two witnesses of equal credibility testify directly opposite to each other

would be an impeachment of him. Rowland v. Plummer, 50 Ala. 182.

[33] Brunswick & W. R. Co. v. Wiggins, 39 S. E. 551, 113 Ga. 842, 61 L. R. A. 513; Thompson v. Flint & P. M. R. Co., 90 N. W. 1037, 131 Mich. 95; State v. Sutfin, 22 W. Va. 771. See Jackson v. State, 57 So. 594, 5 Ala. App. 306; Ferkel v. People, 16 Ill. App. 310.

In Texas, however, it is held that it is proper to refuse to give such an instruction. International & G. N. Ry. Co. v. Jones (Civ. App.) 175 S. W. 488.

In Georgia, an instruction that the testimony of employees of a railroad company, in an action against it for injuries to another employee, could not be "absolutely discarded or disregarded," unless "the evidence introduced before the jury" discredited or contradicted them, was held to be properly refused; the case being differentiated from the case cited in support of the text. Central of Georgia Ry. Co. v. Mote, 62 S. E. 164, 131 Ga. 166.

[34] Engmann v. Immel's Estate, 59 Wis. 249, 18 N. W. 182.

[35] Owens v. State, 63 Miss. 450; Benson v. State, 118 S. W. 1049, 56 Tex. Cr. R. 52; Johnson v. State, 9 Tex. App. 558; Jackson v. State, 7 Tex. App. 363.

[36] Schwamb Lumber Co. v. Schaar, 94 Ill. App. 544.

[37] F. Dohmen Co. v. Niagara Fire Ins. Co. of City of New York, 71 N. W. 69, 96 Wis. 38.

[38] Crockett v. State, 49 S. W. 392, 40 Tex. Cr. R. 173.

[39] Pace v. Cochran, 86 S. E. 934, 144 Ga. 261; Louisville & N. R. Co. v. Ledford, 83 S. E. 792, 142 Ga. 770.

[40] Clevenger v. Curry, 81 Ill. 432; Rea v. State, 105 P. 381, 3 Okl. Cr. 269.

Testimony reasonable and consistent. An instruction that, though numerous witnesses may have testified against the credibility and truthfulness of a particular witness, and the jury may believe, from the evidence, the general reputation of the witness for truth and veracity is bad, yet they should not, on that account, discredit his testimony, if they believe the same to be reasonable and consistent, and that the same is corroborated, etc., is erroneous. Roach v. People, 77 Ill. 25.

[41] Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912.

on a question of fact, the party holding the affirmative of the proposition will not have a preponderance of the evidence.[42]

§ 9. Limiting right to believe witnesses

The court is not required or authorized to give an instruction which disparages the testimony of a witness.[43] It is not the province of the court to tell the jury that certain matters will be sufficient to discredit a witness,[44] and instructions directing the jury to view the evidence of any class of witnesses with caution or suspicion are improper.[45] Thus

[42] Holmes v. Horn, 120 Ill. App. 359; Leek v. People, 118 Ill. App. 514; Stern v. Tuch, 55 Ill. App. 445; Thomas v. Law, 25 Pa. Super. Ct. 19.

[43] **U. S.** (Sup.) Smith v. United States, 161 U. S. 85, 16 S. Ct. 483, 40 L. Ed. 626.

Cal. People v. Christensen, 85 Cal. 568, 24 P. 888.

Conn. Norman Printers' Supply Co. v. Ford, 59 A. 499, 77 Conn. 461.

Mass. Hayes v. Moulton, 80 N. E. 215, 194 Mass. 157.

Mich. People v. Goodrode, 94 N. W. 14, 132 Mich. 542; Williams v. City of West Bay City, 78 N. W. 328, 119 Mich. 395; Wheeler v. Wallace, 19 N. W. 33, 53 Mich. 355.

Minn. Goodhue Farmers' Warehouse Co. v. Davis, 83 N. W. 531, 81 Minn. 210.

Mo. Granby Mining & Smelting Co. v. Davis, 57 S. W. 126, 156 Mo. 422.

N. Y. William J. Burns International Detective Agency v. Powers, 162 N. Y. S. 578, 176 App. Div. 114; Hunt v. Becker, 160 N. Y. S. 45, 173 App. Div. 9; Berkowitz v. Schlanger, 126 N. Y. S. 664, 70 Misc. Rep. 239.

Pa. Bughman v. Byers, 12 A. 357; Commonwealth v. Meads, 29 Pa. Super. Ct. 321.

Wis. McKeon v. Chicago, M. & St. P. Ry. Co., 69 N. W. 175, 94 Wis. 477, 35 L. R. A. 252, 59 Am. St. Rep. 910.

Instructions objectionable within rule. An instruction that "the jury are the judges as to the credibility of witnesses, and as to the weight to be given to the testimony of each witness, and in weighing the evidence they may decide as they deem it preponderates," is ground for reversal, as suggesting a conflict of the evidence or a suspicion of the witnesses' veracity. Anderson & Nelson Distilling Co. v. Hair, 103 Ky. 196, 44 S. W. 658, 19 Ky. Law Rep. 1822. It is error merely on the basis of groundless criticism of counsel for the court to raise a question as to whether a witness testified truly in stating that he made a certain memorandum at the time of the transaction involved. Valley Lumber Co. v. Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216.

Comparing relative credibility of witnesses for state and defense. It is error for the court to make argumentative comparisons on the relative credibility of the principal witnesses for the defense and prosecution, their testimony being diametrically in conflict, and, in doing so disparage the credibility of witnesses for the defense. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003. An instruction, calling attention to the testimony of a witness for the people as opposed to the testimony of a witness for defendant, which carried with it the intimation that the people's witness was to be distrusted, was properly refused. People v. Amer, 90 P. 698, 151 Cal. 303.

Rule where affidavit of absent witnesses is used. Where the presence of a witness in a criminal case is waived, and it is agreed that an affidavit shall be used, instead of his oral testimony, it is error to charge the jury to believe as much of the affidavit as they please, or as little as they please. Parker v. State, 75 S. E. 437, 11 Ga. App. 251.

[44] Louisville & N. R. Co. v. Trout, 75 S. E. 328, 138 Ga. 324.

[45] State v. Smith, 174 P. 9, 103 Wash. 267.

In Pennsylvania, it is not error for the court to call the attention of the jury to the testimony of admitted

it is error to instruct that the testimony of a private detective should be looked upon with suspicion,[46] or that the experience of courts warns them to scan with caution the testimony of immoral or abandoned women,[47] or that the jury should receive with great caution the tesmony of an attesting witness to a will against the testamentary capacity of the testator,[48] and it is proper to refuse an instruction in a criminal case that the jury should be very cautious in weighing the testimony of a child.[49]

An instruction that, on the one hand, coincidence in all parts of the stories of two witnesses engenders suspicion of collaboration,[50] or that, on the other hand striking contradictions in the stories of different witnesses should be attributed to deliberate perjury,[51] constitute an invasion of the jury's province.

While the court should not suggest theories on which inconsistencies in the testimony may be accounted for,[52] yet, where conflicting versions of the happening of an event have been testified to, the jury should be permitted to reconcile the testimony, if possible, without attributing willful perjury to any of the witnesses.[53]

The court should not instruct as to the ethical duty of an attorney to retire from the trial of a case in which he appears as a witness,[54] and it is error to instruct that but little or no credence should be given to a witness, because of his ill will,[55] or to tell the jury that a witness has been impeached.[56]

It is for the jury to determine what credit shall be given to the testimony of an impeached witness,[57] and it is error to tell the jury that they may [58] or should [59] disregard the testimony of a witness because

thieves, provided that attention to the fact that they are thieves is directed as a matter affecting the credibility of the witnesses. Rohm v. Borland, 7 Atl. 171.

[46] De Long v. Giles, 11 Ill. App. 33; Burns v. People, 45 Ill. App. 70.

[47] State v. Tuttle, 66 N. E. 524, 67 Ohio St. 440, 93 Am. St. Rep. 689.

[48] Bohlsen v. Bohlsen, 5 Ky. Law Rep. (abstract) 613; Ogden v. Ogden, 6 Ky. Law Rep. (abstract) 310.

[49] Gordon v. State, 41 So. 847, 147 Ala. 42.

[50] State v. Allen, 87 P. 177, 34 Mont. 403; State v. Anderson, 89 P. 831, 35 Mont. 374.

[51] State v. Allen, 87 P. 177, 34 Mont. 403.

[52] Petrich v. Town of Union, 93 N. W. 819, 117 Wis. 46.

[53] Segaloff v. Interurban St. Ry. Co. (Sup.) 102 N. Y. S. 509; People v. Brow, 90 Hun, 509, 35 N. Y. Supp. 1009; Bodenheimer v. Chicago & N. W. Ry. Co., 123 N. W. 148, 140 Wis. 623.

[54] Fletcher v. Ketcham, 141 N. W. 916, 160 Iowa, 364.

[55] Norwood v. State, 24 So. 53, 118 Ala. 134.

[56] Strickland v. State, 44 So. 90, 151 Ala. 31; City of Huntingburg v. First, 53 N. E. 246, 22 Ind. App. 66; E. Mt. L. Coal Co. v. Schuyler (Pa.) 3 Leg. Gaz. 106.

[57] Shorter v. Marshall, 49 Ga. 31.

[58] Kornazsewska v. West Chicago St. R. Co., 76 Ill. App. 366; McMurrin v. Rigby, 80 Iowa, 322, 45 N. W. 877.

Impeachment by direct contradiction. Where a witness or witnesses testifying on one side of a case are in direct conflict with a witness or witnesses on the other side, it should

[59] See note 59 on following page.

they may believe he has been impeached, unless such witness is corroborated by other evidence in the case.[60] This is true, no matter how thoroughly a witness may have been impeached.[61]

Ordinarily it is error to instruct, or to intimate to, the jury, either in a civil or criminal case, that the testimony of an uncontradicted witness can or should be disregarded because of its inherent improbability.[62] The mere fact that the court thinks that the testimony to establish a material fact is incredible does not authorize it to instruct

be left to the jury to judge of the credibility of the respective witnesses, and it is improper to instruct them that they may disregard the testimony of one witness or set of witnesses on the ground that he or they have been impeached by direct contradiction. Peters v. Bourneau, 22 Ill. App. 177. An instruction that, as certain witnesses for the prosecution had contradicted each other, their testimony should be disregarded, was properly refused, on the ground that the jury, being the exclusive judges of the facts, may, as their judgment indicates, give effect to the testimony of certain of the witnesses, and disregard that of others. State v. Bazile, 23 So. 8, 50 La. Ann. 21.

[59] Pentecost v. State, 107 Ala. 81, 18 So. 146; Sharp v. State, 16 Ohio St. 218; East Mt. Laffee Coal Co. v. Schuyler (Pa.) 1 Walk. 342; State v. Gaul, 152 P. 1029, 88 Wash. 295.

Effect of conviction. A jury cannot lawfully be charged that a witness who has been convicted of burglary, and served out his term, is not entitled to full credit. People v. McLane, 60 Cal. 412.

Instruction that conviction cannot be had on testimony of impeached witness. An instruction that the testimony of a single witness under a cloud, and who is contradicted in material matters, is not such preponderance of testimony as will warrant a conviction, and that, "if the jury find from the evidence this to be the condition of this case it is their duty to discharge the defendant," is properly refused, as invading the province of the jury. Gilyard v. State, 98 Ala. 59, 13 So. 391.

[60] Osborn v. State, 27 So. 758, 125 Ala. 106; Moore v. State, 68 Ala. 360; Addison v. State, 48 Ala. 478; Scoggins v. State, 98 S. E. 240, 23 Ga. App. 366; State v. Larson, 85 Iowa, 659, 52 N. W. 539.

Requirement of corroboration. It is error to instruct that the testimony of an impeached witness is of no value, except when corroborated. Green v. Cochran, 43 Iowa, 544. On an indictment for an assault with intent to murder, a request to charge the jury that "the testimony of a witness for the state, who is shown to be unworthy of credit, is not sufficient to justify a conviction without corroboration, and such corroborating evidence, to avail anything, must be a fact tending to show the guilt of the defendant held properly refused, as an invasion of the province of the jury. Nabors v. State, 82 Ala. 8, 2 So. 357.

[61] Lay v. Fuller, 59 So. 609, 178 Ala. 375.

[62] **U. S.** (C. C. A. Fla.) Post v. United States, 135 F. 1, 67 C. C. A. 569, 70 L. R. A. 989, reversing judgment United States v. Post (D. C.) 128 F. 950, and rehearing denied 135 F. 1022, 67 C. C. A. 679, 70 L. R. A. 989; (C. C. A. N. J.) Beaumont v. Beaumont, 152 F. 55, 81 C. C. A. 251.

Ga. Louisville & N. R. Co. v. Trout, 75 S. E. 328, 138 Ga. 324.

Ill. Bressler v. People, 117 Ill. 422, 3 N. E. 521; Id., 117 Ill. 422, 8 N. E. 62.

Tex. Bishop v. State, 43 Tex. 390; Searcy v. State, 1 Tex. App. 440.

In Pennsylvania, it is not error for the trial judge to comment on the testimony of a witness and to call attention to its inherent probability or improbability, if he does it fairly, and leaves the question of his credibility to the jury. McNeile v. Cridland, 6 Pa. Super. Ct. 428.

the jury to cast it aside.[63] However, the facts may be such as to make the testimony of a witness incredible as a matter of law, in which case it will be error for the court to refuse an instruction to that effect.[64] This rule applies where the testimony of a witness is contrary to the physical facts.[65]

The jury may be told that they are not bound to accept as true a statement of fact made on the witness stand, if from all other facts and circumstances in evidence they believe that such statements are not true,[66] and the court may, in its discretion, tell the jury that they are not bound to believe the testimony of a witness because it is contained in a deposition, any more than they would if he testified from the witness stand.[67]

§ 10. Negative directions as to consideration of matters bearing on credibility

It is error not to permit the jury to consider matters bearing on the credibility of the witnesses.[68] Thus it is improper to instruct the jury not to regard slight variances between the testimony of witnesses,[69] or to give instructions preventing the jury from considering circumstances tending to show bias.[70] On the other hand, the court may instruct that the doing of certain acts by a witness within his legal right to do shall not be considered upon the question of his credibility.[71]

§ 11. Positive directions as to matters to be considered in determining question of credibility

Necessity and sufficiency of instructions on particular matters affecting credibility, see post, §§ 153–156.

In one jurisdiction it is held that the law has not prescribed as tests of the credibility of witnesses their demeanor, intelligence, prejudice, etc.,[72] and that it is error to refer, even in a general way,

[63] Curry v. Curry, 114 Pa. 367, 7 A. 61.

[64] Hagglund v. Erie R. Co., 103 N. E. 770, 210 N. Y. 46, reversing judgment 133 N. Y. S. 1124, 148 App. Div. 935.

[65] McClanahan v. St. Louis & S. F. R. Co., 126 S. W. 535, 147 Mo. App. 386.

[66] Goss Printing-Press Co. v. Lempke, 90 Ill. App. 427, judgment affirmed 60 N. E. 968, 191 Ill. 199; Price v. Lederer, 33 Mo. App. 426.

Rule in Texas. In this jurisdiction an instruction that the jury may discredit the testimony of an unimpeached and uncontradicted witness on account of attendant circumstances is held to be on the weight of the evidence. Ft. Worth & D. C. Ry. Co. v. Osborne (Civ. App.) 26 S. W. 274; Dwyer v. Bassett, 63 Tex. 274.

[67] Johnson County Sav. Bank v. Walker, 65 A. 132, 79 Conn. 348.

[68] Bodenheimer v. Chicago & N. W. Ry. Co., 123 N. W. 148, 140 Wis. 623.

[69] State v. Swayze, 11 Or. 357, 3 P. 574.

[70] Moore v. Nashville, C. & St. L. Ry., 34 So. 617, 137 Ala. 495.

[71] Calhoun, Denny & Ewing v. Whitcomb, 155 P. 759, 90 Wash. 128.

[72] Houston, E. & W. T. Ry. Co. v. Runnels, 47 S. W. 971, 92 Tex. 305, reversing judgment (Civ. App.) 46 S. W. 394.

to such elements as matters to be considered in determining such credibility, on the ground that such an instruction is calculated to give the jury the impression that the court is of the opinion that such matters affect the weight to be given to the testimony of some particular witness, whose manner of testifying may be peculiar, or who may have admitted interest, bias, or prejudice.[73] But the general rule is that it is not error for the court to instruct that the jury may consider various enumerated elements in passing on the question of the credibility of the witnesses,[74] and that it is proper to instruct that the jury may consider upon such question the relation of the witnesses to the parties, their interest, temper, bias, demeanor, and intelligence.[75]

The decisions are not entirely harmonious as to the right of the court to instruct the jury in language expressive of their obligation to consider such matters. In some jurisdictions the court must not tell the jury that they must or should, as a matter of law, take into consideration certain things in passing upon such question of credibility.[76] In Illinois it is proper to instruct the jury that they should take into consideration various matters in determining the credibility of each witness on the stand, where all the matters enumerated are such as may affect the estimate by the jury of such credibility; the use of "may" not being considered necessary.[77] In Indiana, the later cases and some of the earlier ones,[78] at variance with some of the early cases in this jurisdiction,[79] hold that the use of the words "should" or "must," rather than a less mandatory form of expression, is not error; the theory being that such words only imply duty to consider, the weight to be given to the various matters suggested being another thing. In another jurisdiction it is held in a criminal case that it is not proper for the court to direct the jury as to the method by which it shall exercise its powers,[80] it also being held in this jurisdiction, however, that an instruction that the degree of credit due a witness should be determined by various elements detailed therein is not reversible error.[81]

[73] Kellogg v. McCabe, 38 S. W. 542, 14 Tex. Civ. App. 598.

[74] **Ill.** La Fevre v. Du Brule, 71 Ill. App. 263.

Ind. Shular v. State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213.

Iowa. Stewart v. Anderson, 82 N. W. 770, 111 Iowa, 329.

Mont. White v. Chicago, M. & P. S. Ry. Co., 143 P. 561, 49 Mont. 419.

Pa. Williams v. Moore, 43 A. 1022, 192 Pa. 211.

[75] Klepsch v. Donald, 4 Wash. 436, 30 P. 991, 31 Am. St. Rep. 936.

[76] State v. Rosa, 62 A. 695, 72 N. J. Law, 462; Brady v. Cassidy (Com. Pl.) 9 Misc. Rep. 107, 29 N. Y. S. 45, judgment affirmed 145 N. Y. 171, 39 N. E. 814.

[77] People v. Lalor, 124 N. E. 866, 290 Ill. 234.

[78] Lynch v. Bates, 38 N. E. 806, 139 Ind. 206; Robertson v. Monroe, 7 Ind. App. 470, 33 N. E. 1002.

[79] Pennsylvania Co. v. Hunsley, 54 N. E. 1071, 23 Ind. App. 37.

[80] People v. Newcomer, 50 P. 405, 118 Cal. 263.

[81] People v. Benc, 62 P. 404, 130 Cal. 159.

§ 12. Instructions as to comparative credibility of different classes of witnesses

The court should not classify the witnesses,[83] and it is error to charge, and proper to refuse to charge, that any witness or class of witnesses shall receive greater consideration than any other class, or to make a distinction between different classes of witnesses as to their credibility, whether because of superior intelligence, better means of information, the affirmative character of the testimony given, or other reasons.[83] Thus it is an erroneous usurpation of the function of the jury to instruct them that one credible witness is worth more than many witnesses who the jury may and do believe have knowingly testified untruthfully on any material point, and are not corroborated by other credible witnesses,[84] and an instruction that Indian witnesses are entitled to as much credit as white men is improper.[85] But the court may charge that the jury should not reject the testimony of a witness on account of his race.[86]

[83] State v. Tuttle, 66 N. E. 524, 67 Ohio St. 440, 93 Am. St. Rep. 689.

[83] **Ala.** Cummings v. McDonnell, 66 So. 717, 189 Ala. 96; Crane v. State, 111 Ala. 45, 20 So. 590.

Del. State v. Long, 108 A. 36, 7 Boyce, 397.

Ill. Village of Des Plaines v. Winkelman, 110 N. E. 417, 270 Ill. 149; Belskis v. Dering Coal Co., 146 Ill. App. 124; Barron v. Burke, 82 Ill. App. 116; Hope v. West Chicago St. R. Co., 82 Ill. App. 311; Chittenden v. Evans, 41 Ill. 251; Yundt v. Hartrunft, 41 Ill. 9.

Ind. Muncie, H. & Ft. W. Ry. Co. v. Ladd, 76 N. E. 790, 37 Ind. App. 90; Winklebleck v. Winklebleck, 67 N. E. 451, 160 Ind. 570; Jones v. Casler, 38 N. E. 812, 139 Ind. 382, 47 Am. St. Rep. 274.

N. Y. Durst v. Ernst, 91 N. Y. S. 13, 45 Misc. Rep. 627.

Instructions objectionable within rule. An instruction that if there is a conflict in the evidence of the witnesses who testified in a case, and the jury cannot reconcile that evidence, they should believe that witness or those witnesses who have the best opportunity of knowing the facts about which they testify, and the least inducement to swear falsely. Wall v. Crown Cotton Mills, 65 S. E. 788, 6 Ga. App. 732; Southern Mut. Ins. Co. v. Hudson, 38 S. E. 964, 113 Ga. 434; Hudson v. Best, 30 S. E. 688, 104 Ga. 131.

Instructions not obnoxious to rule. An instruction that the credibility of the witness is a question exclusively for the jury, and that they have a right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, is not objectionable on the ground that it instructs the jury that an intelligent, witness is more credible than an ignorant one. North Chicago St. R. Co. v. Wellner, 69 N. E. 6, 206 Ill. 272, affirming judgment 105 Ill. App. 652.

[84] Henderson v. Miller, 36 Ill. App. 232.

[85] Campbell v. United States (C. C. A. Alaska) 221 F. 186, 136 C. C. A. 602.

[86] McDaniel v. Monroe, 41 S. E. 456, 63 S. C. 307.

§ 13. Jury to determine question of interest and the credibility of interested witnesses

The court should not tell the jury that a particular witness is or is not interested,[87] or suggest that the servants or agents of a party called as witnesses may have an interest that will affect their testimony.[88] The question of the credibility as witnesses of the parties to a suit, or other persons having an interest in its result, is for the jury, who should be left at full liberty to believe or to disbelieve such witnesses.[89] Accordingly an instruction that if a party testifying as a witness is corroborated the jury have no right to disbelieve him is erroneous,[90] and it is error to give, and proper to refuse to give instructions which cast suspicion or distrust on the testimony of a party,[91] or to instruct that the testimony of a witness, who is also a party, is to be received with caution,[92] or that such testimony is to be disregarded, if contradicted by the testimony of unimpeached witnesses,[93] or that the jury may disregard the testimony of any witness interested in the result of the trial.[94]

In accordance with the rule above stated [95] it is error to charge, and proper to refuse to charge, that the testimony of an uninterested witness should be given more weight than that of an interested one,[96] or to charge that, when the witnesses appear to be equally credible in every other respect, the one who appears to have the greater interest

[87] Swan v. Carawan, 84 S. E. 699, 168 N. C. 472.

[88] Solomon R. Co. v. Jones, 34 Kan. 443, 8 P. 730.

[89] New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98; Allen v. Lyles, 35 Miss. 513; Van Doren v. Jelliffe (Com. Pl.) 1 Misc. Rep. 354, 20 N. Y. S. 636, affirming judgment (City Ct. N. Y.) 16 N. Y. S. 209; McGuire v. Ogdensburg & L. C. R. Co., 63 Hun, 632, 18 N. Y. S. 313.

[90] Duygan v. Third Ave. R. Co. (City Ct. N. Y.) 6 Misc. Rep. 66, 26 N. Y. S. 79.

[91] Smith v. Woolf, 49 So. 395, 160 Ala. 644; Dow v. City of Oroville, 134 P. 197, 22 Cal. App. 215.

Hopes and fears of witnesses. In an action against a railway company for injuries to an employé, instructions that the jury should take into consideration "the hopes and fears" of the witnesses in determining their credibility, does not cast doubt on the witnesses' veracity. Hatfield v. Chicago, R. I. & P. Ry. Co., 61 Iowa, 434, 16 N. W. 336.

[92] Coloritype Co. v. Williams (C. C. A. N. Y.) 78 F. 450, 24 C. C. A. 163.

[93] Delvee v. Boardman, 20 Iowa, 446.

[94] Rucker v. State (Miss.) 18 So. 121; McEwen v. State (Miss.) 16 So. 242.

[95] Ante, § 9.

[96] **Ala.** Louisville & N. R. Co. v. Watson, 90 Ala. 68, 8 So. 249.

D. C. Metropolitan R. Co. v. Jones, 1 App. D. C. 200.

Ind. Dodd v. Moore, 91 Ind. 522; Nelson v. Vorce, 55 Ind. 455.

Neb. Omaha Belt Ry. Co. v. McDermott, 25 Neb. 714, 41 N. W. 648.

N. C. State v. Jenkins, 85 N. C. 544.

Rule in Iowa. In this jurisdiction it is held that, other things being equal, it is not error to give such an instruction, although it is better not to do so. Bonnell v. Smith, 53 Iowa, 281, 5 N. W. 128.

in the result of the case is to have the less weight,[97] and it is error to charge that the testimony of a witness against himself should be accorded more weight than his testimony in favor of himself.[98] In Missouri, in civil cases, the later decisions hold that an instruction which undertakes to value the testimony of a party against his interest, as compared with that in his own favor, and to tell the jury that the former testimony may be taken as true, but that the latter should be given only such credit as the jury may think it is entitled to, is erroneous, as usurping the province of the jury;[99] but in criminal cases in this jurisdiction such an instruction, while criticized, is held not to be reversible error.[1]

§ 14. Right or duty of jury to consider interest of witness

Necessity and sufficiency of instructions on question of interest of witness, see post, § 159.

As a general rule it is proper for the court to give an instruction, applicable generally to all the witnesses, that the jury may consider the interest that any witness may have in the event of the trial in passing upon his credibility,[2] and in some jurisdictions it is not error under some circumstances to single out a particular party testifying as a witness, and instruct that the jury may take the fact of his interest in the outcome of the trial into consideration.[3] Such an instruction should not be given where the witnesses for the other side are also interested in the result;[4] and in Missouri in civil,[5] and now in criminal, cases it is reversible error to instruct that, while the law permits a party to testify in his own behalf, the jury, in considering the credence to be given to his testimony, may consider the fact that he is a party and is interested in the result of the suit.[6] In Texas, under the statute prohibiting the trial judge from commenting on the

[97] Lee v. State, 74 Wis. 45, 41 N. W. 960.

[98] Douglass' Estate v. Fullerton, 7 Ill. App. 102.

[99] Brown v. Quincy, O. & K. C. R. Co., 106 S. W. 551, 127 Mo. App. 614; Zander v. St. Louis Transit Co., 103 S. W. 1006, 206 Mo. 445.

[1] State v. Porter (Mo.) 199 S. W. 158; State v. Brooks, 99 Mo. 137, 12 S. W. 633.

[2] Lovely v. Grand Rapids & I. Ry. Co., 100 N. W. 894, 137 Mich. 653; Territory v. Taylor, 71 P. 489, 11 N. M. 588; Kavanaugh v. City of Wausau, 98 N. W. 550, 120 Wis. 611.

Fear of losing employment. The court may instruct, with respect to the testimony of witnesses in the employ of one of the parties, that if, from the evidence, they believe they testified in fear of losing their employment, they may take such fact into consideration. Central Warehouse Co. v. Sargeant, 40 Ill. App. 438.

[3] Croupp v. Garfield Park Sanitarium, 147 Ill. App. 7; Chicago City Ry. Co. v. Olis, 94 Ill. App. 323, judgment affirmed 61 N. E. 459, 192 Ill. 514.

[4] Bailey v. Niebruegge, 211 Ill. App. 82.

[5] Copeland v. American Cent. Ins. Co., 138 S. W. 557, 158 Mo. App. 338.

[6] State v. Finkelstein, 191 S. W. 1002, 269 Mo. 612.

evidence, an instruction that the jury may take the interest of a witness into consideration is error.[7]

As above indicated, the authorities are conflicting as to whether it is proper for the court to instruct that the jury "should" consider the interest of a witness in a judicial controversy in determining his credibility. Perhaps the greater weight of authority upholds such an instruction.[8] In Indiana the later cases,[9] overruling some of the earlier ones, hold that such an instruction is not objectionable because of the use of the words "should" or "must," instead of the words "might" or "may."[10] In Illinois it is held that either the words "may" or "should" are proper, both forms meaning substantially the same thing.[11] In Missouri such an instruction is disapproved.[12]

§ 15. Credibility of accused as question for jury

It is within the exclusive domain of the jury to pass upon the credibility of one defending against a criminal accusation and testifying as a witness,[13] and instructions disparaging the testimony of such an ac-

[7] St. Louis & S. F. R. Co. v. Sproule, 101 S. W. 268, 45 Tex. Civ. App. 615; Daggett v. State, 44 S. W. 842, 39 Tex. Cr. R. 5; Penny v. State (Tex. Cr. App.) 42 S. W. 297; Isham v. State (Tex. Cr. App.) 41 S. W. 622; Williams v. State (Tex. Cr. App.) 40 S. W. 801.

Where only one witness has a real pecuniary interest in a suit, it is held, in this jurisdiction, that such an instruction, general in form, is in effect a charge that the jury should consider the interest of such witness. Willis v. Whitsitt, 67 Tex. 673, 4 S. W. 253.

[8] Salazar v. Taylor, 18 Colo. 538, 33 P. 369; Herndon v. Southern Ry. Co., 78 S. E. 287, 162 N. C. 317; Speight v. Seaboard Air Line Ry., 76 S. E. 684, 161 N. C. 80; Oliver v. Columbia, N. & L. R. Co., 43 S. E. 307, 65 S. C. 1.

[9] **Ind.** Mishler v. Chicago, S. B. & N. I. Ry. Co. (App.) 111 N. E. 460, rehearing denied 113 N. E. 310; Pittsburg, C., C. & St. L. Ry. Co. v. Chappell, 106 N. E. 403, 183 Ind. 141, Ann. Cas. 1918A, 627; In re Darrow, 92 N. E. 369, 175 Ind. 44; Southern Ry. Co. v. State, 75 N. E. 272, 165 Ind. 613; Strebin v. Labengood, 71 N. E. 494, 163 Ind. 478; Fifer v. Ritter, 64 N. E. 463, 159 Ind. 8.

In an early case it was held in this jurisdiction that an instruction that the jury are the exclusive judges of the credibility of witnesses, and that they should consider the relationship of the witnesses to the parties, their interest, their apparent candor and intelligence, and other matters of like character, so far as observable in evidence or from their demeanor on the stand, does not make it the duty of the jury, as matter of law, to detract from the weight of the testimony of an interested witness, and hence does not invade the province of the jury. Young v. Gentis, 7 Ind. App. 199, 32 N. E. 796.

[10] Wabash R. Co. v. Biddle, 59 N. E. 284, 27 Ind. App. 161; Lynch v. Bates, 38 N. E. 806, 139 Ind. 206; Duvall v. Kenton, 127 Ind. 178, 26 N. E. 688; Woollen v. Whitacre, 91 Ind. 502.

[11] Chicago & E. R. Co. v. Meech, 45 N. E. 290, 163 Ill. 305; Brown v. Walker, 32 Ill. App. 199.

[12] Kansas City, N. & Ft. S. R. Co. v. Dawley, 50 Mo. App. 480.

[13] **Ark.** Douglass v. State, 121 S. W. 923, 91 Ark. 492.

Fla. Ballard v. State, 31 Fla. 266, 12 So. 865.

Ill. People v. Sehrer, 196 Ill. App. 442; Same v. Clayton, 196 Ill. App. 445; Rider v. People, 110 Ill. 11.

Ky. Commonwealth v. Thomas, 104 S. W. 326, 31 Ky. Law Rep. 899.

N. Y. People v. Biddison, 121 N.

cused person, or implying lack of confidence in it, or that there is some doubt as to whether it is entitled to any weight, are erroneous.[14] This rule applies to unsworn statements made by the accused.[15]

Y. S. 129, 136 App. Div. 525, judgment affirmed 93 N. E. 378, 199 N. Y. 584; People v. McDonald, 54 N. E. 46, 159 N. Y. 309; Newman v. People, 63 Barb. 630.

Okl. Powell v. State, 150 P. 92, 11 Okl. Cr. 615; Wainscott v. State, 129 P. 655, 8 Okl. Cr. 590.

Tex. McCormick v. State, 216 S. W. 871, 86 Tex. Cr. R. 366; Nowlin v. State, 175 S. W. 1070, 76 Tex. Cr. R. 480; Tilmyer v. State, 126 S. W. 870, 58 Tex. Cr. R. 562, 137 Am. St. Rep. 982; Ross v. State, 29 Tex. 499.

Whether defendant successfully impeached. Where witnesses testified that defendant's reputation for truth and veracity in the neighborhood in which he lived was bad, and that they would not believe him under oath, and such evidence was not contradicted, the question whether defendant was successfully impeached was for the jury. Carle v. People, 66 N. E. 32, 200 Ill. 494, 93 Am. St. Rep. 208.

Sufficiency of explanation by defendant of incriminating circumstances. The explanation of one in possession of the fruits of a crime is for the jury, unless the explanation was so clearly satisfactory that it was unreasonable for the jury to disregard it. State v. Curtis, 161 P. 578, 29 Idaho, 724.

[14] **U. S.** Hickory v. United States, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474; Hicks v. United States, 150 U. S. 442, 14 S. Ct. 144, 37 L. Ed. 1137.

Fla. Hampton v. State, 39 So. 421, 50 Fla. 55; Andrews v. State, 21 Fla. 598.

Ga. Roberson v. State, 81 S. E. 798, 14 Ga. App. 557.

Ill. Lambert v. People, 34 Ill. App. 637.

Mo. State v. Porter, 111 S. W. 529, 213 Mo. 43, 127 Am. St. Rep. 589.

Nev. State v. Johnson, 16 Nev. 36; Same v. Vasquez, Id. 42.

N. C. State v. Collins, 118 N. C. 1203, 24 S. E. 118.

Pa. Commonwealth v. Pipes, 158 Pa. 25, 27 A. 839, 33 Wkly. Notes Cas. 237.

S. C. State v. Wyse, 32 S. C. 45, 10 S. E. 612; State v. Caddon, 30 S. C. 609, 8 S. E. 536; State v. Addy, 28 S. C. 4, 4 S. E. 814.

Tex. Johnson v. State, 90 S. W. 633, 49 Tex. Cr. R. 106.

Wash. State v. White, 10 Wash. 611, 39 P. 160.

Illustrations of instructions obnoxious to rule. An instruction, where only issue was self-defense that jury should not accept defendant's testimony blindly, or unless corroborated, but might consider its truth, taking into account defendant's interest, as bearing on his credibility. State v. Lundhigh, 164 P. 690, 30

[15] **Fla.** Miller v. State, 15 Fla. 577.

Ga. Daniel v. State, 88 S. E. 694, 17 Ga. App. 774; Slaughter v. State, 86 S. E. 741, 17 Ga. App. 332; Field v. State, 55 S. E. 502, 126 Ga. 571; Inman v. State, 72 Ga. 269; Wilson v. State, 69 Ga. 224; Day v. State, 63 Ga. 667; Pease v. State, 63 Ga. 631.

Instructions not erroneous under rule. An instruction that defendant has a right to make a statement to the jury which is not under oath, and the jury may believe it in preference to the sworn testimony in the case, or may disregard it, is not erroneous as excluding the jury from the privilege of believing the statement in part and rejecting it in part. Suple v. State, 66 S. E. 919, 133 Ga. 601. After instructing the jury in the language of the statute that they were authorized to believe the defendant's statement in preference to the evidence in the case, the addition by the judge of the words: "But you are not under any obligation to do so or not to do so. The law simply gives you power to do so, if you believe it is the truth"—is not error, as a disparagement of the statement, or as impressing the jury with the idea that they were under no obligation to believe defendant's statement. Stevens v. State, 68 S. E. 874, 8 Ga. App. 217.

It is error, where the accused is a witness in his own behalf, to charge that, in general, a witness who is interested will not be as honest, candid, and fair as one who is not,[16] or to give an instruction tending to mislead the jury into the belief that the evidence of interested parties is to some extent discredited, although the jury may think them honest and truthful,[17] or to charge, as a matter of law, that the jury may disregard the testimony of defendant because of his interest in the matter, if in conflict with other evidence.[18] On the other hand, it is error to instruct, and proper to refuse to instruct, that the jury should not disregard the statement or testimony of the accused simply because he is the defendant,[19] or that the same consideration shall be given to the testimony of the defendant, or to his testimony when corroborated, as to that of any other witness.[20]

Idaho, 365. Instructions that the jury were "not bound to believe the evidence of the defendant in a criminal case and treat it the same as the evidence of other witnesses." Chambers v. People, 105 Ill. 409. An instruction which singles out accused as a witness to call special attention to the weight and defects of his testimony, and to declare exclusive rules by which his testimony alone is to be considered, and in effect tells the jury that, however unworthy of belief he may be, the jury must give some weight to his testimony. People v. Oliver, 95 P. 172, 7 Cal. App. 601. An instruction that a defendant in a criminal trial is a competent witness in his own behalf, and his evidence should not be discarded for the sole reason that he is the defendant, but that the jury are to take that fact into consideration in determining the credit to be given his testimony; that they are the sole judges of the credibility of witnesses; and that, if they believe a witness testified falsely to any material fact, they may disregard the whole or any part of his testimony. State v. Hobbs, 117 Mo. 620, 23 S. W. 1074; State v. Austin, 21 S. W. 31, 113 Mo. 538.

Instructions not objectionable within rule. An instruction, in a prosecution for homicide, that there was nothing shown to justify or excuse the killing, under the law, is not objectionable as a criticism on defendant's credibility as a witness, where defendant's testimony does not support a claim of self-defense as a matter of law. Hicklin v. Territory, 80 P. 340, 9 Ariz. 184.

Instruction on effect of contradiction of defendant. An instruction regarding the weight to be accorded accused's testimony, "and you are also to take into consideration the fact, if such is the fact, that he has been contradicted by other credible witnesses," was not objectionable, because of the mandatory character of the word "are," or as assuming as a fact that accused had been contradicted, or as stating that accused's testimony should be disbelieved, if contradicted. People v. Meyer, 124 N. E. 447, 289 Ill. 184.

In New Jersey, a charge intimating that the jury are not bound to accept as verity the testimony of the accused, given in his own behalf, will not justify a reversal. State v. Rom, 72 A. 431, 77 N. J. Law, 248.

[16] Greer v. State, 53 Ind. 420; Holmes v. State, 123 N. W. 1043, 85 Neb. 506; Beddeo v. State, 123 N. W. 1044, 85 Neb. 510.

[17] State v. Holloway, 117 N. C. 730, 23 S. E. 168.

[18] Allen v. State, 87 Ala. 107, 6 So. 370.

[19] Stevens v. State, 35 So. 122, 138 Ala. 71; People v. Winters, 57 P. 1067, 125 Cal. 325.

[20] McKee v. State, 82 Ala. 32, 2 So. 451; Blackburn v. State, 71 Ala. 319, 46 Am Rep. 323; People v. Pierson, 2 Idaho, 71, 3 P. 688; Clark v. State (Tex. Cr. App.) 59 S. W. 887.

§ 16. Right or duty of jury to consider interest of accused

Necessity and sufficiency of instructions on this head, see post, §§ 166–171.

An instruction, framed in general terms applicable to all witnesses, that the jury, in determining the credibility of witnesses, may consider their character and appearance, the consistency and reasonableness of their statements, the interest, if any, they may feel in the case, etc., does not invade the province of the jury, although the defendant testifies in his own behalf,[21] and it is generally held that it is proper to instruct that the jury may consider the interest of an accused in the verdict to be rendered and his relation to the offense charged as affecting his credibility as a witness.[22]

[21] Felker v. State, 54 Ark. 489, 16 S. W. 663; People v. Waysman, 81 P. 1087, 1 Cal. App. 246.

In Missouri, an instruction, where the defendant testifies, that the jury are the sole judges of the credibility "of the witnesses," and will consider their character, manner on the stand, interest, relation to the parties, and probability of statements, as well as all circumstances in evidence, is not erroneous; it being held that "will" has not an imperative force, like the word "shall." State v. Hilsabeck, 132 Mo. 348, 34 S. W. 38.

[22] **Ala.** Smith v. State, 107 Ala. 139, 18 So. 306; Dryman v. State, 102 Ala. 130, 15 So. 433; Norris v. State, 87 Ala. 85, 6 So. 371.

Ark. Denton v. State, 198 S. W. 111, 131 Ark. 1.

Cal. People v. Hitchcock, 104 Cal. 482, 38 P. 198.

Contra. People v. Bartol, 142 P. 510, 24 Cal. App. 659.

Ill. Siebert v. People, 143 Ill. 571, 32 N. E. 431, distinguishing Purdy v. People, 140 Ill. 46, 29 N. E. 700.

Kan. State v. Bursaw, 87 P. 183, 74 Kan. 473.

Mich. People v. Dumas, 125 N. W. 766, 161 Mich. 45; People v. Resh, 107 Mich. 251, 65 N. W. 99.

Mo. State v. Maguire, 113 Mo. 670, 21 S. W. 212; State v. Wells, 111 Mo. 533, 20 S. W. 232; State v. Ihrig, 106 Mo. 267, 17 S. W. 300; State v. McGinnis, 76 Mo. 326; State v. Maguire, 69 Mo. 197.

Contra, State v. Clark (Mo. App.) 202 S. W. 259.

Neb. Housh v. State, 43 Neb. 163, 61 N. W. 571; Clark v. State, 32 Neb. 246, 49 N. W. 367.

N. M. Territory v. Taylor, 71 P. 489, 11 N. M. 588; Territory v. Romine, 2 N. M. 114.

Or. State v. Tarter, 26 Or. 38, 37 P. 53.

Pa. Commonwealth v. Orr, 138 Pa. 276, 20 A. 866.

Wash. State v. McCann, 49 P. 216, 16 Wash. 249; Id., 47 P. 443, 16 Wash. 249; State v. Carey, 46 P. 1050, 15 Wash. 549; State v. Nordstrom, 7 Wash. 506, 35 P. 382.

Wyo. Haines v. Territory, 3 Wyo. 167, 13 P. 8.

In the federal court, where the defendant testifies in his own behalf, the court is not at liberty to charge the jury, directly or indirectly, that he is not to be believed, because he is the defendant; but, on the other hand, it may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger the temptation; and that the interest of the defendant, being of a character not possessed by other witnesses, is a matter which may seriously affect the credibility of his testimony. Reagan v. United States, 157 U. S. 301, 15 S. Ct. 610, 39 L. Ed. 709.

In Illinois, in connection with such an instruction, the jury should be told that the same tests are to be applied to the testimony of the defendant as to the testimony of any other witness. People v. Harvey, 122 N. E. 138, 286 Ill. 593.

In Louisiana, under a constitutional provision, it is error to give

In some jurisdictions it is proper to charge that the jury "should" or "must" consider the interest of the accused in passing upon his credibility as a witness,[23] but in other jurisdictions this is error.[24] In Missouri the later decisions,[25] overruling the earlier ones,[26] hold that the permissive form "may" should be used rather than "should," although this question is now a merely academic one under the recent decisions.[27] In Texas it is held that the statutory prohibition in that state against charging upon the weight of evidence prohibits the court from singling out a witness and instructing the jury as to any tests they are to apply in determining his credibility, and consequently it is error in this state to charge that in passing upon the credibility of an accused the jury should consider his interest in the result of the trial.[28]

such an instruction. State v. Smith, 65 So. 598, 135 La. 427; State v. Carroll, 64 So. 868, 134 La. 965.

In Texas, the rule seems to be that calling the attention of the jury to the interest of the accused in the result of the trial is error, and that an instruction in general terms that, in determining the credibility of conflicting witnesses, the jury may consider their interest in the case, is, when defendant, has testified, reversible error. Harrell v. State, 40 S. W. 799, 37 Tex. Cr. R. 612; Oliver v. State (Cr. App.) 42 S. W. 554; Shields v. State, 44 S. W. 844, 39 Tex. Cr. R. 13. There are, however, decisions that such a general instruction is not erroneous, as calculated to call the attention of the jury to the interest of the defendant. McGrath v. State, 35 Tex. Cr. R. 413, 34 S. W. 127, 941; Cockerell v. State, 32 Tex. Cr. R. 585, 25 S. W. 421.

[23] **Mich.** People v. Calvin, 60 Mich. 113, 26 N. W. 851; People v. Herrick, 59 Mich. 563, 26 N. W. 767.

Neb. Johnson v. State, 34 Neb. 257, 51 N. W. 835; St. Louis v. State, 8 Neb. 418, 1 N. W. 371.

N. Y. People v. Crowley, 102 N. Y. 234, 6 N. E. 384.

Okl. Rhea v. United States, 50 P. 992, 6 Okl. 249; Territory v. Gatliff, 37 P. 809, 2 Okl. 523.

[24] **Ala.** Adams v. State (App.) 75 So. 641; Swain v. State, 62 So. 446, 8 Ala. App. 26; Pugh v. State, 58 So. 936, 4 Ala. App. 144; Tucker v. State, 52 So. 464, 167 Ala. 1.

Ind. Hartford v. State, 96 Ind. 461, 49 Am. Rep. 185.

In California, the early decisions allowed the use of "should." People v. Knapp, 71 Cal. 1, 11 P. 793; People v. O'Neil, 7 P. 790, 67 Cal. 378; People v. Wheeler, 65 Cal. 77, 2 P. 892. But the later decisions are to the effect that no instructions, either requiring or permitting the jury to consider the interest of the accused, should be given. People v. Blunkall, 161 P. 997, 31 Cal. App. 778; People v. Bartol, 142 P. 510, 24 Cal. App. 659; People v. Borrego, 95 P. 381, 7 Cal. App. 613; People v. Van Ewan, 43 P. 520, 111 Cal. 144.

[25] State v. Fairlamb, 121 Mo. 137, 25 S. W. 895.

[26] **Mo.** State v. Renfrow, 111 Mo. 589, 20 S. W. 299; State v. Mounce, 106 Mo. 226, 17 S. W. 226, following State v. Young, 105 Mo. 634, 16 S. W. 408; State v. Morrison, 104 Mo. 638, 16 S. W. 492; State v. Brown, 104 Mo. 365, 16 S. W. 406; State v. Young, 99 Mo. 666, 12 S. W. 879; State v. Cook, 84 Mo. 40; Same v. Wisdom, Id. 177.

[27] State v. Pace, 192 S. W. 428, 269 Mo. 681.

[28] Muely v. State, 31 Tex. Cr. R. 155, 19 S. W. 915, reversing 18 S. W. 411.

§ 17. Lack of corroboration of accused

In some jurisdictions, in a criminal case, it is not improper to call the attention of the jury, under some circumstances, to the fact that the testimony of the defendant is not corroborated.[29]

§ 18. Testimony of prosecuting witness

Corroboration of prosecuting witness, see post, § 67.
Necessity and sufficiency of instructions, see post, § 160.

The general rule that it is for the jury to determine the credibility of witnesses applies to the testimony of the prosecuting witness in a criminal case,[30] and it invades the province of the jury to charge that, in the absence of disproof of the statements of the prosecuting witness by defendant, they are bound to presume such statements to be true.[31] So, where the law does not require corroboration of the prosecuting witness, an instruction that the jury should acquit, in the absence of corroborating circumstances, is erroneous, as on the weight of the evidence.[32] The court may, however, caution the jury to consider the relation of the prosecuting witness to the case,[33] and, where corroboration is not required as a matter of law, it is not improper to charge that the jury may convict on the uncorroborated testimony of the prosecuting witness.[34]

§ 19. Testimony of wife or relative of accused or prosecuting witness

Necessity and sufficiency of instructions, see post, § 162.

It is error to charge that the jury may disregard the testimony of any witness in a criminal prosecution who is related to the defendant,[35] or to instruct that the testimony of the wife of an accused should be examined with great caution or peculiar care.[36] In some jurisdictions

[29] People v. Rohl, 138 N. Y. 616, 33 N. E. 933; Commonwealth v. Pendergast, 138 Pa. 633, 21 A. 12; Hannon v. State, 70 Wis. 448, 36 N. W. 1.

[30] People v. Mazzurco (Cal. App.) 193 P. 164.

[31] People v. Murray, 86 Cal. 31, 24 P. 802.

[32] Gonzales v. State, 32 Tex. Cr. R. 611, 25 S. W. 781.

[33] People v. Herrick, 59 Mich. 563, 26 N. W. 767.

[34] People v. Akey, 124 P. 718, 163 Cal. 54.

[35] McEwen v. State (Miss.) 16 So. 242.

Testimony of wife of defendant. An instruction, in a criminal case, that defendant's wife is a competent witness; that the jury should not discard her testimony for that fact alone, but may consider it in determining her credibility; that if they believe that any witness has intentionally sworn falsely, they may disregard the whole or any part of the testimony of witness—is erroneous, as telling the jury by implication to disregard the testimony of defendant's wife on some ground, but not alone because she is his wife. State v. Hobbs, 117 Mo. 620, 23 S. W. 1074.

[36] State v. Bernard, 45 Iowa, 234; State v. Rankin, 8 Iowa, 355; State v. Guyer, 6 Iowa, 263.

In one jurisdiction, the rule is

it is not error to charge that the jury may,[37] or should, consider whether the relationship of any of the witnesses to the defendant or the complaining witness may have influenced them to swerve from the truth.[38] But in other jurisdictions it is held that, while it is proper to instruct that, in weighing the testimony of a defendant in a criminal case, the jury may consider his peculiar situation and relationship to the case, the rule cannot be extended beyond the defendant, so as to include his relatives.[39] In Texas, where the province of the jury is perhaps more jealously guarded than in almost any other jurisdiction, an instruction, framed in general terms, that the jury, in estimating the credibility of the testimony, may consider the intelligence and apparent prejudice, if any, of the witnesses, has been held not erroneous, as calculated to call the attention of the jury to the interest of relatives or of the wife of defendant testifying in the case.[40]

§ 20. Testimony of detectives and informers

Necessity and sufficiency of instructions, see post, § 161.

The credibility of the testimony of detectives employed to discover violations of the law is for the jury,[41] and while in some jurisdictions it is held that the giving of instructions as to the caution to be observed in weighing testimony of private detectives or persons employed to find evidence is based upon rules of practice rather than of law, and rests largely in the discretion of the trial judge,[42] the general rule is that it is error to instruct, and proper to refuse to instruct, because invading the province of the jury, that the testimony of police officers

stated to be that, where defendant's wife is a witness in his behalf, it is error to charge that the jury should scrutinize carefully her evidence, and, on account of her interest in the event, receive her testimony with grains of allowance, without a further charge that, if they believe her testimony to be true, it should be given full credit. State v. Collins, 118 N. C. 1203, 24 S. E. 118.

[37] State v. Parker, 39 Mo. App. 116.

[38] State v. Hogard, 12 Minn. 293 (Gil. 191).

In Missouri, in an early case it was held that, under statutory provisions prohibiting the court in a criminal case from commenting on the evidence, and making the accused or his wife competent witnesses, but allowing the fact of their relation to the case to be shown for the purpose of affecting their credibility, the court might instruct the jury in weighing testimony of defendant's wife to consider the fact of her relationship to him. State v. Young, 99 Mo. 666, 12 S. W. 879.

[39] People v. Shattuck, 109 Cal. 673, 42 P. 315; People v. Hertz, 105 Cal. 660, 39 P. 32.

Earlier decisions in California holding contrary to the text, People v. Wong Ah Foo, 69 Cal. 180, 10 P. 375, have been overruled.

[40] McGrath v. State, 35 Tex. App. 413, 34 S. W. 127; Cockerell v. State, 32 Tex. Cr. R. 585, 25 S. W. 421.

[41] Baumgartner v. State, 178 P. 30, 20 Ariz. 157.

[42] O'Grady v. People, 95 P. 346, 42 Colo. 312.

and professional detectives [43] or informers is to be received with caution, or great caution,[44] and, on the other hand, an instruction that the jury is not authorized to disregard testimony of a witness merely because he is employed as a detective, but must give the testimony of such witness the same credence as that of any other witness, unless they believe from the testimony that such witness has knowingly and corruptly sworn falsely to a material fact, is erroneous, as invading the province of the jury.[45]

§ 21. Testimony of accomplices and codefendants in criminal cases

On conflicting evidence, the court should leave the question of whether a witness is an accomplice to the jury;[46] but, where the facts concerning the connection of a witness with the offense charged

[43] **Cal.** People v. Rudolph, 153 P. 721, 28 Cal. App. 683.

Ga. Lynn v. State, 79 S. E. 29, 140 Ga. 387.

Ill. People v. Dressen, 158 Ill. App. 139; Hronek v. People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652.

Mo. State v. Kimmell, 137 S. W. 329, 156 Mo. App. 461; State v. Kennett, 132 S. W. 286, 151 Mo. App. 637; State v. Haines, 107 S. W. 36, 128 Mo. App. 245; State v. Oliphant, 107 S. W. 32, 128 Mo. App. 252.

Okl. Remer v. State, 109 P. 247, 3 Okl. Cr. 706.

S. C. State v. Bennett, 40 S. C. 308, 18 S. E. 886.

Va. Robinson v. Commonwealth, 87 S. E. 553, 118 Va. 785.

Instructions objectionable within rule. An instruction that police officers and detectives had testified, and that in weighing their testimony greater care should be used by the jury as to testimony of persons interested in or employed to find evidence against the accused than in the case of other witnesses, because of the unavoidable tendency and bias of such persons to construe everything as evidence against accused, and disregard everything not tending to support their preconceived opinions. State v. Paisley, 92 P. 566, 36 Mont. 237.

In Nebraska, however, an instruction informing the jury as to the weight to be given the evidence of detectives, and stating that greater care should be used than in other cases, but that it should not be disregarded entirely and that the jury are the sole judges of the credibility of all the witnesses, is not erroneous as invading the province of the jury. Everson v. State, 93 N. W. 394, 4 Neb. (Unof.) 109.

[44] State v. Wisnewski, 102 N. W. 883, 13 N. D. 649; State v. Hoxsie, 15 R. I. 1, 22 Atl. 1059.

Testimony of "spotters." It is proper to refuse an instruction which characterizes a witness as a "spotter," and which tells the jury to take his testimony with extreme care and suspicion, when there is nothing in the conduct or demeanor of such witness to reflect unfavorably upon his credibility, except his admission that he made a purchase of intoxicating liquor from one reputed to be engaged in the illegal sale thereof, intending, if called upon, to testify thereto. State v. Keys, 4 Kan. App. 14, 45 P. 727.

[45] Pederre v. State, 54 So. 721, 99 Miss. 171.

[46] **Ala.** Horn v. State, 72 So. 768, 15 Ala. App. 213; Newsum v. State, 65 So. 87, 10 Ala. App. 124.

Ark. Spencer v. State, 194 S. W. 863, 128 Ark. 452.

Cal. People v. Truax, 158 P. 510, 30 Cal. App. 471; People v. Coffey, 119 P. 901, 161 Cal. 433, 39 L. R. A. (N. S.) 704; People v. Bunkers, 84 P. 364, 2 Cal. App. 197, rehearing denied (Sup.) 84 P. 370, 2 Cal. App. 197; People v. Compton, 56 P. 44, 123 Cal. 403.

Ga. Curtis v. State, 85 S. E. 980, 16 Ga. App. 678; Hays v. State, 72 S.

are not in dispute, the court may, or should, instruct that he is or is not an accomplice.[47]

As in the case of other witnesses, the general rule is that the jury are the exclusive judges of the credibility of accomplices testifying as witnesses,[48] and it is usually error to instruct and proper to refuse to

E. 285, 9 Ga. App. 829; Hargrove v. State, 54 S. E. 164, 125 Ga. 270.

Idaho. State v. Grant, 140 P. 959, 26 Idaho, 189.

Ky. Elmendorf v. Commonwealth, 188 S. W. 483, 171 Ky. 410; Smith v. Commonwealth, 146 S. W. 4, 148 Ky. 60.

Mass. Commonwealth v. Glover, 111 Mass. 395; Same v. Ford, Id. 394; Same v. Elliot, 110 Mass. 104.

N. M. State v. Williams, 161 P. 334, 22 N. M. 337.

N. Y. People v. Richardson, 118 N. E. 514, 222 N. Y. 103, affirming judgment 165 N. Y. S. 1104, 178 App. Div. 925; People v. Swersky, 111 N. E. 212, 216 N. Y. 471, modifying judgment 153 N. Y. S. 1134, 168 App. Div. 941; People v. Wood, 157 N. Y. S. 541, 93 Misc. Rep. 701; People v. Katz, 103 N. E. 305, 209 N. Y. 311, affirming judgment 139 N. Y. S. 137, 154 App. Div. 44; People v. Elliott, 140 N. Y. S. 553, 155 App. Div. 486.

N. D. State v. Kellar, 80 N. W. 476, 8 N. D. 563, 73 Am. St. Rep. 776.

Okl. Cudjoe v. State, 154 P. 500, L. R. A. 1916F, 1251.

Tenn. Hicks v. State, 149 S. W. 1055, 126 Tenn. 359.

Tex. McCormick v. State, 216 S. W. 871, 86 Tex. Cr. R. 366; Melton v. State, 197 S. W. 715, 81 Tex. Cr. R. 604; Savage v. State, 170 S. W. 730, 75 Tex. Cr. R. 213; Goldstein v. State, 166 S. W. 149, 73 Tex. Cr. R. 558; Hyde v. State, 165 S. W. 195, 73 Tex. Cr. R. 452; Foster v. State, 150 S. W. 936, 68 Tex. Cr. R. 38; Franklin v. State, 140 S. W. 1091, 63 Tex. Cr. R. 438; Brown v. State, 125 S. W. 915, 58 Tex. Cr. R. 336; Pace v. State, 124 S. W. 949, 58 Tex. Cr. R. 90; Davis v. State, 117 S. W. 159, 55 Tex. Cr. R. 495; Wyatt v. State, 114 S. W. 812, 55 Tex. Cr. R. 73; Lightfoot v. State (Cr. App.) 78 S. W. 1075; McAlister v. State, 76 S. W. 760, 45 Tex. Cr. R. 258, 108 Am. St. Rep. 958; Preston v. State, 53 S. W. 127, 41 Tex. Cr. R. 300, rehearing denied 53 S. W. 881, 41 Tex. Cr. R. 300; Clay v. State, 51 S. W. 212, 40 Tex. Cr. R. 556; Ransom v. State (Cr. App.) 49 S. W. 582; Preston v. State, 48 S. W. 581, 40 Tex. Cr. R. 72; Rios v. State (Cr. App.) 48 S. W. 505; Hankins v. State (Cr. App.) 47 S. W. 992; Delavan v. State (Cr. App.) 29 S. W. 385; Williams v. State, 33 Tex. Cr. R. 128, 25 S. W. 629, 47 Am. St. Rep. 21; Crowell v. State, 24 Tex. App. 404, 6 S. W. 318.

Wis. Porath v. State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

[47] **Cal.** People v. Coffey, 119 P. 901, 161 Cal. 433, 39 L. R. A. (N. S.) 704.

Iowa. State v. Stalker, 151 N. W. 527, 169 Iowa, 396, L. R. A. 1915E, 1222.

N. M. Territory v. West, 99 P. 343, 14 N. M. 546.

Okl. Wiley v. State (Cr. App.) 191 P. 1057; Moore v. State, 170 P. 519, 14 Okl. Cr. 292.

R. I. State v. Riddell, 96 A. 531, reargument denied 97 A. 15.

Tex. Smalley v. State, 127 S. W. 225, 59 Tex. Cr. R. 95; Spencer v. State, 106 S. W. 386, 52 Tex. Cr. R. 289; Swan v. State (Cr. App.) 76 S. W. 464.

[48] **U. S.** (C. C. Tex.) United States v. Reeves, 38 F. 404.

Cal. People v. Gibson, 53 Cal. 601.

Colo. Tollifson v. People, 112 P. 794, 49 Colo. 219.

Del. State v. Ryan, 75 A. 869, 1 Boyce, 223; State v. Curdy, 75 A. 868, 1 Boyce, 208.

Kan. State v. McDonald, 193 P. 179, 107 Kan. 568.

Me. State v. Litchfield, 58 Me. 267.

Mich. People v. Dumas, 125 N. W. 766, 161 Mich. 45; People v. Jenness, 5 Mich. 305.

Miss. Osborn v. State, 55 So. 52, 99 Miss. 410, overruling the suggestion of error 54 So. 450.

instruct that the testimony of accomplices,[49] or of the wife of an accomplice,[50] is to be viewed with distrust, or received with great caution, or is worthless,[51] and where corroboration of the testimony of an accomplice is not indispensable to warrant the jury in basing a verdict thereon, an instruction that they ought not to convict on the uncorroborated evidence of an accomplice is erroneous,[52] and properly refused.[53] On the other hand, it is proper to refuse to charge that the testimony of an accomplice is not to be given less weight than that of other witnesses,[54] and it is error to charge that the jury are bound to credit the testimony of an accomplice, if corroborated.[55]

The jury may be told, in a criminal case, that they may take into consideration the fact that a witness is a codefendant.[56]

§ 22. Effect of false testimony of witness on credibility of part of testimony not shown to be false

Necessity and correctness of instructions as statements of legal propositions, see post, §§ 178–180.

The fact that a witness has knowingly testified falsely to material facts does not require the jury to disbelieve his testimony on other matters,[57] and therefore it invades the province of the jury to instruct

Mo. State v. Faulkner, 84 S. W. 967, 185 Mo. 673.

N. Y. Maine v. People, 9 Hun, 113.

W. Va. State v. Betsall, 11 W. Va. 703.

Wis. Mack v. State, 4 N. W. 449, 48 Wis. 271.

[49] People v. Hoosier, 142 P. 514, 24 Cal. App. 746; People v. Moran, 77 P. 777, 144 Cal. 48; People v. Wardrip, 74 P. 744, 141 Cal. 229; People v. O'Brien, 96 Cal. 171, 31 Pac. 45; State v. Bobbitt, 114 S. W. 511, 215 Mo. 10. Contra, People v. Costello, 1 Denio, 83.

In the federal courts, the court cannot declare as matter of law. that the declarations of self-confessed accomplices and members of a conspiracy are unworthy of belief unless corroborated. United States v. McKee, Fed. Cas. No. 15,685, 3 Dill. 546.

[50] Crittenden v. State, 32 So. 273, 134 Ala. 145.

[51] People v. Wallin, 22 N. W. 15, 55 Mich. 497.

[52] Richardson v. United States (C. C. A. Pa.) 181 F. 1, 104 C. C. A. 69; State v. Hare, 100 N. E. 825, 87 Ohio St. 204; State v. Sowell, 67 S. E. 316, 85 S. C. 278; State v. Musgrave, 28 S. E. 813, 43 W. Va. 672. Contra, Abaly v. State, 158 N. W. 308, 163 Wis. 609.

[53] People v. Schweitzer, 23 Mich. 301.

[54] Hicks v. State, 26 So. 337, 123 Ala. 15.

[55] People v. Eckert, 16 Cal. 110; Hamilton v. People, 29 Mich. 173.

[56] Mathews v. State, 100 Ala. 46. 14 So. 359; State v. Hing, 16 Nev. 307.

[57] **Ala.** Grimes v. State, 63 Ala. 166.

Cal. People v. Hicks, 53 Cal. 354.

Ill. Pennsylvania Co. v. Conlan, 101 Ill. 93.

La. State v. Washington, 31 So. 638. 107 La. 298.

Me. Parsons v. Huff, 41 Me. 410.

Mass. Commonwealth v. Clune, 162 Mass. 206, 38 N. E. 435.

Minn. Schuek v. Hagar, 24 Minn. 339.

Miss. Finley v. Hunt, 56 Miss. 221.

Mo. State v. Anderson, 19 Mo. 241.

that the jury ought to, should, or must, disregard the entire testimony of a witness whom they may believe to have so spoken falsely as to a material fact, unless he is corroborated by other reliable evidence,[58] and such an instruction is properly refused.[59] But the jury may be told in a proper case that if they believe, from all the circumstances, a witness to have willfully testified falsely on a material point, they should consider such fact in determining the weight to be given to his evidence,[60] and in some jurisdictions it is proper, in such case, to tell the jury that they may disregard the entire testimony of such witness.[61] In one jurisdiction, however, an instruction that the jury may disregard the entire testimony of a witness who has willfully

Neb. Neal v. State, 175 N. W. 669, 104 Neb. 56.

N. H. Senter v. Carr, 15 N. H. 351.

N. Y. People v. Kerr (O. & T.) 6 N. Y. S. 674.

Wis. Mercer v. Wright, 3 Wis. 645.

[58] **Ala.** Mills v. State, 55 So. 331, 1 Ala. App. 76.

Ill. Hoge v. People, 117 Ill. 35, 6 N. E. 796; Ruddock v. Belton, 7 Ill. App. 517; Otmer v. People, 76 Ill. 149.

Iowa. Judge v. Jordan, 81 Iowa, 519, 46 N. W. 1077.

Kan. Higbee v. McMillan, 18 Kan. 133; State v. Potter, 16 Kan. 80; Shellabarger v. Nafus, 15 Kan. 547.

Ky. Hall v. Renfro, 3 Metc. 51; Letton v. Young, 2 Metc. 558.

Miss. Spivey v. State, 58 Miss. 858.

Mo. State v. Cushing, 29 Mo. 215.

N. Y. Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319.

N. C. State v. Williams, 47 N. C. 257.

Pa. Commonwealth v. Ieradi, 64 A. 889. 216 Pa. 87, 116 Am. St. Rep. 761.

Tenn. Frierson v. Galbraith, 12 Lea, 129.

W. Va. State v. Thompson, 21 W. Va. 741.

In New York, early cases apparently in opposition to the rule of the text Roth v. Wells, 29 N. Y. 471; People v. Petmecky, 2 N. Y. Cr. R. 450 have been explained, answered, or overruled by the later cases.

[59] Butler v. State, 77 So. 72, 16 Ala. App. 234; Saulsberry v. State, 59 So. 476, 178 Ala. 16; Edmondson v. State, 59 So. 229, 4 Ala. App. 196; Lowe v. State, 88 Ala. 8, 7 So. 97; Slayton v. State, 94 S. W. 901, 50 Tex. Cr. R. 62.

[60] Bowles v. Glasgow, 2 Posey, Unrep. Cas. 714.

[61] **Ala.** Byrd v. State, 84 So. 777, 17 Ala. App. 301; Barker v. Tennessee Coal, Iron & R. Co., 66 So. 600, 189 Ala. 579; Seaboard Air Line Ry. Co. v. Taylor, 64 So. 187, 9 Ala. App. 628; Kress v. Lawrence, 47 So. 574, 158 Ala. 652; Sanders v. Davis, 44 So. 979, 153 Ala. 375; Alabama Steel & Wire Co. v. Griffin, 42 So. 1034, 149 Ala. 423; Jordan v. State, 81 Ala. 20, 1 So. 577.

Cal. Whitaker v. California Door Co., 95 P. 910, 7 Cal. App. 757.

Colo. Denver & R. G. R. Co. v. Warring, 86 P. 305, 37 Colo. 122.

Mo. Myers v. City of Independence (Sup.) 189 S. W. 816; Cohen v. St. Louis Merchants' Bridge Terminal Ry. Co., 181 S. W. 1080, 193 Mo. App. 69; Price v. Hiram Lloyd Bldg. & Const. Co., 177 S. W. 700, 191 Mo. App. 395; Hall v. Manufacturers' Coal & Coke Co., 168 S. W. 927, 260 Mo. 351, Ann. Cas. 1916C, 375; State v. Martin, 124 Mo. 514, 28 S. W. 12; State v. Mounce, 106 Mo. 226, 17 S. W. 226, following State v. Vansant, 80 Mo. 67.

Neb. Atkins v. Gladwish, 27 Neb. 841, 44 N. W. 37.

Ohio. Dye v. Scott, 35 Ohio St. 194, 35 Am. Rep. 604.

Okl. Strickler v. Gitchel, 78 P. 94, 14 Okl. 523.

sworn falsely to a material fact is held to be erroneous,[62] as suggesting to the jury the weight to be attached to a particular part of the evidence,[63] and in other jurisdictions such an instruction should be hedged around with certain qualifications, as will be shown in a subsequent chapter.[64]

Under some statutes, on a proper occasion, the court may instruct that a witness false in one part of his testimony is to be distrusted in another,[65] and under such a statute an instruction that, if the jury is convinced that a witness has willfully stated what is untrue with intent to deceive, the jury must treat all his testimony with distrust and suspicion, and reject it unless they are convinced that, notwithstanding his base character, he has in other respects sworn to the truth, may not be objectionable as withdrawing the credibility of the witness from the jury.[66] An instruction, however, which makes it the unqualified duty of the jury to distrust the entire testimony of a witness because of such a false statement is erroneous.[67]

While the maxim, "Falsus in uno, falsus in omnibus," should not be laid down as a rule of law for the jury in testing the credibility of the witnesses, the doing so may not be material error, when viewed in connection with the entire instruction.[68]

§ 23. Determination of question whether witness has made contradictory statements

As a general rule, whether a part of the testimony of a witness is at variance with other parts, or with his statements made out of court, or on a former trial, should be left to the jury,[69] and it is not proper for the court to instruct that certain testimony of a witness qualifies what he has already said,[70] nor should the jury be told to reconcile, if possible, the conflicting statements of a witness,[71] and where a witness attempts to explain contradictory statements the court should not so instruct as apparently to approve such explanation.[72]

[62] Cook v. Commonwealth, 4 Ky. Law Rep. 31.

Contra, Rutherford v. Commonwealth, 2 Metc. 387.

[63] Barnett v. Commonwealth, 84 Ky. 449, 1 S. W. 722.

[64] Post, §§ 179, 180.

[65] People v. Votaw, 177 P. 485, 38 Cal. App. 714; State v. Connors, 94 P. 199, 37 Mont. 15.

[66] People v. Kelly, 79 P. 846, 146 Cal. 119.

[67] People v. Delucchi, 118 P. 935, 17 Cal. App. 96.

[68] State v. Littlejohn, 33 S. C. 599, 11 S. E. 638.

[69] Pound v. State, 43 Ga. 88; State v. Davis (Mo.) 217 S. W. 87; Wendt v. Craig, 147 N. Y. 697, 41 N. E. 516, reversing 63 Hun, 627, 17 N. Y. S. 748; State v. Pirkey, 118 N. W. 1042, 22 S. D. 550, 18 Ann. Cas. 192, judgment reversed on rehearing 124 N. W. 713, 24 S. D. 533.

[70] Beard v. Kirk, 11 N. H. 397.

[71] Isly v. Illinois Cent. R. Co., 88 Wis. 453, 60 N. W. 794.

[72] Potter v. State, 45 S. E. 37, 117 Ga. 693.

§ 24. Effect of contradictory statements of witness

Necessity and sufficiency of instructions, see post, §§ 181, 182.

It is for the jury to say whether the credibility of a witness has been impaired by the making of contradictory statements,[73] and instructions which tend to withdraw the fact of such contradiction from their consideration,[74] or which tell the jury that under certain circumstances such fact will not operate to impair the credibility of a witness,[75] or which minimize its effect, as by telling the jury that evidence of such contradiction is generally worthless, or of little weight, are erroneous.[76] Thus an instruction that the normal weight of testimony as to contradictory statements previously made out of court by a witness is in all cases slight invades the province of the jury.[77] On the other hand, it is equally improper to instruct that proof of having made contradictory statements should weigh heavily against a witness,[78] and it is proper to refuse to instruct that the testimony of such a witness should be received with great distrust.[79]

In accordance with the general principle stated supra, it is proper to tell the jury that, in weighing the testimony of a witness, they may, or should, consider the fact that he has made inconsistent statements,[80] and in one jurisdiction it is held not error to instruct that the jury may disregard the entire testimony of a witness who has made such statements as to a material fact, unless he is corroborated by other

[73] **U. S.** (C. C. A. Iowa) Chicago G. W. Ry. Co. v. Price, 97 F. 423, 38 C. C. A. 239.
Ala. Smith v. State, 92 Ala. 69, 9 So. 622.
Cal. People v. Avena, 168 P. 148. 34 Cal. App. 500; People v. Chober, 157 P. 533, 29 Cal. App. 627; People v. Preston, 127 P. 660, 19 Cal. App. 675.
Ill. Raymond v. People, 80 N. E. 996, 226 Ill. 433; Chicago City Ry. Co. v. Tuohy, 63 N. E. 997, 196 Ill. 410, 58 L. R. A. 270.
Mich. Piehl v. Piehl, 101 N. W. 628, 138 Mich. 515.
Mo. Craveus v. Hunter, 87 Mo. App. 456.
Neb. Dixon v. State, 46 Neb. 298, 64 N. W. 961.
N. Y. Festa v. New York City Ry. Co. (Sup.) 95 N. Y. S. 595.
Pa. Platz v. McKean Tp., 36 A. 136, 178 Pa. 601.
Tex. Galveston, H. & S. A. Ry. Co. v. Butshek, 78 S. W. 740, 34 Tex. Civ. App. 194.

[74] Newberry v. State, 26 Fla. 334, 8 So. 445.
Charge as to presumptions. In a prosecution for homicide, a charge that, even though defendant may have made statements as to manner of death different from his testimony at the trial, there is no presumption of law that his testimony is untrue, is properly refused. Kent v. State, 43 So. 773, 53 Fla. 51.

[75] State v. Johnagen, 53 Iowa, 250, 5 N. W. 176; Flege v. State, 133 N. W. 431, 90 Neb. 390.

[76] Warder v. Fisher, 48 Wis. 338, 4 N. W. 470.

[77] Bradley v. Gorham, 58 A. 698, 77 Conn. 211, 66 L. R. A. 934.

[78] Paul v. State, 100 Ala. 136, 14 So. 634; Barr v. Hack, 46 Iowa, 308.

[79] Tarbell v. Forbes, 58 N. E. 873, 177 Mass. 238.

[80] Stevens v. Leonard, 56 N. E. 27, 154 Ind. 67, 77 Am. St. Rep. 446; Smith v. State, 142 Ind. 288, 41 N. E. 595.

credible witnesses,[81] but in other jurisdictions such an instruction is held to invade the province of the jury.[82]

Mandatory instructions that the jury disregard the entire testimony of a witness who has made contradictory statements are generally held to be erroneous,[83] and where a party's testimony relates to a subject as to which the burden of proof is on the opposite party, seeming inconsistency therein will not ordinarily warrant the court in instructing the jury to reject those parts of it in his favor, and to base their verdict on those parts which seem to make against him.[84]

§ 25. Station in life of witness

Ordinarily it is the safer practice to refrain from speaking of the particular station in life filled by a witness,[85] and it is error to charge that the testimony of a witness derives additional weight from the fact that he happens to be a clergyman.[86] An instruction, however, that a party testifying as a witness is a reputable lawyer means only that he is a regular lawyer, and is not objectionable as a charge on his character,[87] and in jurisdictions where the court may comment on the evidence it is not error for the court to characterize a witness as a well-known and capable member of the bar.[88]

§ 26. Appearance and demeanor of witness

The court ought not to state to the jury its estimate of the appearance and manner of a witness,[89] but it is not error to tell the jury that they may consider the demeanor of a witness while on the stand and his manner of testifying in judging of his credibility.[90] The rule is otherwise as to the demeanor and conduct of a witness while off the stand,[91] these being no part of the evidence.[92]

[81] White v. New York, Chicago & St. L. R Co., 142 Ind. 648, 42 N. E. 456.

[82] Waycaster v. State, 70 S. E. 883, 136 Ga. 95; Schmidt v. St. Louis R. Co., 50 S. W. 921, 149 Mo. 269, 73 Am. St. Rep. 380.

[83] Blackington v. Sumner, 69 Me. 136; Cleveland v. New Jersey Steamboat Co., 53 Hun. 638, 7 N. Y. S. 28; Danko v Pittsburg Rys. Co., 79 A. 511, 230 Pa. 295; Vance v. Ferguson, 85 S. E. 241, 101 S. C. 125.

Inconsistency between testimony and sworn answer. Where the main facts in the testimony of a witness are contradicted by his sworn answer to a bill in equity in another case, it is not error to charge that he is not to be believed, unless corroborated. Saul v. Buck, 72 Ga. 254.

[84] Smith v. Jackson Tp., 26 Pa. Super. Ct. 234.

[85] Sneed v. Creath, 8 N. C. 309.

[86] Sneed v. Creath, 8 N. C. 309.

[87] Lyon v. Freshour's Estate, 140 N. W. 517, 174 Mich. 114, 45 L. R. A. (N. S.) 67, Ann. Cas. 1915A, 726.

[88] Holmes v. Montauk Steamboat Co., 93 F. 731, 35 C. C. A. 556.

[89] Crutchfield v. Richmond & D. R. Co., 76 N. C. 320.

[90] Turner v. State, 49 So. 828, 160 Ala. 40; Brown v. Stacy, 5 Ark. 403; Kirchner v. Collins, 53 S. W. 1081, 152 Mo. 394; People v. Scanlon, 117 N. Y. S. 57, 132 App. Div. 528.

[91] People v. Zoeller, 160 Ill. App. 437; Purdy v. People, 140 Ill. 46, 29 N. E. 700.

[92] Cridland v. Crow, 70 A. 888, 221 Pa. 618.

§ 27. Instructions directed at particular witness or class of witnesses

See, also, post, §§ 183, 184.

It is error to single out a particular witness by name, and make the jury the judges of his credibility, although they are also told that they are the judges of the credibility of all the witnesses;[93] this rule applying to an instruction as to the effect of the giving of false testimony by certain witnesses.[94]

In some jurisdictions an instruction which is couched in general terms in stating the matters which the jury may consider in passing upon the credibility of a witness, but which, because of the circumstances of the case, points with more or less force to particular witnesses, is erroneous,[95] and the province of the jury is invaded by an instruction giving special directions as to how the evidence of a particular class of witnesses shall be weighed.[96]

[93] Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030.

In Utah, however, it has been held that a judge may, if necessary, single out a particular witness and charge the jury as to his credibility. Lowe v. Herald Co., 6 Utah, 175, 21 P. 991.

[94] Wastl v. Montana Union R. Co., 17 Mont. 213, 42 P. 772.

[95] Tyler Ice Co. v. Tyler Water Co., 95 S. W. 649, 42 Tex. Civ. App. 210; Houston, E. & W. T. Ry. Co. v. Runnels, 47 S. W. 971, 92 Tex. 305, reversing judgment (Civ. App.) 46 S. W. 394.

[96] State v. Schnepel, 59 P. 927, 23 Mont. 523.

CHAPTER III

COMMENT BY COURT OR EXPRESSION OF OPINION ON THE WEIGHT OR SUFFICIENCY OF THE EVIDENCE

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A. RULE IN ABSENCE OF CONSTITUTIONAL OR STATUTORY PROVISIONS

§ 28. Statement of rule

Where there are no constitutional or statutory provisions governing the subject, the court may, both in civil,[1] and in criminal cases,[2] subject

[1] **U. S.** (C. C. A. Ark.) United Mine Workers of America v. Coronado Coal Co., 258 F. 829, 169 C. C. A. 549.

Conn. Stacy v. Brothers, 107 A. 613, 93 Conn. 690; Earley v. Hall, 95 A. 2, 89 Conn. 606; Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 89 A. 909, 87 Conn. 691; McLaughlin v. Thomas, 85 A. 370, 86 Conn. 252; Barnes v. City of Waterbury, 74 A. 902, 82 Conn. 518; Appeal of Turner, 44 A. 310, 72 Conn. 305.

Minn. Dobsloff v. Nichols-Chisholm Lumber Co. 112 N. W. 218, 101 Minn. 267; First Nat. Bank of Decorah v. Holan, 65 N. W. 952, 63 Minn. 525; McArthur v. Craigie, 22 Minn. 351.

Pa. Katzenberg v. Oberndorf, 70 Pa. Super. Ct. 567; Krider v. City of Philadelphia, 36 A. 405, 180 Pa. 78; Porter v. Nelson, 121 Pa. 628, 15 A. 852; Wanger v. Hipple, 13 A. 81; Schoneman v. Fegley, 14 Pa. 376.

Vt. Seviour v. Rutland R. Co., 88 Vt. 107, 91 A. 1039.

In Rhode Island, the trial judge is empowered to make such comments on the evidence as he believes will direct the jury to right conclusions; the jury being the ultimate arbiter of the facts. Desautelle v. Nasonville Woolen Co., 66 Atl. 579, 28 R. I. 261.

Instructions held proper within rule. In an action of assumpsit for board and lodging, where the defendant alleges that he loaned money to the husband of plaintiff to buy the farm on which plaintiff lived with her husband, and that a part of the transaction was that he should receive board and lodging free when in the nighborhood, the court may, in its charge, call the jury's attention to the fact that when the loan was made the husband agreed to pay interest upon it. Springer v. Stiver, 16 Pa. Super. Ct. 184. Where, in an action by an administrator on a bond given for the maintenance of the decedent to recover

[2] See note 2 on following page.

to the qualifications and restrictions stated supra (section 4), comment upon the evidence, or intimate or express its opinion upon the weight thereof, or any part of it, or emphasize such evidence

for support and medical services rendered to decedent after she had left the defendant's house, it appears that the medical services were rendered by a son of the decedent, it is not error for the court to say in its charge that the jury were not to conclude that the medical services were worth what the son testified they were worth simply because he said so, but that they were to fix what would be a reasonable compensation from all the evidence in the case. Mills v. Plant, 18 Pa. Super. Ct. 80. Where, in an action against defendant for rent, as assignee of a lease, he introduced a memorandum book which showed that charges for rent had been made by plaintiff against the assignor, who was in possession of the property, the fact that the court charged the jury that, because this memorandum book is so very small it hardly seems to make the term applicable, it does not follow that it is not a book of original entry, and, of course, it is of some significance that the charges of rent from month to month were entered against the assignor, though not conclusive proof that they were charged against him, is not prejudicial to defendant, as ridiculing his evidence. Benedict v. Everard, 46 A. 870, 73 Conn. 157. In an action for personal injuries, it is proper for the court to call the attention of the jury to the number of witnesses testifying to facts showing that plaintiff stepped off a moving train, and the court should refer to the number of witnesses on each side, their respective interests, opportunities for observation, and other matters affecting the weight of the evidence. Bockelcamp v. Lackawanna & W. V. R. Co., 81 A. 93, 232 Pa. 66. A charge, in an action to recover for services rendered defendant's testate, that verbal statements, repeated a long time after by those who heard them, are likely to be affected by a failure to remember exactly, etc., was not improper where the trial court also stated he expressed no opinion concerning the weight of the evidence. McCurley v. National Savings & Trust Co. 258 F. 154, 49 App. D. C. 10. Where a boy nine years old, testifying with respect to an accident occurring a year before, stated that he had talked the matter over with his mother, that she had told him what happened at the time of the accident, and what he saw, an instruction directing the jury to give such weight to the testimony of the boy as in their judgment it was worth, and that they should recall his youth and liability to repeat what he had heard if he had been talked to, is not erroneous as invading the province of the jury. Banks v. Connecticut Ry. & Lighting Co., 64 A. 14, 79 Conn. 116.

[2] **U. S.** (C. C. A. Ala.) Turner v. United States, 66 F. 286, 13 C. C. A. 442; (C. C. Kan.) Woodruff v. United States, 58 F. 766.

Conn. State v. Cabaudo, 76 A. 42, 83 Conn. 160; State v. Duffy, 57 Conn. 525, 18 A. 791.

D. C. United States v. Schneider, 21 D. C. 381.

Ind. T. Parris v. United States, 35 S. W. 243, 1 Ind. T. 43.

N. J. State v. Fiore, 108 A. 363, 93 N. J. Law, 362, judgment affirmed 110 A. 909; State v. Warady, 72 A. 37, 77 N. J. Law, 348, judgment affirmed 75 A. 977, 78 N J. Law, 687; State v. Valentina, 60 A. 177, 71 N. J. Law, 552; Engle v. State, 50 N. J. Law, 272, 13 A. 604.

N. Y. People v. Druse, 5 N. Y. Cr. R. 10; People v. Carpenter, 6 N. E. 584; Done v. People, 5 Parker, Cr. R. 364; Jefferds v. Same, Id. 522; Conraddy v. Same, Id. 234; Stephens v. People, 4 Parker, Cr. R. 396; People v. Quinn, 1 Parker, Cr. R. 340.

Pa. Commonwealth v. McGowan, 42 A. 365, 189 Pa. 641, 69 Am. St. Rep. 836, 29 Pittsb. Leg. J. (N. S.) 293, 42 Wkly. Notes Cas. 459; Commonwealth v. Miller (Pa.) 3 Lanc. Law Rep. 175.

In Minnesota, while the defendant has the constitutional right to have the facts in issue determined by the jury uninfluenced by opinions from the bench (State v. Yates, 99 Minn. 461,

as the court considers most important;[3] how far the discussion of the evidence shall proceed being committed to the sound discretion of the trial court.[4] Thus instructions warning the jury that photographs introduced in evidence may be misleading,[5] or speaking of certain statements by a party as "loose talk,"[6] or stating that certain evidence adduced by a party to establish a fact was overwhelmingly contradicted by the evidence of the other side,[7] or speaking of the testimony of one party as uncorroborated,[8] or characterizing certain testimony as important or the material testimony in the case,[9] or stating that certain evidence was strong evidence,[10] have been held proper. Where in a criminal case a state of facts tending to incriminate the defendant has been shown, and he undertakes to explain it, his neglect to produce existing satisfactory proof peculiarly within his power is a proper subject of comment by the court, if none is made on his own failure to testify.[11]

109 N. W. 1070), the court may, in a criminal case, comment upon the testimony or state that certain evidence is material, or that it tends to prove certain facts, when such comment is made fairly, and the jury are fully advised that they are the exclusive judges of the facts and of the credibility of the witnesses (State v. Rose, 47 Minn. 47, 49 N. W. 404).

In New York, it is not legal error for a trial judge to indicate his opinion in charges, and it is only where the evidence of bias is marked and where, in the opinion of the appellate court, the balance of proof is only slight in favor of the prosecution, and where, in the interest of justice, accused should be given another chance to prove his innocence, that the conviction should be reversed for such cause. People v. Fisher, 120 N. Y. S. 659, 136 App. Div. 57.

Instructions held proper within rule. Where the court instructed as to the bearing of evidence of defendant's good character, a reference by the court to the fact that those who testified to defendant's character had known him but a short time. State v. Totten, 47 A. 105, 72 Vt. 73. A charge to the jury to the effect that "the evidence seems to point to the guilt of defendant." Johnson v. Commonwealth, 115 Pa. 369, 9 A. 78. An expression of opinion that there is nothing in the case to reduce the crime to manslaughter. McClain v. Commonwealth, 110 Pa. 263, 1 A. 45.

[3] Desautelle v. Nasonville Woolen Co., 66 A. 579, 28 R. I. 261.

[4] Brown v. United States, 142 F. 1, 73 C. C. A. 187; Appeal of Wheeler, 100 A. 13, 91 Conn. 388; State v. Alderman, 78 A. 331, 83 Conn. 597; Shupack v. Gordon, 64 A. 740, 79 Conn. 298.

[5] McLean v. Erie R. Co., 57 A. 1132, 70 N. J. Law, 337, affirming judgment 54 A. 238, 69 N. J. Law, 57.

[6] Harrold v. Harrold, 96 A. 745, 251 Pa. 303.

[7] Church v. Delaware, L. & W. R. Co., 95 A. 341, 250 Pa. 21.

[8] Lillibridge v. Barber, 55 Conn. 366, 11 A. 850.

[9] Winther v. Second & Third Sts. Pass. Ry. Co., 159 Pa. 628, 28 A. 472; Grove v. Donaldson, 15 Pa. 128.

[10] Rosevear v. Borough of Osceola Mills, 169 Pa. 555, 32 A. 548; Fry v. Pennsylvania R. Co., 24 Pa. Super. Ct. 147.

[11] Spear v. United States, 246 F. 250, 158 C. C. A. 410, certiorari denied 38 S. Ct. 335, 246 U. S. 667, 62 L. Ed. 929.

§ 29. Limitations of rule

As has already been stated, the above rule does not permit the court to withdraw the ultimate determination of the weight of the evidence from the jury, and instructions which have this effect, or which may lead them to think that they are deprived of this power, are erroneous.[12]

§ 30. Rule in particular jurisdictions

In Michigan, where the statute provides that the court shall instruct only as to the law, there is some variance in the decisions as to the power of the court to comment on the evidence. Some of the cases

[12] **U. S.** (Sup.) Greenleaf v. Birth, 9 Pet. 292, 9 L. Ed. 132; (C. C. A. N. Y.) Delaware, L. & W. Ry. Co. v. Tuovinen, 240 F. 678, 153 C. C. A. 476; (C. C. A. Wis.) Nyback v. Champagne Lumber Co., 109 F. 732, 48 C. C. A. 632.

Conn. Warner v. McLay, 103 A. 113, 92 Conn. 427.

Minn. Rugland v. Tollefsen, 53 Minn. 267, 55 N. W. 123; State v. Kobe, 1 N. W. 1051, 26 Minn. 150.

N. J. New Jersey Traction Co. v. Gardner, 38 A. 669, 60 N. J. Law, 571.

N. Y. Johnston v. New York City Ry. Co., 104 N. Y. S. 1039, 120 App. Div. 456; Corrigan v. Funk, 96 N. Y. S. 910, 109 App. Div. 846; Fox v. Manhattan Ry. Co., 73 N. Y. S. 896, 67 App. Div. 460; People v. Brow, 90 Hun, 509, 35 N. Y. S. 1009; Markham v. Jaudon, 49 Barb. 462, 3 Abb. Prac. (N. S.) 286.

Pa. Drexler v. Borough of Braddock, 86 A. 272, 238 Pa. 376; Dietrich v. City of Lancaster, 61 A. 1112, 212 Pa. 566; Heydrick v. Hutchinson, 165 Pa. 208, 30 A. 819, 35 Wkly. Notes Cas. 503; Sellers v. Jones, 22 Pa. 423; Cadbury v. Nolen, 5 Pa. 320; Zerger v. Sailer, 6 Bin. 24; Brown v. Campbell, 1 Serg. & R. 176.

R. I. Mowry v. Saunders, 80 A. 421, 33 R. I. 45, Ann. Cas. 1913A, 1344.

Instructions held improper within rule. An instruction that, "if the law is as laid down by the court, plaintiff has failed in making out his case, and is not entitled to recover." Spangler v. Hummer, 3 Pen. & W. (Pa.) 370. A charge where the evidence on an issue of fact would have warranted a finding either way, that it seems to the judge the plaintiff had made out the better case, and how he would regard it if he were on the jury. Samuel v. Knight, 9 Pa. Super. Ct. 352, 43 Wkly. Notes Cas. 392. A charge in an action by a passenger against a street railway company, treating the testimony in the case as positive proof that the driver had been dismissed by defendant because his negligence had produced the injuries to plaintiff, where there is no distinct proof to that effect, and it might have been inferred that the discharge was simply due to the fact that the accident to plaintiff occurred while he was driving. Lombard & S. S. Pass. Ry. Co. v. Christian, 124 Pa. 114, 16 A. 628, 23 Wkly. Notes Cas. 273. An instruction, in an action against an executrix on a note given by testator, where defendant proved her appointment as executrix, publication of notice to creditors to prove their claims and knowledge by plaintiff that she was executrix, to show that no demand was made by plaintiff for payment, that there was no evidence to negative a demand. Walls v. Walls, 170 Pa. 48, 32 A. 649. An instruction, in an action against a railroad company to recover damages for personal injuries sustained through the negligence of the driver of a hansom cab, where it is admitted by the defendant that the name of the railroad company was printed on the cab, and this fact is the only evidence in the case as to the ownership of the cab, which charges that the evidence is sufficient to sustain a finding that the driver was the servant of the defendant, without permitting the jury to draw the inference, from the name on the cab, that the defendant was its owner. Hershinger v. Pennsylvania R. Co., 25 Pa. Super. Ct. 147.

hold that, if the jury are explicitly and positively informed that they have the exclusive right to determine the facts, it will not be improper for the court to make such remarks upon the facts as are not calculated to mislead the jury as to their rights and responsibilities,[13] or to intimate its opinion as to the weight of certain evidence,[14] or to caution the jury, if needful, against giving undue importance to unimportant things,[15] and that under some circumstances it may be the duty of the court to charge upon the weight of the evidence.[16]

The discussion of the evidence, however, must not be of such a character as to create prejudice against one party or the other,[17] and some of the decisions hold that the instructions must not indicate the trial judge's opinion as to the facts, either by emphasizing particular testimony, or calling attention to the lack of it, or giving an opinion as to its interpretation,[18] or by unfavorable comment on the testimony presented by a party.[19] In this jurisdiction, as elsewhere, instructions on conflicting evidence, which are so framed as to withdraw from the jury the final decision as to the facts or to embarrass it in the making of such decision are erroneous, and properly refused,[20] and the trial judge should exercise great care to avoid impressing his own view of the evidence upon the jury,[21] and an expression of opinion by the judge as to the weight of certain evidence, which is of such a charac-

[13] Hamilton v. People, 29 Mich. 173.

[14] People v. Carey, 84 N. W. 1087, 125 Mich. 535.

[15] Welch v. Ware, 32 Mich. 77.

[16] Card v. Fowler, 79 N. W. 925, 120 Mich. 646.

[17] Renaud v. City of Bay City, 82 N. W. 617, 124 Mich. 29.

[18] McCain v. Smith, 137 N. W. 616, 172 Mich. 1; Preston Nat. Bank v. Michigan Mut. Fire Ins. Co., 73 N. W. 815, 115 Mich. 511.

[19] Pokriefka v. Mackurat, 91 Mich. 399, 51 N. W. 1059.

[20] **Mich.** Connor v. McRae, 160 N. W. 479, 193 Mich. 682; McCain v. Smith, 137 N. W. 616, 172 Mich. 1; Smith v. Hertz & Hosbach Co., 125 N. W. 368, 160 Mich. 431; Dawson v. Falls City Boat Club, 84 N. W. 618, 125 Mich. 433; Lincoln v. City of Detroit, 101 Mich. 245, 59 N. W. 617; Blumeno v. Grand Rapids & I. R. Co., 101 Mich. 325, 59 N. W. 594; Letts v. Letts, 91 Mich. 596, 52 N. W. 54; Webster v. Fowler, 89 Mich. 303, 50 N. W. 1074.

Instruction held improper without rule. Where there is evidence fairly tending to establish the plaintiff's case, it is reversible error for the court to state, in the presence of the jury, that the testimony is so indefinite and unsatisfactory that it will not justify a verdict, although he finally permits the case to go to the jury. Burrows v. Delta Transp. Co., 64 N. W. 501, 106 Mich. 582, 29 L. R. A. 468.

[21] Valin v. McKerreghan, 104 Mich. 213, 62 N. W. 340; Sterling v. Callahan, 94 Mich. 536, 54 N. W. 495.

Characterizing testimony as "strong evidence." It is error for the trial judge to point out particular testimony, and tell the jury that, if they believe it, it is "pretty strong evidence," and "very strong evidence," and "evidence * * * that I should not fail to act upon if I was on the jury," where he does not caution the jury not to be influenced by his individual opinion, and tell them that they are exclusive judges of the weight of the testimony. People v. Gastro, 75 Mich. 127, 42 N. W. 937.

ter as to be likely to prevent the jury from acting contrary thereto, is not cured by telling them that they are the exclusive judges of the facts.[22]

In New Hampshire, it is not the ordinary practice for the court to express opinions in regard to the weight of evidence but it is not irregular for it to make such suggestions in relation to the facts as it may suppose will be useful to the jury; the matter being left to them for decision.[23]

B. Rule under Constitutional or Statutory Provisions

§ 31. General considerations

In those jurisdictions which, as above stated, have constitutional or statutory provisions forbidding the court, in varying phraseology, to charge on the facts, instructions on conflicting evidence, which charge on the weight thereof, or intimate the opinion of the court as to its weight or sufficiency, are erroneous both in civil [24] and in criminal

[22] People v. Lyons, 49 Mich. 78, 13 N. W. 365.

[23] Cook v. Brown, 34 N. H. 460; Patterson v. Colebrook, 29 N. H. 94; Flanders v. Colby, 28 N. H. 34.

[24] **Ala.** O'Brien v. Birmingham Ry., Light & Power Co., 72 So. 343, 197 Ala. 97; Louisville & N. R. Co. v. Godwin, 67 So. 675, 191 Ala. 498; Louisville & N. R. Co. v. Sherrell, 44 So. 631, 152 Ala. 213; Tait v. Murphy, 80 Ala. 440, 2 So. 317; Newton v. Jackson, 23 Ala. 335; Mundine v. Gold, 5 Port. 215.

Ariz. Southern Pac. Co. v. Hogan, 108 P. 240, 13 Ariz. 34, 29 L. R. A. (N. S.) 813.

Ark. Twist v. Mullinix, 190 S. W. 851, 126 Ark. 427; Karnopp v. Ft. Smith Light & Traction Co., 178 S. W. 302, 119 Ark. 295; Valentine v. Edwards, 166 S. W. 531, 112 Ark. 354; Kansas City Southern Ry. Co. v. Drew, 147 S. W. 50, 103 Ark. 374; Cameron v. Vandegriff, 53 Ark. 381, 13 S. W. 1092.

Cal. Fisher v. Los Angeles Pacific Co., 132 P. 767, 21 Cal. App. 677; McNeil v. Barney, 51 Cal. 603; Battersby v. Abbott, 9 Cal. 565; Treadwell v. Wells, 4 Cal. 260.

Colo. Denver Omnibus & Cab Co. v. Gast, 129 P. 233, 54 Colo. 17.

D. C. Woods v. Trinity Parish, 21 D. C. 540.

Fla. Florida East Coast Ry. Co. v. Carter, 65 So. 254, 67 Fla. 335, Ann. Cas. 1913E, 1299; Farnsworth v. Tampa Electric Co., 57 So. 233, 62 Fla. 166; Supreme Lodge, K. P., v. Lipscomb, 39 So. 637, 50 Fla. 406; Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297.

Ga. De Ment v. Rogers, 101 S. E. 197, 24 Ga. App. 438; Robinson & Eason v. Register, 94 S. E. 864, 21 Ga. App. 614; Garbutt Lumber Co. v. Prescott, 62 S. E. 228, 131 Ga. 326; Owen v. Palmour, 36 S. E. 969, 111 Ga. 885; Augusta Southern R. Co. v. McDade, 31 S. E. 420, 105 Ga. 134; King v. King, 37 Ga. 205; Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436.

Idaho. State v. Shuff, 72 P. 664, 9 Idaho, 115.

Ill. Mayville v. French, 92 N. E. 919, 246 Ill. 434; Andrewzewski v. Gallatin Coal & Coke Co., 143 Ill. App. 418; Supreme Court of Honor v. Barker, 96 Ill. App. 490; Merchants' Loan & Trust Co. v. Lamson, 90 Ill. App. 18; Rice & Bullen Malting Co. v. International Bank, 86 Ill. App. 136, judgment affirmed 56 N. E. 1062, 185 Ill. 422; Eastman v. West Chicago St. R. Co., 79 Ill. App. 585; New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Walsh v. Aylsworth, 46 Ill. App. 516; Frasure

cases,[25] and it is, of course, proper to refuse such an instruction.[26]

v. Zimmerly, 25 Ill. 202; Eames v. Blackhart, 12 Ill. 195.

Ind. Ft. Wayne & N. I. Traction Co. v. Smith, 107 N. E. 31, 57 Ind. App. 304; Deal v. State, 39 N. E. 930, 140 Ind. 354; Guetig v. State, 63 Ind. 278; Chamness v. Chamness, 53 Ind. 301; Cain v. Hunt, 41 Ind. 466; Reynolds v. Cox, 11 Ind. 262; Hackleman v. Moat, 4 Blackf. 164.

Iowa. Carroll v. Chicago, St. P., M. & O. Ry. Co., 84 N. W. 1035; Russ v. The War Eagle, 9 Iowa, 374; Woods v. Mains, 1 G. Greene, 275.

Kan. Tuttle v. Missouri Pac. Ry. Co., 119 P. 370, 86 Kan. 28.

Ky. Richmond & L. Turnpike Road Co. v. Foley, 5 Ky. Law Rep. (abstract) 425; Smith's Adm'x v. Northern Bank, 1 Metc. 575; Swigert v. Graham, 7 B. Mon. 661; Salter v. Myers, 5 B. Mon. 280.

La. Hewes v. Barron, 7 Mart. (N. S.) 134.

Me. Whitehouse v. Bolster, 50 A. 240, 95 Me. 458; Sawyer v. Nichols, 40 Me. 212.

Md. Western Maryland R. Co. v. Shivers, 61 A. 618, 101 Md. 391; Maltby v. Northwestern Virginia R. Co., 16 Md. 422; Burtles v. State, 4 Md. 273; Tiffany v. Savage, 2 Gill, 129.

Mass. Davis v. Jenney, 1 Metc. 221.

Miss. Daniel v. Daniel, 4 So. 95; French v. Sale, 63 Miss. 386; Thrasher v. Gillespie, 52 Miss. 840.

Mo. Morrill v. Kansas City (App.) 179 S. W. 759; Winter v. Supreme Lodge K. P. of the World, 69 S. W. 662, 96 Mo. App. 1; Jones v. Roberts, 37 Mo. App. 163; Nall v. St. Louis, K. C. & N. Ry. Co., 59 Mo. 112; Kinman v. Cannefax, 34 Mo. 147; Farrar v. David, 33 Mo. 482; Glasgow v. Copeland, 8 Mo. 268.

Mont. O'Brien v. Corra-Rock Island Mining Co., 105 P. 724, 40 Mont. 212.

Neb. Kleutsch v. Security Mut. Life Ins. Co., 100 N. W. 139, 72 Neb. 75.

N. M. C. W. Kettering Mercantile Co. v. Sheppard, 142 P. 1128, 19 N. M. 330; Chaves v. Chaves, 3 N. M. (Johns.) 199, 5 P. 331; Vasquez v. Spiegelberg, 1 N. M. 464.

N. C. May v. Morganton Mfg. & Trading Co., 80 S. E. 380, 164 N. C. 262; Universal Metal Co. v. Durham & C. R. Co., 59 S. E. 50, 145 N. C. 293; Dobson & Whitley v. Southern Ry. Co., 44 S. E. 593, 132 N. C. 900; Reed v. Schenck, 13 N. C. 415.

Okl. Littlefield Loan & Investment Co. v. Walkley & Chambers (Sup.) 166 P. 90; Clarke v. Uihlein, 152 P. 589, 52 Okl. 48; Leavitt v. Deichmann, 120 P. 983, 30 Okl. 423.

Or. Meyer v. Thompson, 16 Or. 194, 18 P. 16; State v. Huffman, 16 Or. 15, 16 P. 640.

S. D. Fellows v. Christensen, 133 N. W. 814, 28 S. D. 353.

Tenn. Jones v. Cherokee Iron Co., 14 Lea, 157; Ayres v. Moulton, 5 Cold. 154; Case v. Williams, 2 Cold. 239; Kirtland v. Montgomery, 1 Swan, 452; Ivey v. Hodges, 4 Humph. 154.

Tex. Thornburg v. Moon (Civ. App.) 180 S. W. 959; First State Bank of Amarillo v. Cooper (Civ. App.) 179 S. W. 295; G. A. Kelly Plow Co. v. London, 125 S. W. 974, 59 Tex. Civ. App. 208; Buckley v. Runge, 122 S. W. 596, 57 Tex. Civ. App. 322; Thomson v. Kelley (Civ. App.) 97 S. W. 326; Texas & P. Ry. Co. v. Bailey, 96 S. W. 1089, 43 Tex. Civ. App. 553; Gulf, C. & S. F. Ry. Co. v. Bunn, 95 S. W. 640, 41 Tex. Civ. App. 503; Fulcher v. White (Civ. App.) 59 S. W. 628; Missouri, K. & T. Ry. Co. v. Brown (Civ. App.) 39 S. W. 326; Texas & P. Ry. Co. v. Murphy, 46 Tex. 356, 26 Am. Rep. 272.

Va. Mopsikov v. Cook, 95 S. E. 426, 122 Va. 579; Whitelaw's Ex'r v. Whitelaw, 1 S. E. 407, 83 Va. 40; Kincheloe v. Tracewells, 11 Grat. 587; McKinley v. Ensell, 2 Grat. 333; McRae v. Scott, 4 Rand. 463; Ross v. Gill, 1 Wash. 87.

W. Va. Cincinnati Gas Transp. Co. v. Kress, 73 S. E. 309, 70 W. Va. 201; Same v. Wilson, 73 S. E. 306, 70

[25], [26] See notes 25 and 26 on pages 54 to 58.

The prohibition contained in such provisions is intended to prevent

W. Va. 157; Harman & Crockett v. Maddy Bros., 49 S. E. 1009, 57 W. Va. 66; Winkler v. Chesapeake & O. R. Co., 12 W. Va. 699.

Wis. Davis v. Dregne, 97 N. W. 512, 120 Wis. 63; Lampe v. Kennedy, 60 Wis. 110, 18 N. W. 730.

Illustrations of instructions erroneous within rule. A charge that most of the evidence only indirectly bears upon the issues of the case. Ellis v. City of Hazelhurst, 75 S. E. 99, 138 Ga. 181. An instruction that if the jury believe, from the evidence of a particular witness, that all his knowledge of a fact testified about by him is derived from the books of the party calling him, and if they find that the testimony of such witness is all the evidence on that subject, then there is no evidence before them as to that fact. Wolcott v. Heath, 78 Ill. 433. An instruction in which the court undertakes to tell the jury the effect or weight of portions of the evidence, how to compare them one with another, and what portions are supported by other portions. Wood v. Deutchman, 75 Ind. 148. An instruction, in an action for assault and battery, that, if the jury found the issues in favor of plaintiff, plaintiff was not entitled to exemplary or punitive damages. Barlow v. Hamilton, 44 So. 657, 151 Ala. 634. An instruction, in an action for compensation by an attorney, that if the jury find from the evidence that by the terms of the contract of employment plaintiff was to give his entire time and attention to the service of defendant, the evidence is insufficient to warrant the jury in finding that such provision of the contract was waived by defendant. Greene v. Hereford, 95 P. 105, 12 Ariz. 85. A charge that the jury should not consider the fact that defendant's deed made calls for an alley, the existence of which was in controversy. Perrow v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 178 S. W. 973, rehearing denied 181 S. W. 496. An instruction, in an action for loss from defendant's failure to furnish cars as agreed for transporting cattle to market, in which plaintiff testified that defendant's agent made an absolute promise to furnish the cars, but the latter testified that his promise was conditioned upon his ability to do so, that if defendant's agent did not agree to furnish cars, or if he had no authority to do so defendant was not liable for the delay, and that the agent's statement that he would try to furnish the cars was not an agreement to do so. (Tex. Civ. App.) St. Louis, I. M. & S. Ry. Co. v. Boshear, 108 S. W. 1032, judgment affirmed 113 S. W. 6, 102 Tex. 76. An instruction that if "defendant, or he and his wife, contracted for the land in controversy for the purpose of making it a homestead, and caused it to be improved, intending to live thereon and own no other home, it became their homestead, whether paid for or not, or whether they occupied it or not; and, if the homestead character once attached, it remained their homestead until abandoned with the intention of not returning to it." Rockwell Bros. & Co. v. Hudgens, 123 S. W. 185, 57 Tex. Civ. App. 504. A charge in an action on a liquor dealer's bond, that to be vulgar or obscene within the meaning of the statute the pictures must be "something more than nature in its simplicity as God created it." Raley v. State, 105 S. W. 342, 47 Tex. Civ. App. 426. An instruction, in an action against an electric light company for death by electric shock received from a broken wire, that if decedent in getting out of a vehicle after he was told not to do so by the driver was negligent, and his act in so doing and going on the wire caused his injuries, and it was not his duty to get out of the vehicle, and, if he had remained there, he would not have been injured, and, if his getting out of the vehicle contributed proximately to his death, there could be no recovery, though the company was guilty of negligence, was properly refused as on the weight of the evidence for failure to present to the jury the question of negligence in going to where the wire was and coming in contact with it. Jacksonville Ice & Electric Co. v. Moses, 134 S. W. 379, 63 Tex. Civ. App. 496. An issue being whether logs received by

the court from expressing its own opinion upon the force and effect

plaintiff were received upon a certain contract, and there being evidence that they were not so received, but were taken under a subsequent agreement, it was an expression of opinion on the evidence to charge, "I conclude that there cannot be much doubt that what logs were delivered and accepted by plaintiffs were received upon this contract," and, "If plaintiffs received the logs, it strikes me that they must be held, in the absence of any evidence to the contrary, as having received them under the contract." Ketchum v. Ebert, 33 Wis. 611. On the issue of the fact of a common-law marriage, a charge that such marriage may be proved by testimony of witnesses to the agreement of the man and woman at the time "if such testimony satisfies the jury of the fact of marriage," or by the admissions and conduct of the parties, "provided the jury are thereby satisfied of the fact of marriage," is subject to the objection of indicating a disbelief by the court of the testimony offered to prove the fact of marriage. In re Imboden's Estate, 86 S. W. 263, 111 Mo. App. 220. An instruction, in an action for injury to a miner, that the servant assumed the risks of which he had actual knowledge and of such hazards as he would have learned by ordinary inspection, and cannot shut his eyes to dangers obvious to an ordinary man, or to an experienced man, if he is experienced, was properly refused because the rule as to assuming risks is the same whether the servant is an ordinary or an experienced man, and the stress laid in the requested charge on the difference between such men made it a charge on the weight of evidence. Consumers' Lignite Co. v. Cameron (Tex. Civ. App.) 134 S. W. 283. An instruction in an action for injuries to the conductor on a train, where there was evidence that the failure of a brake valve to lap would not have caused the train to run away as it did, but would have stopped the train because the engineer would have gotten a greater pressure than he sought to apply, that this defense is entirely paradoxical and is not a valid defense to the action. Louisville & N. R. Co. v. Bohan, 94 S. W. 84, 116 Tenn. 271. An instruction, in suit for injuries to a servant, received by caving in of unbraced walls of a trench, that any duty of defendant to brace its side was partially discharged if it furnished materials for braces, competent men to put them in, and a competent man to see it was done. If these persons were negligent in not bracing it, and it caved, the act being one which it was the employer's duty to perform, defendant company was responsible. Ryan v. Oakland Gas, Light & Heat Co., 102 P. 558, 10 Cal. App. 484. An instruction, where the evidence on the question whether a purchaser of school land had abandoned the same was conflicting, that mere temporary absence, for business or pleasure, from lands settled upon would not constitute an abandonment. Lewis v. Scharbauer, 76 S. W. 225, 33 Tex. Civ. App. 220. An instruction that, in determining whether the whistle on defendant's locomotive was sounded or the bell rung at the crossing at which plaintiff was injured, the jury should consider the testimony of witnesses who testified that they did not hear the whistle or bell as well as the testimony of witnesses who testified that they did hear the same, that they were the exclusive judges of the weight which they would give to the testimony, and in doing so might consider that a person might hear the sound of a whistle or bell and not be conscious of hearing it. Vandalia R. Co. v. Baker, 97 N. E. 16, 50 Ind. App. 184. An instruction in an action against a fertilizer factory, in which plaintiff claimed that the factory, which was situated in the suburbs within a few hundred yards of plaintiff's home, was maintained so as to amount to a continuous nuisance, that a properly conducted factory adjacent to residential quarters may cause great depreciation in value, but that in such cases the annoyance, the inconvenience occasioning the loss in value, was not actionable because arising from an unlawful use, and that the factory owner was as much entitled to the use of his property as

of the testimony, or of any part of it, or intimating its views as to the

the owner of the residence property. Jones v. F. S. Royster Guano Co., 65 S. E. 361, 6 Ga. App. 506. An instruction, in an action against a railway company for injuries to property in consequence of the use of a line of road and depot and stock pens in the vicinity of the property, that if the property had been injured by the acts of the company, the measure of damages was the actual loss, determined by ascertaining the market value of the property immediately before and immediately after the injury, and that the jury should consider all the evidence relating to the use of the property when the company built and operated its line, depot and stock pens and all the surroundings, was objectionable as leading the jury to infer that, in the opinion of the court, the property was injuriously affected by the construction of the line, depot and pens. Dallas, C. & S. W. Ry. Co. v. Langston (Tex. Civ. App.) 98 S. W. 425. A charge, in an action for fire spreading from a railroad right of way, that even if the fire was communicated to the right of way, the plaintiff cannot recover, since the engine was in good repair and equipped with an improved spark arrester, and was managed in a careful manner by a competent engineer, and the evidence as to this is uncontroverted and uncontradicted. Williams v. Atlantic Coast Line R. Co., 53 S. E. 448, 140 N. C. 623. Where, in an action for injuries to a traveler coming in contact with a railroad trestle over the highway, the evidence showed that sand had been washed down to the road, so that the space between the road and the timbers of the trestle was about six feet, and that plaintiff was injured while attempting to ride under it on horseback in the daytime, a charge that plaintiff could assume that the railroad company had performed its duty of maintaining the crossing in repair for the ordinary safety of the traveling public was erroneous as on the weight of the evidence. Marshall & E. T. Ry. Co. v. Petty (Tex. Civ. App.) 134 S. W. 406. Where in trespass to try title to certain school land, the state's evidence conflicted with that of defendant as to the time of defendant's settlement, and tended to show that defendant had not settled at the time he made his application, and also negatived the bona fides of his settlement and occupancy of the land, the abandonment of his former home and the good faith of his settlement on the land in controversy, being sharply contested, instructions that a valid settlement, on school land might be made in a tent, and the fact that defendant was the owner of a large body of other land and commodious improvements thereon would not prevent his buying the land in question, if in purchasing it, he complied with the law as to settlement, residence, and improvements, was improper as on the weight of the evidence. State v. Haley (Tex. Civ. App.) 142 S. W. 1003. An instruction, in an action against a railway company for killing cattle at a crossing, that there was some testimony showing that the plaintiff did not stop the cattle before going on the crossing until he could ascertain whether a train was approaching. Kinyon v. Chicago & N. W. Ry. Co., 92 N. W. 40, 118 Iowa, 349, 96 Am. St. Rep. 382. An instruction, in an action against a railroad for injuries to property in consequence of the use of a line of road, depot and stock pens in the vicinity of the property, that if the company without the consent of plaintiff, used the road, depot and stock pens near plaintiff's property, and the company reduced the market value of the property, as alleged in the petition and shown by the evidence, the company was responsible therefor. Dallas, C. & S. W. Ry. Co. v. Langston (Tex. Civ. App.) 98 S. W. 425. An instruction, in an action for trespass to land by cutting timber thereon, that, if plaintiff could not read, the jury should more carefully scrutinize the transaction in which a deed to the timber to defendant was signed by her and her husband, and if false representations were made to her as to the nature of the deed, and such representations were made with knowledge of their falsity, and plain-

sufficiency or insufficiency of the evidence, in whole or in part,[27] or, in other words, to give the jury the exclusive power to pass on the

tiff believed them to be true, the jury should find the deed was obtained by fraud. Davis v. Miller Brent Lumber Co., 44 So. 639, 151 Ala. 580. An instruction, in an action for conversion, that if the property was delivered to defendant by plaintiff, and, after a first purchase note had become due, and all the purchase notes had been declared due, plaintiff refused to pay the notes, and told defendant to do what it pleased with the property, to find for defendant. Crouch Hardware Co. v. Walker, 113 S. W. 163, 51 Tex. Civ. App. 571. An instruction, in an action against a railroad for damages to plaintiff's land caused by an overflow of water resulting from an embankment, in which there was evidence tending to show that part of the embankment was on defendant's right of way, that defendant was not liable if the jury believed that the embankment was not on the right of way, for the reason that, if the jury so believed, there was no evidence tending to show that defendant either built or caused the same to be built. Doke v. Trinity & B. V. Ry. Co., 126 S. W. 1195, 60 Tex. Civ. App. 106. While exhibition of high temper, eccentricities, and unreasonable prejudices would not, in the absence of other evidence, establish a want of testamentary capacity, yet in a will contest case an instruction that such exhibitions were not alone proof of incompetency or testamentary incapacity was properly refused, being on the weight of the evidence. Campbell v. Campbell (Tex. Civ. App.) 215 S. W. 134.

Instruction that certain evidence is competent to establish certain facts. An instruction that evidence of the declaration of a testator before and after the execution of a will is not admissible to prove the actual fact of undue influence being exercised upon the testator in making the will, but competent to establish the effect of external acts of undue influence, if any are shown, upon the mind of the testator, is improper as a charge upon the weight of the evidence, for the word "competent" means answering to all requirements, adequate, sufficient; and the word "establish" means "to fix or settle unalterably." Hart v. Hart (Tex. Civ. App.) 110 S. W. 91.

Instruction that verdict must be either not guilty or for substantial damages. In an action for personal injuries, an instruction that the jury should not compromise between the question of liability and amount of damages, and, if, after due consideration of the evidence and instructions based on a view as to the preponderance of the evidence, some should believe the defendant not guilty, and others believe the defendant guilty and plaintiff entitled to substantial damages, they should not merely, as a matter of compromise, bring in a verdict for some unsubstantial amount against the plaintiff is erroneous. Guaranty Const. Co. v. Broeker, 93 Ill. App. 272.

[26] **Ala.** Ogles v. State, 72 So. 598, 15 Ala. App. 111; Hall v. State, 32 So. 750, 134 Ala. 90.

Ark. Thomas v. State, 107 S. W. 390, 85 Ark. 138.

Cal. People v. Dufur, 168 P. 590, 34 Cal. App. 644; People v. Goodrum, 160 P. 690, 31 Cal. App. 430; People v. Verenesenecckockockhoff, 62 P. 111, 129 Cal. 497; People v. Melendrez, 62 P. 109, 129 Cal. 549; People v. Ellenwood, 51 P. 553, 119 Cal. 166.

Colo. Dickens v. People, 186 P. 277, 67 Colo. 409; Ausmus v. People, 107 P. 204, 47 Colo. 167, 19 Ann. Cas. 491.

Fla. Mathis v. State, 84 So. 287, 45 Fla. 46.

Ga. Thomas v. State, 88 S. E. 720, 18 Ga. App. 19; Jeffers v. State, 85 S. E. 1005, 143 Ga. 849; Strickland v. State, 77 S. E. 1070, 12 Ga. App. 640; Scott v. State, 60 S. E. 803, 4 Ga. App. 73; Waters v. State, 60 S. E. 335, 3 Ga. App. 649; Dorsey v. State, 58 S. E. 477, 2 Ga. App. 228;

[27] Enlee v. Seaboard Air Line Ry., 96 S. E. 490, 110 S. C. 137; Norris v. Clinkscales, 47 S. C. 488, 25 S. E. 797.

facts without any interference whatever on the part of the judge,[28] and it has been held error for the court to advise the jury how they

Shuler v. State, 55 S. E. 496, 126 Ga. 630; Brown v. State, 54 S. E. 162, 125 Ga. 281; Dorsey v. State, 35 S. E. 651, 110 Ga. 331.

Ill. Hammond v. People, 64 N. E. 980, 199 Ill. 173; Adams v. People, 54 N. E. 296, 179 Ill. 633; Healey v. People, 52 N. E. 426, 177 Ill. 306.

Iowa. State v. Carter, 83 N. W. 715, 112 Iowa, 15.

La. State v. Johnson, 72 So. 370, 139 La. 829; State v. Johnson, 48 La. Ann. 87, 19 So. 213.

Mich. People v. Durham, 136 N. W. 431, 170 Mich. 598.

Miss. Ashford v. State, 33 So. 174, 81 Miss. 414; Fore v. State, 23 So. 710, 75 Miss. 727.

Mo. State v. Shelton, 122 S. W. 732, 223 Mo. 118; State v. Smith, 53 Mo. 267.

Neb. Clarence v. State, 125 N. W. 540, 86 Neb. 210.

N. C. State v. McDowell, 39 S. E. 840, 129 N. C. 523.

N. D. State v. Peltier, 129 N. W. 451, 21 N. D. 188; State v. Barry, 92 N. W. 809, 11 N. D. 428.

Okl. Collegenia v. State, 132 P. 375, 9 Okl. Cr. 425; Havill v. State, 121 P. 794, 7 Okl. Cr. 22.

Or. State v. McAllister, 136 P. 354, 67 Or. 480.

S. C. State v. Nelson, 96 S. E. 127, 109 S. C. 274; State v. Riley, 82 S. E. 621, 98 S. C. 386; State v. Davis, 31 S. E. 62, 53 S. C. 150, 69 Am. St. Rep. 845.

Tex. King v. State, 216 S. W. 1091, 86 Tex. Cr. R. 407; Hunt v. State, 214 S. W. 983, 85 Tex. Cr. R. 622; Earnest v. State, 202 S. W. 739, 83 Tex. Cr. R. 257; Hinton v. State, 144 S. W. 617, 65 Tex. Cr. R. 408; Bradley v. State, 132 S. W. 484, 60 Tex. Cr. R. 398; Coker v. State, 128 S. W. 137, 59 Tex. Cr. R. 241; Best v. State, 125 S. W. 909, 58 Tex. Cr. R. 327; Marsden v. State, 110 S. W. 897, 53 Tex. Cr. R. 458; Ross v. State, 109 S. W. 152, 53 Tex. Cr. R. 295; King v. State, 101 S. W. 237, 51 Tex. Cr. R. 208, 123 Am. St. Rep. 881; Nelson v. State, 67 S. W. 320, 43 Tex. Cr. R. 553; Renner v. State, 65 S. W. 1102, 43 Tex. Cr. R. 347; Still v. State (Cr. App.) 50 S. W. 355.

Utah. State v. Greene, 94 P. 987, 33 Utah, 497.

Va. Dejarnette v. Commonwealth, 75 Va. 867.

W. Va. State v. Allen, 30 S. E. 209, 45 W. Va. 65; State v. Chesapeake & O. Ry. Co., 24 W. Va. 809.

Wis. Benedict v. State, 14 Wis. 423.

Illustrations of instructions erroneous within rule. Where the court told the jury that the evidence of an accomplice must be received and acted upon with caution, and that two or more accomplices could not corroborate each other, a further instruction that the source of such evidence was tainted, and the danger of collusion and temptation to exculpate themselves was so strong as to require a warning against the danger of convicting upon their uncorroborated testimony, was properly refused, as the jury might have understood that the court thought the testimony tainted and uncorroborated. Hunt v. Commonwealth, 101 S. E. 896, 126 Va. 815. An instruction that if the jury find that any statements of the defendant have been proven by the state, and not denied by the defendant, they are taken as admitted to be true, is erroneous, as equivalent to charging that defendant must specifically deny every statement attributed to him. State v. Hollingsworth, 56 S. W. 1087, 156 Mo. 178. A charge on a trial for burglary "that the evidence as to stolen property—as to recovering possession of any property —was offered by the state to show that the defendant had possession of stolen property, and is only to fix the crime upon him." Seales v. State, 25 S. E. 388, 97 Ga. 692. An instruction, in a prosecution for homicide, that if the defendant received a blow on his head which affected his mind to some extent, and that, when under excitement or anger, such affection

[28] State v. Mitchell, 35 S. E. 210, 56 S. C. 524.

may weigh the testimony,[29] or to instruct that they should be guided by the rules which chancellors have laid down for their own guidance

caused him to lose mental control of himself, together with mental control of his power to distinguish between right and wrong, and that, at the time of the killing, defendant was laboring under great mental excitement, and entertained no malice towards deceased, but merely wished to protect himself, and that the affection of his mind produced a mental delusion magnifying the extent of his danger, and that, while laboring under such delusion, and without malice, he shot and killed deceased, or, if the jury had a doubt as to the truth of such facts, they should acquit defendant. Tidwell v. State, 36 So. 393, 84 Miss. 475. A charge, in a prosecution for the murder of a man and his wife, that it had been shown that certain witnesses, also indicted, had been acquitted for the murder of the husband, but were still under indictment for the murder of the wife, and that those facts could not be considered by the jury as proof of the guilt or innocence of the witnesses or of defendants, but only on the issue as to the credibility of said witnesses and the weight to be given to their evidence. Crowson v. State, 100 S. W. 782, 51 Tex. Cr. R. 12. An instruction in a prosecution for murder, discussing the importance of the proof of motive, and stating that it may be in many cases impossible to show a motive, for the reason that we cannot fathom the mind of the accused, and, though the prosecution might not be able to prove it, defendant may have had such desire of vengeance or passion to be gratified. People v. Vereneseneckockockhoff, 58 P. 156, 129 Cal. 497; Id., 62 P. 111, 129 Cal. 497. An instruction, in a prosecution for wife murder, that the defense of insanity was subject to great abuse and was often resorted to as the only means of escape from conviction, and that the evidence to sustain it should be carefully scrutinized, and that an ingenious counterfeit of insanity should not be permitted to deceive the jury. State v. Shaw, 135 P. 20, 75 Wash. 326. A charge that if the parties willingly rushed at each other to fight, and "in pursuance of such agreement" defendant fired the shot, then the law of self-defense does not apply. Gardner v. State, 125 S. W. 13, 57 Tex. Cr. R. 471. Where, on a trial for keeping intoxicating liquors for unlawful sale, there was evidence that accused had concealed on his person intoxicating liquor, and that intoxicating liquor had been found in his house partially concealed, a charge that the jury must determine from the circumstances whether accused had liquor in his possession for an unlawful purpose, and that if a practicing physician had liquor in his possession the jury would naturally infer that he was going to use the same for medicine, while if a notorious blind tiger traveled around with liquor they would naturally suppose he was plying the trade, was objectionable as a charge on the facts. State v. Parris, 71 S. E. 808, 89 S. C. 140.

Matters not constituting improper comment on the evidence. An instruction in a prosecution for criminal assault that, where an injury is actually caused by violence to the person injured, the intent to injure is presumed. Miller v. State, 150 S. W. 635, 67 Tex. Cr. R. 654. An instruction that circumstances, substantially proven, which point to guilt and are irreconcilable with innocence, and which may be explained by defendant, if innocent, but which are not so explained, may be sufficient. Smith v. State, 96 S. E. 632, 148 Ga. 332. A charge that, under definition of murder and malice connected therewith, jury should say whether defendant killed deceased under circumstances making it murder, and whether he acted with malice and without circumstances of mitigation or justification, and that, if he did, and all those things concurred, the jury should convict. Webb v. State, 99 S. E. 630, 149 Ga. 211. A charge that the idea of prevention enters into cases of justifiable homi-

[29] State v. Mitchell, 35 S. E. 210, 56 S. C. 524.

when determining the facts.[80] Under such a provision the judge should not, in his charge, review in detail each fact and circumstance

cide, and that no one can legally slay another when it is apparent that there is no imminent danger at time of killing, or when danger is over, and that it is not justifiable to kill in revenge for a past wrong, and that to justify killing the danger must be urgent, or apparently so, at killing, was not erroneous, as expressing opinion that deceased was killed in a spirit of revenge. Gaillard v. State, 99 S. E. 629, 149 Ga. 190. A charge on the subject of murder, and in defining malice, that in this case it would be an indication to do a wrongful act resulting in the death of deceased without sufficient legal provocation or just excuse. State v. Gallman, 60 S. E. 682, 79 S. C. 229. An instruction on self-defense, that "it is for you to determine from all the evidence whether such defense is made in good faith or is a mere pretense." State v. Goodrich, 176 P. 813, 24 N. M. 660. An instruction, where defendant, in a prosecution for homicide, admitted the killing, and claimed that deceased, following a conversation as to the act of deceased's son in stealing defendant's property, suddenly became enraged, and said to defendant, "I will cut your heart out for calling my boy a thief," and was in pursuit of defendant when the fatal shot was fired, that, "before proceeding to instruct you upon this issue of self-defense, I will try to simplify this issue to some extent by eliminating such other considerations and matters as do not have anything to do with the issue of self-defense, and, first, I instruct you that the merits or demerits of the controversy over articles of property have nothing to do with this question." State v. Ware, 109 P. 359, 58 Wash. 526. A charge, where the defense relied on was an alibi, that: "I apprehend you will have little trouble in coming to a conclusion whether there was murder or not. I believe it was conceded by the first counsel who addressed you that the killing was a felonious one." State v. Aughtry, 26 S. E. 619, 49 S. C. 285; Same v. Aughtrey, 27 S. E. 199, 49 S. C. 285. An instruction, that "this case is one of murder against defendant beyond all question the gravest offense known to the law." State v. McIntosh, 39 S. C. 97, 17 S. E. 446. In a prosecution for homicide, where circumstantial evidence was relied on, an instruction that the evidence was legal and competent, and if of such character as to exclude every reasonable hypothesis other than guilt the jury should convict, is not objectionable as tantamount to telling the jury that the evidence was sufficient. People v. Tom Woo, 184 P. 389, 181 Cal. 315. Where evidence in prosecution for murder, considered with defendant's statement at trial, authorized charge on mutual combat, a charge that, if there was a mutual intent to fight, defendant could not justify killing without showing that it was absolutely necessary, and that, if absolutely necessary defendant should be acquitted, was not erroneous as expressing opinion that defendant was at fault. Fitzpatrick v. State, 99 S. E. 128, 149 Ga. 75. A charge, in prosecution for making alcoholic liquor in violation of law, where the evidence showed that a substance commonly called "beer," made out of corn meal and water, was found on defendant's premises, that jury might presume that he was in possession of the "beer," and that he owned and made it. Williams v. State, 99 S. E. 711, 24 Ga. App. 53. An instruction, in a prosecution for violating the local option law, that the jury to convict must find that defendant kept the whisky to protect another. State v. Galliton, 161 S. W. 848, 176 Mo. App. 115. An instruction that, in determining whether a prescription was unlawfully written, the jury might consider the physical condition of the person for whom the whisky was prescribed. State v. Long, 173 S. W. 722, 187 Mo. App. 223. An instruction that, if the defendant took the money from the person of the

[80] Ferrall v. Broadway, 95 N. C. 551.

in testimony in such a way as tends to impress the jury that the testimony has established the contention of one of the parties, or that certain testimony is entitled to more weight than others.[81]

prosecuting witness under such circumstances as to make her guilty of theft, the fact that the prosecuting witness endeavored to make up with defendant after instituting the prosecution would not have any effect on the guilt of defendant, but such evidence should be considered in passing on the weight to be given to his evidence. Harris v. State (Tex. Cr. App.) 65 S. W. 921. A charge that an assault with intent to commit a rape is an assault made with the intent to have carnal knowledge of a female, forcibly and against her will, and that an assault with such intent, and a seizing of the woman with that intention, and a desisting from fear or an inability to commit the offense, would not acquit of offense of assault with intent to commit a rape, did not intimate an opinion as to what had been proven. Walton v. State, 100 S. E. 765, 24 Ga. App. 326. A charge, in a prosecution for robbery that it is not necessary, to constitute the stealing or carrying away from the presence of deceased, that it should have been done, if done, in his immediate view, but if the jury found that defendant made a violent assault on deceased by choking him and causing him to fall, and then took from his pockets a sum of money, then they should find him guilty, etc. State v. Mitchell, 72 P. 707, 32 Wash. 64. An instruction in a prosecution for robbery, detailing merely the facts charged in the indictment, and stating that such matters must be proved beyond a reasonable doubt to justify a conviction. Young v. State (Tex. Cr. App.) 79 S. W. 34.

Instruction on alibi held not objectionable within rule. An instruction as to alibi, stating that defendant introduced testimony that at or about the time the alleged robbery was committed he was at another place at such a distance from the alleged robbery that he could not be guilty, and that, although the alibi might not be exact, still, if it raised a reasonable doubt of defendant's guilt, he could not be convicted, and also that the court did not intend to express any doubt about the alibi, or any opinion whatever about it, as its sufficiency was for the jury, fully explained to the jury that they alone were to decide the question as to alibi, and was not objectionable as containing any intimation as to the court's opinion. Graham v. State, 45 So. 580, 153 Ala. 38.

[26] **Ala.** Langston v. State, 75 So. 715, 16 Ala. App. 123; Norman v. State, 69 So. 362, 13 Ala. App. 337; Aldrich Mining Co. v. Pearce, 68 So. 900, 192 Ala. 195; Crews & Green v. Parker, 68 So. 287, 192 Ala. 383; Manley v. Birmingham Ry., Light & Power Co., 68 So. 60, 191 Ala. 531; Kirkwood v. State, 62 So. 1011, 8 Ala. App. 108, certiorari denied 63 So. 990, 184 Ala. 9; Nashville, C. & St. L. Ry. v. Hinds, 60 So. 409, 5 Ala. App. 596; Louisville & N. R. Co. v. Young, 53 So. 213, 168 Ala. 551; Byrd v. Beall, 50 So. 53, 161 Ala. 594; Gillespie v. Hester, 49 So. 580, 159 Ala. 444; Davis v. State, 44 So. 561, 152 Ala. 25; Kirby v. State, 44 So. 38, 151 Ala. 66; Fletcher v. Prestwood, 43 So. 231, 150 Ala. 135.

Ariz. Hurley v. Territory, 108 P. 222, 13 Ariz. 2.

Ark. St. Louis, I. M. & S. Ry. Co. v. Coke, 175 S. W. 1177, 118 Ark. 49; Western Coal & Mining Co. v. Buchanan, 114 S. W. 694, 88 Ark. 7.

Cal. Neff v. Mattern, 151 P. 382, 28 Cal. App. 99; People v. Horn, 144 P. 641, 25 Cal. App. 583; Estrella Vineyard Co. v. Butler, 57 P. 980, 125 Cal. 232.

Ga. Albany & N. Ry. Co. v. McArthy, 54 S. E. 193, 125 Ga. 205.

Ill. Klofski v. Railroad Supply

[81] Rouse v. State, 58 S. E. 416, 2 Ga. App. 184.

A judge should refer to the evidence only so far as is necessary to present the leading issues, and should omit reference to the minor details of the testimony. Farkas v. Brown, 60 S. E. 1014, 4 Ga. App. 130.

The trial court may violate the above rule by the manner, tone, or emphasis of its charge,[82] and under such provisions the judge should carefully avoid the use of expressions which, while not so intended, may suggest to the jury that he has formed certain views with regard to the evidence, or certain phases of it.[83] Thus a suggestion in a civil

Co., 85 N. E. 274, 235 Ill. 146, affirming judgment Railroad Supply Co. v. Klofski, 138 Ill. App. 468.

Ind. Marietta Glass Mfg. Co. v. Pruitt, 102 N. E. 369, 180 Ind. 434; Indianapolis Southern R. Co. v. Emmerson, 98 N. E. 895, 52 Ind. App. 403.

Iowa. Tarashonsky v. Illinois Cent. R. Co., 117 N. W. 1074, 139 Iowa, 709.

La. State v. Williams, 56 So. 891, 129 La. 795; State v. Hopkins, 24 So. 188, 50 La. Ann. 1171.

Me. Duplissy v. Maine Cent. R. Co., 91 A. 983, 112 Me. 263; Hotchkiss v. Bon Air Coal & Iron Co., 78 A. 1108, 108 Me. 34.

Md. Abell v. Harris, 11 Gill & J. 367.

Mass. McManus v. Thing, 88 N. E. 442, 202 Mass. 11; Commonwealth v. Lynes, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709; Delaney v. Hall, 130 Mass. 524; Commonwealth v. Brown, 121 Mass. 69.

Mich. People v. Jones, 24 Mich. 215.

Mo. State v. Stewart, 204 S. W. 10, 274 Mo. 649; State v. Rollins, 126 S. W. 478, 226 Mo. 524.

Neb. Hanika v. Lincoln Traction Co., 153 N. W. 568, 98 Neb. 583.

N. M. Victor American Fuel Co. v. Melkusch, 173 P. 198, 24 N. M. 47.

N. Y. Gombert v. New York Cent. & H. R. R. Co., 88 N. E. 382, 195 N. Y. 273, 133 Am. St. Rep. 794, reversing judgment 106 N. Y. S. 1133, 123 App. Div. 913; Bernhard v. Brunner, 17 N. Y. Super. Ct. 528.

N. C. Tillery v. Royal Benefit Society, 80 S. E. 1068, 165 N. C. 262; Daniel v. Dixon, 77 S. E. 305, 161 N. C. 377; Thompson v. City of Winston, 118 N. C. 662, 24 S. E. 421; Ellis v. Harris, 106 N. C. 395, 11 S. E. 248.

Okl. Missouri, O. & G. Ry. Co. v. Miller, 145 P. 867, 45 Okl. 173.

S. C. Kennedy v. Kennedy, 68 S. E. 664, 86 S. C. 483; Toale v. Western Union Telegraph Co., 57 S. E. 117, 76 S. C. 248.

S. D. Grissel v. Bank of Woonsocket, 80 N. W. 161, 12 S. D. 93.

Tex. Smith v. Bryan (Civ. App.) 204 S. W. 359; Panhandle & S. F. Ry. Co. v. Vaughn (Civ. App.) 191 S. W. 142; Glover v. Houston Belt & Terminal Ry. Co. (Civ. App.) 163 S. W. 1063; Houston, E. & W. T. Ry. Co. v. Lacy (Civ. App.) 153 S. W. 414; Kansas City, M. & O. Ry. Co. of Texas v. Florence (Civ. App.) 138 S. W. 430; Weatherred v. Finley, 121 S. W. 895, 57 Tex. Civ. App. 50.

Wis. Hamann v. Milwaukee Bridge Co., 116 N. W. 854, 136 Wis. 39.

[82] Johnson v. State, 62 So. 328, 8 Ala. App. 207; State v. Howell, 28 S. C. 250, 5 S. E. 617.

[83] **Ala.** Lamar v. King, 53 So. 279, 168 Ala. 285.

Ga. Procter v. Pointer, 56 S. E. 111, 127 Ga. 134; Same v. Thompson, 56 S. E. 112, 127 Ga. 137.

Ill. Feitl v. Chicago City Ry. Co., 113 Ill. App. 381, judgment affirmed 71 N. E. 991, 211 Ill. 279; Franey v. Illinois Cent. R. Co., 104 Ill. App. 499.

Iowa. State v. Dorland, 72 N. W. 492, 103 Iowa, 168.

Ky. Milton v. Hunter, 13 Bush, 163.

Mich. Butler v. Detroit Y. & A. A. Ry., 101 N. W. 232, 138 Mich. 206.

Use of word "bogus." Where a material question in a proceeding to set aside a voluntary conveyance was as to the amount of the donor's liabilities, as compared with his resources, at the time the conveyance was executed, an allusion of the court in its charge to "bogus" debts or claims was objectionable. Cleveland v. Chambliss, 64 Ga. 352.

Use of phrase "If you reach the question of damages." In a motorcycle rider's action for personal injuries against an automobile driver, the use of the language, "If you arrive at the point when damages are assessed," in the instructions, was not open to criticism, as giving the jury

suit that the evidence indicates criminality is improper.[34] The court should not describe the evidence as clear, strong, and convincing, or the reverse,[35] and a reference in an instruction to a sale attacked as in fraud of creditors as the "so-called sale" will render it erroneous.[36]

As the use of the word "even" ordinarily expresses doubt,[37] an instruction that, "even" if the jury should find certain facts, or even though they should find for the plaintiff, etc., is objectionable, as an intimation that the jury will not so find.[38] The use of the word "even," or "even though," may, however, be necessary to give point and effect to a proposition of law as to what facts may be inferred from certain evidence, and in such case their use will not be erroneous.[39]

An instruction which unduly emphasizes certain issues by frequent repetition may incur the criticism of being on the weight of evidence.[40] An instruction that places the evidence of one party in an unfavorable light as compared with that of the other is erroneous,[41] and in a criminal case a charge on the weight of evidence favorable to the accused is no more authorized than one favorable to the state.[42] That

to understand it was questionable if they would ever arrive at that point. Gardner v. Russell, 179 N. W. 41, 211 Mich. 647.

[34] Furhman v. City of Huntsville, 54 Ala. 263.

[35] **Ala.** Bonner v. State, 107 Ala. 97, 18 So. 226.

Cal. People v. Ah Sing, 59 Cal. 400.

Mich. People v. Gastro, 75 Mich. 127, 42 N. W. 937.

N. C. Ray v. Patterson, 87 S. E. 212, 170 N. C. 226; Jones v. Warren, 46 S. E. 740, 134 N. C. 390; Ray v. Long, 44 S. E. 652, 132 N. C. 891.

Tenn. Boyer v. State, 93 Tenn. 216, 23 S. W. 971.

[36] Kuhlenbeck v. Hotz, 53 Ill. App. 675.

[37] Dowd v. Chicago City Ry. Co., 153 Ill. App. 85.

[38] Birmingham & A. Ry. Co. v. Campbell, 82 So. 546, 203 Ala. 296; Manistee Mill Co. v. Hobdy, 51 So. 871, 165 Ala. 411, 138 Am. St. Rep. 73.

"Even though." A requested charge directing a verdict for defendant, "even though the jury find certain facts as testified by plaintiff's witnesses," was properly refused as tending to cast suspicion upon the truth of plaintiff's testimony. Louisville & N. R. Co. v. Abernathy, 73 So. 103, 197 Ala. 512.

Use of "even" in the sense of "although" or "if." In an action against a railroad company for damages from fire, an instruction that "even" if the jury found for plaintiff they should not return a verdict for more than the actual cost value of the property destroyed was not erroneous as an intimation of the court's opinion that a finding for plaintiff was not probable, as the quoted word was evidently used in its popular sense as carrying the same meaning as "although" or "if." May v. Missouri Pac. R. Co., 219 S. W. 756, 143 Ark. 75.

[39] Central of Georgia Ry. Co. v. Ellison, 75 So. 159, 199 Ala. 571.

[40] Galveston, H. & N. Ry. Co. v. Wallis, 104 S. W. 418, 47 Tex. Civ. App. 120; Gulf, C. & S. F. Ry. Co. v. Condra, 82 S. W. 528, 36 Tex. Civ. App. 556.

It is error in a criminal case to frequently repeat a principle of law involved so as to create an impression on the jurors' minds as to the court's opinion of the facts to which the principle is applicable. Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

[41] Withers v. Lane, 56 S. E. 855, 144 N. C. 184.

[42] Burns v. State, 145 S. W. 356, 65 Tex. Cr. R. 175; Carver v. State, 148 S. W. 746, 67 Tex. Cr. R. 116.

an intimation of opinion by the court as to the facts is unintentional does not take it out of the ban of such provisions.[43]

The fact that a judge may have personal knowledge of certain matters of fact in dispute does not remove him from the scope of the rule against expressing an opinion as to such matters,[44] and it is error for him to try to compel the jury to harmonize their views of the facts with such knowledge.[45]

The rule supported by reason and the weight of authority is that error in charging on the weight of the evidence, or intimating an opinion thereon, in violation of the above provisions, is not cured by telling the jury that they are the exclusive judges of the facts.[46] The contrary rule, which has support in some of the cases,[47] would seem to practically nullify the effect of such provisions.

§ 32. Limitations of rule

The familiar principle that a statutory provision which is in derogation of the common law should be strictly construed has been recognized by some courts as applicable to the above provisions.[48] Remarks of the judge during the progress of the trial, when refusing a nonsuit, or when making a ruling on the admissibility of evidence, or during the examination of witnesses, or when hearing arguments, do not as

[43] State v. Pascal, 85 So. 621, 147 La. 634; Starling v. Selma Cotton Mills, 88 S. E. 242, 171 N. C. 222; State v. Greene, 94 P. 987, 33 Utah, 497.

[44] Andreas v. Ketcham, 77 Ill. 377.

[45] Shafer v. City of Eau Claire, 81 N. W. 409, 105 Wis. 239.

[46] **Cal.** In re Hess' Estate (Sup.) 192 P. 35; People v. Chew Sing Wing, 88 Cal. 268, 25 P. 1099.

Mich. People v. Lyons, 13 N. W. 365, 49 Mich. 78.

N. D. State v. Barry, 92 N. W. 809, 11 N. D. 428.

Or. State v. Hatcher, 29 Or. 309, 44 P. 584.

S. C. State v. White, 15 S. C. 381.

S. D. Fullerton Lumber Co. v. Hosford, 176 N. W. 1017, 42 S. D. 642.

Tex. Johnson v. State, 1 Tex. App. 609.

Expression of disbelief in testimony for accused. Where the court has erred in making argumentative comparisons of the testimony for the defense and prosecution, indicating his disbelief in that for the defense, the error is not cured by repeated instructions to the jury that they are exclusive judges of the weight of the evidence and the credibility of the witnesses. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

[47] State v. Streeter, 20 Nev. 403, 22 P. 758; White v. Territory, 1 Wash. St. 279, 24 P. 447.

In Nevada, in an earlier case than that cited for the contrary rule, where, on a trial for murder, it appeared that defendant had kicked deceased in the face, and the state contended that the killing was by a kick on the breast, a remark of the judge, in overruling objections to testimony as to bruises on the breast, that "there was as much evidence that defendant kicked deceased on the chest as upon the face," was held reversible error, though the court afterwards stated that no expression of opinion was intended and that the whole evidence was for the jury. State v. Harkin, 7 Nev. 377.

[48] State v. Baldwin, 100 S. E. 348, 178 N. C. 687, 10 A. L. R. 1112.

a general rule fall within the scope of the above provisions.[49] Such rule does not prohibit the trial judge, either in civil or criminal cases, from stating to the jury the questions which they are called on to determine,[50] and instructing them as to what evidence may be looked to in such determination;[51] nor do such requirements prohibit such reference to the undisputed evidence as is necessary to enable the jury to comprehend the law applicable to the concrete issues of fact which they are to decide,[52] and it is not a comment upon the facts for the court to state the reason for the withdrawal by the plaintiff of one of the causes of action alleged in his complaint.[53]

A statement of an abstract principle of law cannot be regarded as a charge on the facts, on the theory that it indicates the opinion of the court that there are facts in evidence to which such principle is applicable.[54] It is not a comment upon testimony specially to refer to the fact sought to be established by such testimony.[55] The judge

[49] Zonker v. Cowan, 84 Ind. 325; State v. Whitaker, 87 S. E. 1001, 103 S. C. 210; Hunt v. Atlantic Coast Lumber Corporation, 85 S. E. 229, 101 S. C. 64; Goodwin v. Atlantic Coast Line R. Co., 64 S. E. 242, 82 S. C. 321; Latimer v. General Electric Co., 62 S. E. 438, 81 S. C. 374.

Remarks held not to constitute a charge on the facts. A remark, in admitting evidence to show that a life insurance soliciting agent had knowledge of the facts misrepresented in an application: "I don't know much about life insurance companies. They are the smartest people on the face of the globe. Let the courts pass one rule to-day, and they will frame a rule to meet it the next." Rearden v. State Mut. Life Ins. Co., 60 S. E. 1106, 79 S. C. 526. The judge in giving his reason for a ruling on evidence may refer to testimony already in the case. State v. Thrailkill, 50 S. E. 551, 71 S. C. 136.

In Utah, however, in a prosecution for adultery, in which the evidence that defendant was a married man consisted entirely of his admissions that the woman he lived with was his wife and their reputation in the community, remarks of the court, on overruling a motion for a directed verdict of not guilty, that a man should not be permitted to live in a community for years with a woman as his wife, holding her out to be so, and then, because the state cannot produce direct evidence of the marriage ceremony, go scot free, have been held an expression of opinion on the weight of evidence, and prejudicial error. State v. Greene, 94 P. 987, 33 Utah, 497.

[50] Eubanks v. State, 56 So. 88, 2 Ala. App. 61; State v. Lambert, 71 A. 1092, 104 Me. 394, 15 Ann. Cas. 1055; Crowley v. Taylor, 95 P. 1016, 49 Wash. 511.

Pointing out elements of damage. An instruction in eminent domain proceedings as to the various elements of damages to be considered in estimating the damage to the land is not objectionable as on the weight of the evidence. Beaumont & G. N. R. R. v. Elliott (Tex. Civ. App.) 148 S. W. 1125.

[51] Smyth v. Caswell, 67 Tex. 567, 4 S. W. 848.

[52] State v. Driggers, 66 S. E. 1042, 84 S. C. 526, 137 Am. St. Rep. 855, 19 Ann. Cas. 1166.

[53] Lownsdale v. Gray's Harbor Boom Co., 78 P. 904, 36 Wash. 198.

[54] Welch v. Clifton Mfg. Co., 33 S. E. 739, 55 S. C. 568; Atchison, T. & S. F. Ry. Co. v. Bryant (Tex. Civ. App.) 162 S. W. 400.

[55] Luchow v. Kansas City Breweries Co. (Mo. App.) 183 S. W. 1123.

may charge facts judicially known to him,[56] and the court may charge that there is a conflict in the testimony where that fact is not in dispute,[57] and an inadvertent misstatement of a fact in evidence is not a forbidden expression of opinion on an issue of fact.[58]

The use of an illustration, although the evidence brings the case of a party directly under it, does not constitute an improper comment on the evidence.[59] Thus it is proper to use illustrations, not referring to the facts in the case, for the purpose of pointing out the distinction between positive and circumstantial evidence,[60] and the court may properly use mathematical computations in a charge on the measure of damages, if he tells the jury that they are used merely as an example, and should not be accepted, as they may not be correct.[61]

§ 33. Specific applications of rule in civil cases

The above rule has been applied in civil cases to instructions characterizing the nature of a particular transaction,[62] as that the drawing of a check was not in the ordinary course of business,[63] that the relation of master and servant,[64] of fellow servants,[65] of carrier and passenger,[66] or of partnership existed,[67] that contracts made by a partner were not within the scope of the firm business,[68] that certain acts or omissions of a tenant in common would or would not constitute authority to his cotenant to sign his name to a contract for the sale

[56] Koch v. State, 22 So. 471, 115 Ala. 99; People v. Mayes, 113 Cal. 618, 45 P. 860; Trustees of Little Cedar Congregation of Adams v. Chicago, M. & St. P. Ry. Co., 137 N. W. 970, 119 Minn. 181; State v. Nerzinger, 119 S. W. 379, 220 Mo. 36; Turner v. Lambeth, 2 Tex. 365.

[57] Horn v. State, 102 Ala. 144, 15 So. 278; People v. Flynn, 73 Cal. 511, 15 P. 102; Wilson v. Moss, 60 S. E. 313, 79 S. C. 120.

[58] Grows v. Maine Cent. R. Co., 69 Me. 412.

[59] State v. Smith, 50 So. 842, 124 La. 1035.

[60] State v. Godfrey, 89 S. E. 1, 60 S. C. 498.

[61] Speight v. Seaboard Air Line Ry., 76 S. E. 684, 161 N. C. 80.

Illustrating method of using mortality tables. It is not error for the trial judge in an action for damages for personal injuries, in illustrating to the jury the method of using the mortality and annuity tables, to use for example a figure approximating that shown by the evidence to be the plaintiff's age. Central of Georgia Ry. Co. v. Duffy, 42 S. E. 510, 116 Ga. 346.

[62] Idaho Implement Co. v. Lambach, 101 P. 951, 16 Idaho, 497; Cotulla State Bank v. Herron (Tex. Civ. App.) 202 S. W. 797.

[63] National Bank of San Mateo v. Whitney, 183 P. 789, 181 Cal. 202, 8 A. L. R. 298.

[64] San Antonio, U. & G. R. Co. v. Dawson (Tex. Civ. App.) 201 S. W. 247; Houston Chronicle Pub. Co. v. Murray (Tex. Civ. App.) 185 S. W. 407.

[65] Ward v. Liverpool Salt & Coal Co., 92 S. E. 92, 79 W. Va. 371.

[66] Georgia, S. & F. Ry. Co. v. Overstreet, 87 S. E. 909, 17 Ga. App. 629; Louisville Ry. Co. v. O'Connor, 101 S. W. 305, 30 Ky. Law Rep. 1329; El Paso Electric Ry. Co. v. Boer (Tex. Civ. App.) 108 S. W. 199.

[67] Williams v. Carson, 191 S. W. 401, 126 Ark. 618; Doggett v. Jordan, 2 Fla. 541.

[68] Wilson v. Moss, 60 S. E. 313, 79 S. C. 120.

of the land held in common,[69] that a servant had no authority to do certain things,[70] that certain facts failed to show an agency,[71] that the evidence did not show that certain acts were within the apparent authority of an agent,[72] that the evidence showed that a servant assumed certain risks,[73] that certain facts were not controlling as to whether one kept a private boarding house,[74] that one signed his name to a contract,[75] that certain facts constituted the procuring cause of a sale,[76] that certain facts amounted to an acceptance of work done,[77] that a certain occurrence or event was or was not the proximate cause of an injury,[78] that the evidence failed to show that certain events produced certain results,[79] as to whether a horse race was fair,[80] that if the jury believed the evidence they must find that there was fraud in a sale of goods,[81] that certain facts showed that one did not use reasonable diligence in relying on certain false representations,[82] as to matters constituting undue influence,[83] that there was probable cause for a prosecution,[84] that language used by an employee of a carrier to a passenger was insulting,[85] that certain facts would constitute malice,[86] that certain facts would not show a conversion [87] that certain facts would be sufficient to show the delivery of goods to a bailee in good condition,[88] that certain facts showed that the duty rested on a

[69] Naylor v. Parker (Tex. Civ. App.) 139 S. W. 93.

[70] Missouri, K. & T. Ry. Co. of Texas v. Avis, 91 S. W. 877, 41 Tex. Civ. App. 72, judgment affirmed 93 S. W. 424, 100 Tex. 33.

[71] McFarland v. Lynch (Tex. Civ. App.) 159 S. W. 303.

[72] Milwaukee Mechanics' Ins. Co. v. Frosch (Tex. Civ. App.) 130 S. W. 600.

[73] Missouri, K. & T. Ry. Co. of Texas v. Steele, 110 S. W. 171, 50 Tex. Civ. App. 634.

[74] Hedrick v. Smith (Tex. Civ. App.) 146 S. W. 305.

[75] Danner v. Walker-Smith Co. (Tex. Civ. App.) 154 S. W. 295.

[76] Andrew v. Mace (Tex. Civ. App.) 194 S. W. 598.

[77] Sturn v. Central Oil Co., 156 Ill. App. 165.

[78] **Ala.** Southern Ry. Co. v. McGowan, 43 So. 378, 149 Ala. 440.

Ga. Schaufele v. Central of Georgia Ry. Co., 65 S. E. 708, 6 Ga. App. 660.

Md. Firor v. Taylor, 81 A. 389, 116 Md. 69.

Mich. Jones v. McMillan, 88 N. W. 206, 129 Mich. 86.

Miss. Yazoo & M. V. R. Co. v. Smith, 60 So. 73, 103 Miss. 150.

Tex. Weatherford Machine & Foundry Co. v. Pope (Civ. App.) 132 S. W. 503.

[79] Chobanian v. Washburn Wire Co., 80 A. 394, 33 R. I. 289, Ann. Cas. 1913D, 730.

[80] Armstrong v. Parchman, 42 Tex. 185.

[81] Montgomery Moore Mfg. Co. v. Leeth, 50 So. 210, 162 Ala. 246.

[82] Yanelli v. Littlejohn, 137 N. W. 723, 172 Mich. 91.

[83] Rapp v. Becker, 26 Ohio Cir. Ct. R. 321.

[84] Snead v. Jones, 53 So. 188, 169 Ala. 143.

[85] Atlantic Coast Line R. Co. v. Mead, 90 S. E. 87, 18 Ga. App. 621.

[86] Smith v. Brown, 81 S. E. 633, 97 S. C. 239; Webb v. J. L. Wiginton & Co., 118 S. W. 856, 55 Tex. Civ. App. 413.

[87] Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co., 129 S. W. 1161, 61 Tex. Civ. App. 49.

[88] Disbrow v. People's Ice, Storage

telegraph company to deliver a telegram promptly,[89] that one of two colliding vehicles had the right of way,[90] as to weight of testimony of one injured in a collision with respect to seeing the object collided with,[91] as to assumptions permissible to the operator of an automobile with respect to the movements of pedestrians,[92] that one used more force than was necessary in repelling an assault,[93] as to effect of evidence bearing on question of knowledge,[94] that certain facts would not be sufficient to show constructive notice of fraud,[95] that certain facts would constitute constructive notice of defects in a sidewalk,[96] as to effect of knowledge by traveler of defects in sidewalk,[97] as to effect of certain facts as showing constructive notice of lack of authority in an agent,[98] that certain facts did not show a waiver,[99] as to effect of certain facts with respect to showing a release from liability,[1] as to effect of testimony bearing on the validity of a release,[2] that the evidence if believed showed payment of a debt,[3] as to ownership of property,[4] that certain facts showed an abandonment of property,[5] that certain acts did or did not constitute an admission of ownership in another,[6] that an action was barred by the statute of limitations,[7] that certain facts did or did not show adverse possession,[8] that the evidence showed that certain lands were dedicated to public use,[9] that certain facts show-

& Fuel Co., 119 S. W. 1007, 138 Mo. App. 56.

[89] Western Union Telegraph Co. v. White (Tex. Civ. App.) 149 S. W. 790.

[90] Boston Ins. Co. v. Brooklyn Heights R. Co., 169 N. Y. S. 251, 182 App. Div. 1.

[91] Zander v. St. Louis Transit Co., 103 S. W. 1006, 206 Mo. 445.

[92] McCown v. Muldrow, 74 S. E. 386, 91 S. C. 523.

[93] Morris v. McClellan, 45 So. 641, 154 Ala. 639, 16 Ann. Cas. 305.

[94] Spittle v. Charlotte Electric Ry. Co., 95 S. E. 910, 175 N. C. 497.

[95] Parlin & Orendorff Co. v. Glover, 118 S. W. 731, 55 Tex. Civ. App. 112.

[96] Diamond Rubber Co. v. Harryman, 92 P. 922, 41 Colo. 415, 15 L. R. A. (N. S.) 775.

[97] Town of Newcastle v. Grubbs, 86 N. E. 757, 171 Ind. 482.

[98] Garbutt Lumber Co. v. Prescott, 62 S. E. 228, 131 Ga. 826.

[99] Mutual Life Ins. Ass'n of Texas, No. 1, v. Garvin (Tex. Civ. App.) 141 S. W. 797; Rice v. Ward (Tex. Civ. App.) 54 S. W. 818, judgment reversed 56 S. W. 747, 93 Tex. 532.

[1] Doty v. Moore (Tex. Civ. App.) 113 S. W. 955.

[2] Loveman v. Birmingham Ry., L. & P. Co., 43 So. 411, 149 Ala. 515.

[3] Speakman v. Vest, 44 So. 1021, 152 Ala. 623.

[4] Postal Telegraph Cable Co. v. Brantley, 107 Ala. 683, 18 So. 321; Harris v. Murfree, 54 Ala. 161; Douthitt v. Farrar (Tex. Civ. App.) 159 S. W. 182.

[5] Jones v. Wright (Tex. Civ. App.) 81 S. W. 569, reversed 84 S. W. 1053, 98 Tex. 457.

[6] Vidmer v. Lloyd, 63 So. 943, 184 Ala. 153; Halbert v. De Bode, 40 S. W. 1011, 15 Tex. Civ. App. 615.

[7] Frizzell v. Woodman Pub. Co. (Tex. Civ. App.) 130 S. W. 659.

[8] Theodore Land Co. v. Lyon, 41 So. 682, 148 Ala. 668; Anniston City Land Co. v. Edmondson, 30 So. 61, 127 Ala. 445; Pittman v. Pittman, 27 So. 242, 124 Ala. 306; Burnham v. Hardy Oil Co. (Tex. Civ. App.) 147 S. W. 330.

[9] Louisville & N. R. Co. v. Higginbotham, 44 So. 872, 153 Ala. 334.

ed an estoppel,[10] that a stream was not a natural water course,[11] as to the period of gestation,[12] as to what facts show mental capacity to make a will,[13] that certain facts were insufficient to show want of testamentary capacity,[14] as to effect of evidence as to value,[15] as to amount of recovery by a plaintiff,[16] that certain elements could not be included in an award of damages,[17] and that the jury should allow interest.[18]

So such rule has been applied to instructions referring to a controverted fact "as shown by the evidence,"[19] to instructions to adopt one or another of different conflicting theories,[20] and to an instruction that cases cited by counsel are like the case on trial with respect to the facts involved.[21]

It is improper for the court to call the attention of the jury to the fact that certain testimony unfavorable to one of the parties has been given by such party's own witness.[22] An instruction that certain matters should be considered in mitigation of exemplary damages, without expressly submitting the question whether any exemplary damages should be found, is an intimation of an opinion that the case is one for the allowance of such damages,[23] and since the jury are the arbiters of the teachings of experience, as of all other questions of fact, an instruction that in assessing damages in a personal injury action they may consider the satisfaction of life which only those having a sound body and the full use of all their members may enjoy invades their province.[24]

[10] Blount v. Henry (Tex. Civ. App.) 160 S. W. 418.

[11] Fleming v. Wilmington & W. R. Co., 115 N. C. 676, 20 S. E. 714.

[12] E. N. E. v. State, 25 Fla. 268, 6 So. 58.

[13] Allday v. Cage (Tex. Civ. App.) 148 S. W. 838.

[14] Philpott v. Jones, 146 N. W. 859, 164 Iowa, 730.

[15] Campbell v. Ludin (Sup.) 104 N. Y. S. 372.

[16] **Ala.** Citizens' Light, Heat & Power Co. v. Lee, 62 So. 199, 182 Ala. 561.

Iowa. Chadima v. Kovar, 150 N. W. 691, 168 Iowa, 385.

Mo. Stockwell Co. v. Union Pac. Ry. Co. (App.) 182 S. W. 829; Lederer v. Morrow, 111 S. W. 902, 132 Mo. App. 438.

Okl. Midland Valley R. Co. v. Featherstone, 123 P. 1123, 32 Okl. 837.

Tex. Kirby Lumber Co. v. Stewart (Civ. App.) 141 S. W. 295; Missouri, K. & T. Ry. Co. of Texas v. Rich (Civ. App.) 112 S. W. 114; Lane v. Delta County (Civ. App.) 109 S. W. 866.

[17] Birmingham Ry., Light & Power Co. v. Bush, 56 So. 731, 175 Ala. 49.

[18] Anderson v. State, 2 Ga. 370.

[19] Marble v. Lypes, 82 Ala. 322, 2 So. 701; Commercial Fire Ins. Co. v. Morris, 105 Ala. 498, 18 So. 34; People v. Casey, 65 Cal. 260, 3 P. 874; Weyburn v. Kipp's Estate, 63 Mich. 79, 29 N. W. 517; Hill v. Graham, 72 Mich. 659, 40 N. W. 779.

[20] Nashville, C. & St. L. Ry. v. Blackmon, 61 So. 468, 7 Ala. App. 530.

[21] Moore v. Robinson, 62 Ala. 537.

[22] Parks v. Central Coal & Coke Co. (Mo.) 183 S. W. 560.

[23] Holland v. Williams, 55 S. E. 1023, 126 Ga. 617.

[24] Pittsburgh, C., C. & St. L. Ry. Co. v. O'Conner, 85 N. E. 969, 171 Ind. 686.

§ 34. Application of rule in negligence cases

An instruction addressed to the particular things that should have been done rather than to the legal standard of duty is often unobjectionable because, practically viewed, it exacts no more than the doing of that which obviously was necessary under the facts to constitute the care required, and therefore does not invade the province of the jury, but, where a real question exists whether or not precautions should have been taken other than those that were, the question is for the jury to decide by applying the standard of care of a person of ordinary prudence, and it should be left to the jury by the charge,[25] and as a general rule it is an invasion of the province of the jury to give an instruction that the doing of a certain specific act or that the failure to observe a certain specified precaution under a given state of conditions and circumstances constitutes negligence, unless the specific act is prescribed by some statute, order, or rule which gives it the force of law, or unless the specified conditions and circumstances are of such character that no other reasonable inference can be drawn therefrom.[26]

[25] San Antonio & A. P. Ry. Co. v. Hodges, 120 S. W. 848, 102 Tex. 524.

[26] **Ala.** Southern Ry. Co. v. Ellis, 60 So. 407, 6 Ala. App. 441; Merrill v. Sheffield Co., 53 So. 219, 169 Ala. 242; Woodward Iron Co. v. Sheehan, 52 So. 24, 166 Ala. 429.

Ark. St. Louis Southwestern Ry. Co. v. Aydelott, 194 S. W. 873, 128 Ark. 479; Wells Fargo & Co. Express v. W. B. Baker Lumber Co., 171 S. W. 132, 115 Ark. 142; Bauschka v. Western Coal & Mining Co., 129 S. W. 1095, 95 Ark. 477; Aluminum Co. of North America v. Ramsey, 117 S. W. 568, 89 Ark. 522.

Cal. Pierce v. United Gas & Electric Co., 118 P. 700, 161 Cal. 176; Manning v. App. Consol. Gold Min. Co., 84 P. 657, 149 Cal. 35; Quint v. Dimond, 82 P. 310, 147 Cal. 707; Weiderkind v. Tuolumne County Water Co., 65 Cal. 431, 4 Pac. 415.

Conn. Kebbee v. Connecticut Co., 84 A. 329, 85 Conn. 641.

Ga. Western & A. R. Co. v. Jarrett, 96 S. E. 17, 22 Ga. App. 313; Augusta-Aiken, Ry. & Electric Corp. v. Collins, 89 S. E. 444, 18 Ga. App. 303; Western & A. R. Co. v. Roberts, 86 S. E. 933, 144 Ga. 250; Western & A. R. Co. v. Summerour, 77 S. E. 802, 139 Ga. 545; Seaboard Air Line Ry. v. Johnson, 77 S. E. 632, 139 Ga. 471; Seaboard Air Line Ry. v. Blackshear, 75 S. E. 902, 11 Ga. App. 579; Alabama Great Southern R. Co. v. Brown, 75 S. E. 330, 138 Ga. 328; Louisville & N. R. Co. v. Arp, 71 S. E. 867, 136 Ga. 489; Central of Georgia Ry. Co. v. Cole, 68 S. E. 804, 135 Ga. 72; Southern Ry. Co. v. Freeman, 64 S. E. 129, 6 Ga. App. 55; Evans v. Josephine Mills, 52 S. E. 538, 124 Ga. 318; Macon Ry. & Light Co. v. Vining, 51 S. E. 719, 123 Ga. 770; Alabama Midland Ry. Co. v. Guilford, 46 S. E. 655, 119 Ga. 523.

Ill. Crisler v. Chicago City Ry. Co., 204 Ill. App. 491; Hurst v. Madison Coal Corp., 201 Ill. App. 205; Lenihan v. Chicago Rys. Co., 195 Ill. App. 144; De Voney v. Chiappe, 192 Ill. App. 435; Tracey v. Chicago Ry. Co., 185 Ill. App. 125; Engel v. Frank Parmalee Co., 169 Ill. App. 410; Chicago & A. Ry. Co. v. Hill, 130 Ill. App. 218; Harley v. Aurora, E. & C. Ry. Co., 128 Ill. App. 343; Postal Telegraph Cable Co. v. Likes, 124 Ill. App. 459, judgment affirmed 80 N. E. 136, 225 Ill. 249; Illinois Cent. R. Co. v. Hicks, 122 Ill. App. 349; Swift & Co. v. Griffin, 109 Ill. App. 414; West Chicago St. Ry. Co. v. Winters, 107 Ill. App. 221.

Ind. Pittsburgh, C., C. & St. L. Ry. Co. v. Arnott (Sup.) 126 N. E. 13; Beck v. Indianapolis Traction & Terminal Co., 119 N. E. 528, 67 Ind.

Thus ordinarily it will be error to instruct that certain facts show

App. 635; Pennsylvania Co. v. Hensil, 70 Ind. 569, 36 Am. Rep. 188.

Mich. Lamb v. Clam Lake Tp., 140 N. W. 1009, 175 Mich. 77.

Mo. Schwyhart v. Barrett, 130 S. W. 388, 145 Mo. App. 332; Blair v. Mound City Ry. Co., 31 Mo. App. 224; Dowell v. Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598.

Mont. Forquer v. Slater Brick Co., 97 P. 848, 37 Mont. 426.

N. Y. Olpp v. Interborough Rapid Transit Co. (Sup.) 126 N. Y. S. 184, 69 Misc. Rep. 595; Ward v. Metropolitan St. Ry. Co., 90 N. Y. S. 897, 99 App. Div. 126; Locke v. Waldron, 77 N. Y. S. 405, 75 App. Div. 152.

N. C. Ware v. Southern Ry. Co., 95 S. E. 921, 175 N. C. 501.

S. C. Kelly v. Columbia Ry., Gas & Electric Co., 84 S. E. 423, 100 S. C. 113; Strauss v. Atlantic Coast Line R. Co., 77 S. E. 1117, 94 S. C. 324; Lundy v. Southern Bell Telephone & Telegraph Co., 72 S. E. 558, 90 S. C. 25; Talbert v. Western Union Telegraph Co., 64 S. E. 862, rehearing denied 64 S. E. 916, 83 S. C. 68; Anderson v. South Carolina & G. R. Co., 61 S. E. 1096, 81 S. C. 1; Campbell v. Western Union Telegraph Co., 54 S. E. 571, 74 S. C. 300; China v. City of Sumter, 29 S. E. 206, 51 S. C. 453.

Tex. Abilene Gas & Electric Co. v. Thomas (Civ. App.) 194 S. W. 1016; St. Louis Southwestern Ry. Co. of Texas v. Christian (Civ. App.) 169 S. W. 1102; Galveston-Houston Electric Ry. Co. v. Stautz (Civ. App.) 166 S. W. 11; Trinity & Brazos Valley Ry. Co. v. Lunsford (Civ. App.) 160 S. W. 677; Carter v. South Texas Lumber Yard (Civ. App.) 160 S. W. 626; Gulf, C. & S. F. Ry. Co. v. Wafer, 130 S. W. 712, 62 Tex. Civ. App. 74; Thompson v. Galveston, H. & S. A. Ry. Co., 106 S. W. 910, 48 Tex. Civ. App. 284; Ft. Worth & R. G. R. Co. v. Cage Cattle Co. (Civ. App.) 95 S. W. 705; Houston & T. C. R. Co. v. Strickel (Civ. App.) 94 S. W. 427; City of Hillsboro v. Jackson, 44 S. W. 1010, 18 Tex. Civ. App. 325; St. Louis S. W. Ry. Co. of Texas v. Caseday (Civ. App.) 40 S. W. 198; Spencer v. Shelburne, 33 S. W. 260, 11 Tex. Civ. App. 521; Gulf, C. & S. F. Ry. Co. v. Grubbs, 7 Tex. Civ. App. 53, 26 S. W. 326; San Antonio & A. P. Ry. Co. v. Long, 4 Tex. Civ. App. 497, 23 S. W. 499; Gulf, C. & S. F. Ry. Co. v. Bagley, 3 Tex. Civ. App. 207, 22 S. W. 68.

Wash. Underhill v. Stevenson, 170 P. 354, 100 Wash. 129.

Instructions improper within rule. An instruction that if plaintiff had stepped down onto the step of the car, and was only making preparation to leave it when the car stopped, and if while in this attitude the car suddenly jerked, and caused plaintiff to be thrown from the car, the jury should find for plaintiff. Northern Texas Traction Co. v. Moberly (Tex. Civ. App.) 109 S. W. 483. A charge, in an action against the proprietors of a skating rink for injuries alleged to have been sustained by plaintiff from defendants' negligence, that it would be defendants' duty to exercise ordinary care to enforce their rules for protection of skaters, since what ordinary care would require defendants to do is for the jury, in the absence of a statute or municipal ordinance imposing upon them the duty of doing certain specified acts. Stewart v. Mynatt, 70 S. E. 825, 135 Ga. 637. An instruction, in an action against a railroad for personal injuries, that if defendant's train dashed out from behind box cars on the track, in view of plaintiff's team, and made unnecessary noises defendant failed to exercise ordinary care. Missouri, K. & T. Ry. Co. of Texas v. Burk (Tex. Civ. App.) 146 S. W. 600. An instruction that if plaintiff knew, or ought to have known, that the engine was approaching and was dangerously near, and undertook to cross the track, he cannot recover, is an expression of opinion that it is negligence to cross a track in front of an approaching engine which one knows, or ought to know, is dangerously near. Wright v. Western & A. R. Co., 77 S. E. 161, 139 Ga. 343. A requested charge that if plaintiff's husband deliberately went on the railroad track at a crossing in front of an approaching train, thinking that he could cross before it reached him, and miscalculating its speed, plaintiff could not recover for

wanton negligence,[27] or that certain facts constitute contributory negligence,[28] or that certain facts do not show negligence,[29] or that certain

his death, though the railroad company may have been negligent in running at a high speed and in failing to check the speed of the train at the crossing, was properly refused, as it would have been in effect an instruction that certain facts would constitute negligence of the husband. Southern Ry. Co. v. Grizzle, 62 S. E. 177, 131 Ga. 287. An instruction, in an action against a railway company for killing an animal on its track at a public crossing in a district within which stock was prohibited from running at large, in which the evidence showed that the whistle of the locomotive was not blown nor the bell rung at the crossing, that, if the company failed to sound the whistle or ring the bell before passing the public crossing, the company was negligent per se, and, if the company was guilty of gross negligence in failing to blow the whistle or ring the bell or in checking the speed of the train after discovering the animal's peril, a verdict for plaintiff was authorized. Missouri, K. & T. Ry. Co. of Texas v. Scofield (Tex. Civ. App.) 98 S. W. 435. An instruction, in an action against a railroad company for killing an animal on its track at a public crossing, which authorized a finding that the company's employés in charge of the train were guilty of gross negligence if, in approaching the crossing, they failed to sound the whistle or ring the bell, is erroneous. Missouri, K. & T. Ry. Co. of Texas v. Scofield (Tex. Civ. App.) 98 S. W. 435. A charge to find for defendant unless the jury believe the parties in charge of the empty cars used more force than necessary in attaching them to the caboose, or were otherwise negligent in making the coupling, is a charge on the weight of evidence, making the use of unnecessary force in attaching the cars negligence per se, though in other portions of the charge failure of those engaged in annexing the empty cars "to exercise ordinary care to avoid injuring those in the caboose," if on account of such failure "the empty cars were run violently against the caboose," to plaintiff's injury, was made the test of liability. Houston & T. C. Ry. Co. v. Burns (Tex Civ. App.) 63 S. W. 1035.

[27] Southern Ry. Co. v. Hyde, 61 So. 77, 183 Ala. 346.

[28] **U. S.** (C. C. A. Ohio) Harmon v. Barber, 247 F. 1, 159 C. C. A. 219, certiorari denied 38 S. Ct. 335, 246 U. S. 666, 62 L. Ed. 929.

Ala. North Alabama Traction Co. v. Taylor, 57 So. 146, 3 Ala. App. 456; Birmingham Ry., Light & Power Co. v. Fox, 56 So. 1013, 174 Ala. 657; Louisville & N. R. Co. v. Johnson, 50 So. 300, 162 Ala. 665; Birmingham Ry., Light & Power Co. v. Williams, 48 So. 93, 158 Ala. 381; Southern Ry. Co. v. Hobbs, 43 So. 844, 151 Ala. 335.

Ark. E. L. Bruce Co. v. Yax, 199 S. W. 535, 135 Ark. 480.

Cal. Worley v. Spreckels Bros. Commercial Co., 124 P. 697, 163 Cal. 60.

Ill. Jones & Adams Co. v. George, 81 N. E. 4, 227 Ill. 64, reversing judgment 125 Ill. App. 506; Pittsburgh, C., C. & St. L. Ry. Co. v. Banfill, 69 N. E. 499, 206 Ill. 553, affirming judgment 107 Ill. App. 254; Vittum v. Drury, 161 Ill. App. 603; Chicago & A. R. Co. v. Truitt, 68 Ill. App. 76.

Ind. Chicago & E. R. Co. v. Hunter, 113 N. E. 772, 65 Ind. App. 158; Cleveland, C., C. & St. L. Ry. Co. v. Schneider, 80 N. E. 985, 40 Ind. App. 38; Indiana Steel & Wire Co. v. Studes, 119 N. E. 2, 187 Ind. 469; American Car & Foundry Co. v. Adams, 99 N. E. 993, 178 Ind. 607.

Iowa. Lunde v. Cudahy Packing Co., 117 N. W. 1063, 139 Iowa, 688.

N. C. Sanders v. Atlantic Coast Line R. Co., 76 S. E. 553, 160 N. C. 526.

Okl. Pioneer Hardwood Co. v. Thompson, 153 P. 137, 49 Okl. 502.

Pa. Musick v. Borough of Latrobe, 39 A. 226, 184 Pa. 375, 42 Wkly. Notes Cas. 209.

S. C. Martin v. Columbia Electric St. Ry., Light & Power Co., 66 S. E. 993, 84 S. C. 568.

Tex. International & G. N. Ry. Co. v. Jones (Civ. App.) 175 S. W. 488;

[29] See note 29 on following page.

facts do not show contributory negligence,[30] or that certain facts show the exercise of due care.[31]

Missouri, K. & T. Ry. Co. of Texas v. Rogers, 128 S. W. 711, 60 Tex. Civ. App. 544; Gulf, C. & S. F. Ry. Co. v. Dickens, 118 S. W. 612, 54 Tex. Civ. App. 637; Missouri, K. & T. Ry. Co. of Texas v. Balliet, 107 S. W. 906, 48 Tex. Civ. App. 641; International & G. N. R. Co. v. Howell (Civ. App.) 105 S. W. 560; City of San Antonio v. Porter, 59 S. W. 922, 24 Tex. Civ. App. 444; Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 40 S. W. 849, reversed 40 S. W. 956, 91 Tex. 52.

Instructions improper within rule. An instruction making it negligence per se for a passenger to attempt to alight from a moving train. Houston & T. C. Ry. Co. v. Moss (Tex. Civ. App.) 63 S. W. 894. An instruction, in an action for injuries to a switchman by falling between two cars which had been uncoupled to make a flying switch, that if plaintiff heard one of his fellow servants call that he would uncouple the cars he could not recover, or if a man of ordinary prudence, before attempting to step across the space between the cars, would have looked to see which car was to be uncoupled, and if plaintiff failed to look, and such failure was negligence which caused or contributed to the accident, plaintiff could not recover. Missouri, K. & T. Ry. Co. of Texas v. Stinson, 78 S. W. 986, 34 Tex. Civ. App. 285.

[29] **Ala.** Southern Ry. Co. v. E. L. Kendall & Co., 69 So. 328, 14 Ala. App. 242, certiorari denied Ex parte Southern Ry. Co., 69 So. 1020; Birmingham, E. & B. R. Co. v. Feast, 68 So. 294, 192 Ala. 410; Louisville & N. R. Co. v. Holland, 55 So. 1001, 173 Ala. 675; Alabama Great Southern R. Co. v. McWhorter, 47 So. 84, 156 Ala. 269; Duncan v. St. Louis & S. F. R. Co., 44 So. 418, 152 Ala. 118.

Cal. Wyckoff v. Southern Pac. Co., 87 P. 203, 4 Cal. App. 94.

Colo. Independence Coffee & Spice Co. v. Kalkman, 156 P. 135, 61 Colo. 98.

Ga. City of Moultrie v. Land, 89 S. E. 485, 145 Ga. 479; Southern Ry. Co. v. Sheffield, 56 S. E. 838, 127 Ga. 569.

Ill. Pittsburg, C. C. & St. L. Ry. Co. v. Robson, 68 N. E. 468, 204 Ill. 254; Chicago & E. I. R. Co. v. Rains, 67 N. E. 840, 203 Ill. 417; Toledo, P. & W. Ry. Co. v. Parker, 73 Ill. 526; Strom v. Postal Telegraph-Cable Co., 200 Ill. App. 431, transferring back to Appellate Court from Supreme Court 111 N. E. 555, 271 Ill. 544.

Ind. Pittsburgh, C., C. & St. L. Ry. Co. v. Pence, 113 N. E. 7, 185 Ind. 495.

Md. Hunner v. Stevenson, 89 A. 418, 122 Md. 40.

Mich. Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585.

Mo. Dutcher v. Wabash R. Co., 145 S. W. 63, 241 Mo. 137; Crawford v. Kansas City Stockyards Co., 114 S. W. 1057, 215 Mo. 394; Zeis v. St. Louis Brewing Ass'n, 104 S. W. 99, 205 Mo. 638.

N. Y. Cline v. Northern Cent. R.

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[30] **Ark.** St. Louis & S. F. R. Co. v. Carr, 126 S. W. 850, 94 Ark. 246.

Ill. Eilers v. Peoria Ry. Co., 200 Ill. App. 487; Johnson v. Galesburg & Kewanee Electric Ry. Co., 193 Ill. App. 387.

Ind. Cleveland, C., C. & St. L. Ry. Co. v. Cloud, 110 N. E. 81, 61 Ind. App. 256.

Mass. Rubinovitch v. Boston Elevated Ry. Co., 77 N. E. 895, 192 Mass. 119.

Mo. Woodward v. Wabash R. Co., 133 S. W. 677, 152 Mo. App. 468.

N. Y. Cooke v. Union Ry. Co. of New York City (Sup.) 111 N. Y. S. 708.

Tex. Ft. Worth & D. C. Ry. Co. v. Watkins, 108 S. W. 487, 48 Tex. Civ. App. 568.

Utah. Loofborrow v. Utah Light & Ry. Co., 88 P. 19, 31 Utah, 355.

Vt. Place v. Grand Trunk Ry. Co. in Canada, 71 A. 836, 82 Vt. 42.

[31] City of Chicago v. Kubler, 133 Ill. App. 520; City of Covington v. Whitney, 99 S. W. 337, 30 Ky. Law Rep. 659.

§ 35. Specific applications of rule in criminal cases

In criminal cases the above rule has been applied to instructions with regard to the presence or absence of a motive,[82] to an instruction that

Co., 168 N. Y. S. 303, 181 App. Div. 203; Thomson v. Seaman, 73 N. Y. S. 488, 67 App. Div. 58.

N. C. Sherrill v. Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429.

R. I. Chobanian v. Washburn Wire Co., 80 A. 394, 33 R. I. 289, Ann. Cas. 1913D, 730; Blackwell v. O'Gorman Co., 49 A. 28, 22 R. I. 638.

S. C. Carolina Rice Co. v. West Point Mill Co., 82 S. E. 679, 98 S. C. 476; Bamberg v. South Carolina R. Co., 9 S. C. 61, 30 Am. Rep. 13.

Tex. Gulf, T. & W. Ry. Co. v. Dickey (Civ. App.) 171 S. W. 1097; Pecos & N. T. Ry. Co. v. Welshimer (Civ. App.) 170 S. W. 263; Texas & P. Ry. Co. v. Wiley (Civ. App.) 155 S. W. 356; Texas & P. Ry. Co. v. Tuck (Civ. App.) 116 S. W. 620; Houston & T. C. R. Co. v. Grych, 103 S. W. 703, 46 Tex. Civ. App. 439; Houston & T. C. R. Co. v. O'Donnell (Civ. App.) 90 S. W. 886, judgment reversed 92 S. W. 409, 99 Tex. 636; International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991, rehearing denied 83 S. W. 34 and reversed 87 S. W. 328, 99 Tex. 28; Johnson v. Gulf, C. & S. F. Ry. Co., 2 Tex. Civ. App. 139, 21 S. W. 274.

Instructions improper within rule. An instruction, in an action for the death of a street car passenger falling from a car while riding on the platform when intoxicated, that the company was not justified under the evidence in refusing to accept decedent as a passenger, and it was not the company's duty to place a watch over him, but simply to use such caution for his safety as his conduct or appearance would indicate to a man of ordinary prudence to be necessary under the circumstances, etc. Benson v. Tacoma Ry. & Power Co., 98 P. 605, 51 Wash. 216. A charge, in an action for death of a fireman killed by reason of a derailing switch being left open, "that, if you believe the engine was caused to leave the track on account of defects in the derailing appliances, and those defects were caused by the repair man having taken some pipes, rods, and connections out temporarily to repair them, and said repairs were necessary to maintain the appliance in proper condition, and they were to be kept out only a short time, then you cannot find that such act was an act of negligence." Hines v. Mills (Tex. Civ. App.) 218 S. W. 777. An instruction that employés, operating a hand car by which plaintiff, a coemployé, was struck, were entitled to act on the presumption that plaintiff, who was walking on the track, would leave the same in time to prevent injury, unless he did or said something to indicate that he would not get out of the way. Chicago, R. I. & T. Ry. Co. v. Long, 74 S. W. 59, 32 Tex. Civ. App. 40, writ of error denied 75 S. W. 483, 97 Tex. 69. A charge, in an action against a railroad company, that if the jury should find and believe from the facts that the alleged defective condition of the track, if any, was of a hidden and concealed character, which could not and would not have been discovered by the exercise of ordinary care, then plaintiff cannot recover in this case, and in that event it is immaterial whether the track at the place in question had been properly inspected or not. Galveston, H. & S. A. Ry. Co. v. Roberts (Tex. Civ. App.) 91 S. W. 375. An instruction, in an action for injuries in a crossing accident, that if defendant's employés on the engine did all they could to make plaintiff leave the track and avoid injuring him, and that the means they used were such as a person of ordinary care would have used under the same circumstances, then to find for defendant, though they did not apply the air on the engine or attempt to stop

[82] Reeves v. State, 95 Ala. 31, 11 So. 158; People v. Muhly, 114 P. 1017, 15 Cal. App. 416; Harris v. State, 88 S. E. 121, 17 Ga. App. 723; State v. Johnson, 72 So. 370, 139 La. 829; Commonwealth v. Dower, 4 Allen (Mass.) 297.

the failure to show a motive for the alleged crime is a circumstance in favor of the defendant,[33] to instructions with regard to intent or malice,[34] to an instruction that the defense of alibi should be received with caution,[35] to an instruction that the proof of one single fact inconsistent with the guilt of the defendant will require an acquittal,[36] and an instruction will ordinarily be erroneous, as on the weight of the evidence, if it takes from the jury the right to determine the degree of the crime charged.[37]

it. Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Tex. Civ. App.) 115 S. W. 340. A charge that, though plaintiff was knocked down by defendant's street car, and was seen by the driver in time to stop the car before it ran over him, yet if the emergency was sudden, it must appear that the negligence of the driver in failing to stop the car was more than slight to make him negligent. Costley v. Galveston City R. Co., 70 Tex. 112, 8 S. W. 114.

Instructions not improper within rule. In action for injury from negligence in starting a train which struck plaintiff while he was attempting to place a child aboard, a statement in a charge that, if train had started in the usual course without negligence, plaintiff could not recover, in view of a charge that, if train started without defendant's negligence, there could be no recovery, was not an expression of opinion on facts as to what would constitute defendant's negligence, but was fairly adjusted to issue, since jury might infer that, if train stopped, as claimed by plaintiff, it was started in usual course. Howard v. Georgia Railroad (Ga. App.) 104 S. E. 26.

[33] **Ark.** Ince v. State, 88 S. W. 818, 77 Ark. 418.

Cal. People v. Wilkins, 111 P. 612, 158 Cal. 530; People v. McGee, 111 P. 264, 14 Cal. App. 99; People v. Glaze, 72 P. 965, 139 Cal. 154.

Mont. State v. Lu Sing, 85 P. 521, 34 Mont. 31.

Neb. Clough v. State, 7 Neb. 320.

[34] **Cal.** People v. Vereneseneckockockhoff, 58 P. 156, 129 Cal. 497; People v. Johnson, 106 Cal. 289, 39 P. 622.

Fla. McNair v. State, 55 So. 401, 61 Fla. 35.

Ga. Cosper v. State, 79 S. E. 94, 13 Ga. App. 301.

Ky. Watkins v. Commonwealth, 142 S. W. 1035, 146 Ky. 449, 38 L. R. A. (N. S.) 1052; Burks v. Commonwealth, 7 Ky. Law Rep. (abstract) 826; Crittenden v. Commonwealth, 3 Ky. Law Rep. (abstract) 56.

Neb. Carson v. State, 114 N. W. 938, 80 Neb. 619.

N. Y. People v. Webster, 59 Hun, 398, 13 N. Y. S. 414; People v. Utter, 44 Barb. 170.

Tex. Thomas v. State, 125 S. W. 35, 57 Tex. Cr. R. 452; White v. State, 79 S. W. 523, 45 Tex. Cr. R. 602.

W. Va. State v. Hertzog, 46 S. E. 792, 55 W. Va. 74.

[35] Spencer v. State, 50 Ala. 124; State v. Smalls, 82 S. E. 421, 98 S. C. 297.

In Iowa it is permissible for the trial judge to disparage, within limits, a defense of alibi. State v. Menilla, 158 N. W. 645, 177 Iowa, 283.

[36] Johnson v. State, 69 So. 396, 13 Ala. App. 140, certiorari denied Ex parte State, 69 So. 1020, 193 Ala. 682; Ex parte Davis, 63 So. 1010, 184 Ala. 26, denying certiorari Davis v. State, 62 So. 1027, 8 Ala. App. 147.

[37] **Ala.** Burkett v. State, 45 So. 682, 154 Ala. 19; Thomas v. State, 43 So. 371, 150 Ala. 31; Washington v. State, 28 So. 78, 125 Ala. 40.

Ariz. Vincent v. State, 145 P. 241, 16 Ariz. 297.

Cal. People v. Mahatch, 82 P. 779, 148 Cal. 200.

Ill. Lynn v. People, 48 N. E. 964, 170 Ill. 527.

Iowa. State v. Cafer, 69 N. W. 880, 100 Iowa, 501.

Ky. Speaks v. Commonwealth, 149 S. W. 850, 149 Ky. 393; Burgess v. Commonwealth, 11 S. W. 88.

Me. State v. Oakes, 50 A. 28, 95 Me. 369.

The question of the insanity of a defendant in a criminal case is ordinarily a question for the jury,[88] as all symptoms and all tests of

N. C. State v. Barrett, 43 S. E. 832, 132 N. C. 1005.

Ohio. Lindsay v. State, 24 Ohio Cir. Ct. R. 1.

Okl. Fooshee v. State, 108 P. 554, 3 Okl. Cr. 666; Lawson v. Territory, 56 P. 698, 8 Okl. 1.

Pa. Commonwealth v. Marcinko, 89 A. 457, 242 Pa. 388; Commonwealth v. Fellows, 61 A. 922, 212 Pa. 297; Commonwealth v. Kovovic, 58 A. 857, 209 Pa. 465.

Tex. Gatlin v. State (Cr. App.) 217 S. W. 698; Bibb v. State, 205 S. W. 135, 83 Tex. Cr. R. 616; French v. State, 117 S. W. 848, 55 Tex. Cr. R. 538; Brown v. State (Cr. App.) 53 S. W. 639.

Va. Gwatkin v. Commonwealth, 9 Leigh, 678, 33 Am. Dec. 264.

Instructions not improper within rule. On a murder trial, an instruction that the judge deemed it his duty to charge on the law of voluntary manslaughter, and a subsequent statement that he would later instruct in regard to the grades of voluntary manslaughter, if necessary, did not amount to an expression of opinion that a verdict of manslaughter should be rendered, though such other grades of voluntary manslaughter were not submitted. Gunn v. State, 99 S. E. 62, 23 Ga. App. 545. An instruction that if the jury believed from the evidence, beyond a reasonable doubt, that defendant, with malice aforethought, express or implied, inflicted on deceased a mortal wound in the manner charged, not in self-defense, as the same was defined in the instructions, and not on the sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, and that deceased thereafter died from such wound in the manner charged in the indictment, the jury should find defendant guilty of murder. Carle v. People, 66 N. E. 32, 200 Ill. 494, 93 Am. St. Rep. 208. An instruction that, if the jury believe that a shooting occurred as described by accused without any intent to kill, they should acquit, and, if not, they should consider whether accused shot with intent to kill, and which then explain-

[88] **Ala.** Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193.

Ill. Myatt v. Walker, 44 Ill. 485.

Ind. Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; McDougal v. State, 88 Ind. 24.

Iowa. State v. Wegener, 162 N. W. 1040, 180 Iowa, 102; State v. Grendahl, 109 N. W. 121, 131 Iowa, 602.

Ky. Davidson v. Commonwealth, 188 S. W. 631, 171 Ky. 488.

La. State v. McIntosh, 68 So. 104, 136 La. 1000.

Mo. State v. Holme, 54 Mo. 153.

Mont. State v. Howard, 77 P. 50, 30 Mont. 518; State v. Keerl, 75 P. 362, 29 Mont. 508, 101 Am. St. Rep. 579.

Neb. Philbrick v. State, 179 N. W. 398; Larson v. State, 137 N. W. 894, 92 Neb. 24.

N. H. State v. Jones, 50 N. H. 369, 9 Am. Rep. 242.

Okl. Bell v. State (Cr. App.) 168 P. 827; Baker v. State, 130 P. 524, 9 Okl. Cr. 47; Litchfield v. State, 126 P. 707, 8 Okl. Cr. 164, 45 L. R. A. (N. S.) 153; Adair v. State, 118 P. 416, 6 Okl. Cr. 284, 44 L. R. A. (N. S.) 119.

S. C. State v. Stark, 1 Strob. 479.

Tex. Harkness v. State (Cr. App.) 28 S. W. 476.

Temporary insanity. An instruction, in a prosecution for homicide, that if defendant's mind was measurably impaired by a blow on his head, and, while ordinarily sane, his mind would become so disordered under excitement as to cause him to lose power to distinguish between right and wrong, and was laboring under such disorder at the time of firing the fatal shot, and magnified through a delusion the danger to which he was exposed, and without malice, and with a perfectly sincere belief that he was in immediate danger of death at the hands of deceased, fired the fatal shot, he should be acquitted, was properly refused as on the weight of the evidence. Tidwell v. State, 36 So. 393, 84 Miss. 475.

mental disease are purely matters of fact.[39] Thus matters of science in regard to insane delusions, and the possibility of one being possessed of a monomania, such as to excuse him from punishment for the commission of a crime, are matters of fact,[40] and the court should not charge as a matter of law that one possessed of an insane delusion is incapable of reasoning upon that subject.[41] So whether a deaf mute is mentally incapable of committing a crime is, on conflicting evidence, peculiarly a question for the jury,[42] and it is for the jury to say whether the accused was so far intoxicated as to be unable to form a guilty intent.[43]

ed to the jury what constituted murder in the first degree, second degree, and voluntary manslaughter, and added that there would seem to be no middle ground which would reduce the case from second-degree murder to manslaughter, is not objectionable as coercing the jury to find a verdict of murder by preventing them from considering the question of manslaughter. State v. Pulley, 82 A. 857, 82 N. J. Law, 579. A charge that it is possible, under the evidence, for the jury to find the defendants guilty of an assault with intent to do bodily harm, or to find the defendants guilty of a simple assault. State v. Montgomery, 83 N. W. 873, 9 N. D. 405. Instruction that the theory of the commonwealth is that the homicide was a willful, premeditated killing, followed by instructions on the subject and a charge that the jury should fix the degree. Commonwealth v. Harris, 85 A. 875, 237 Pa. 597. An instruction that evidence of insanity could not reduce the degree of the murder; that, if defendant committed the murder willfully, deliberately, and premeditately, he was guilty of murder in the first degree, unless found to have been in an irresponsible state of mind, in which case he should be acquitted. Commonwealth v. Hollinger, 42 A. 548, 190 Pa. 155. A charge, in a homicide case, that if the jury are satisfied beyond a reasonable doubt that accused is guilty of murder, but have a reasonable doubt as to the degree, they will give him the benefit of the doubt and convict of murder in the second degree, is not an indication that the court believes that accused is guilty of murder in the second degree. Tinsley v. State, 106 S. W. 347, 52 Tex. Cr. R. 91. An instruction that, if accused unlawfully and intentionally hit deceased in the head with a pistol and killed him, though he did not intend to kill, yet he is prima facie guilty of murder in the second degree, is not binding on the jury to find that degree of murder, and does not prevent them from finding voluntary manslaughter or self-defense. State v. Stover, 63 S. E. 315, 64 W. Va. 668.

Expressing disbelief in guilt of higher grade of offense. An instruction that the court is satisfied that the defendant is not guilty of anything more than a specified grade of the offense charged does not express the opinion that the state has established the commission by defendant of the specified degree of the offense of which he is accused. State v. Little, 6 Nev. 281.

[39] Smith v. State, 62 So. 184, 182 Ala. 38; Porter v. State, 33 So. 694, 135 Ala. 51; State v, Jones, 50 N. H. 369, 9 Am. Rep. 242; Oborn v. State, 126 N. W. 737, 143 Wis. 249, 31 L. R. A. (N. S.) 966; Steward v. State, 102 N. W. 1079, 124 Wis. 623.

[40] People v. Hubert, 51 P. 329, 119 Cal. 216, 63 Am. St. Rep. 72.

[41] People v. Hubert, 51 P. 329, 119 Cal. 216, 63 Am. St. Rep. 72.

[42] Belcher v. Commonwealth, 177 S. W. 455, 165 Ky. 649, Ann. Cas. 1917B, 238.

[43] Keeton v. Commonwealth, 92 Ky. 522, 18 S. W. 359; Commonwealth v. Hagenlock, 140 Mass. 125, 3 N. E. 36.

C. Statement by the Court of the Contentions of the Parties

§ 36. Rule that such a statement is within the province of the court

An instruction stating the contentions of the parties, without expressing any opinion as to their justice or legality, is within the province of the court, and is everywhere held not to be objectionable.[44] Such an instruction, if it sets out the respective positions of the parties fairly, is not faulty as an intimation of an opinion as to what has been proved,[45] and does not consttute a charge on the facts or a comment on the evidence within the prohibition stated supra.[46] This rule ap-

[44] **Conn.** Temple v. Gilbert, 85 A. 380, 86 Conn. 335; Sackett v. Carroll, 68 A. 442, 80 Conn. 374; Dexter v. McCready, 54 Conn. 171, 5 A. 855.

Del. Richards v. Richman, 64 A. 238, 5 Pennewill, 558, 562.

Ga. Brookman v. Rennolds, 98 S. E. 543, 148 Ga. 721; De Graffenried v. Menard, 30 S. E. 560, 103 Ga. 651; Weekes v. Cottingham, 58 Ga. 559.

Iowa. Hawley v. Chicago, B. & Q. R. Co., 71 Iowa, 717, 29 N. W. 787; Reid v. Mason, 14 Iowa, 541.

Mich. Rogers v. Ferris, 64 N. W. 1048, 107 Mich. 126.

Mo. Price v. Metropolitan St. Ry. Co., 119 S. W. 932, 220 Mo. 435, 132 Am. St. Rep. 588.

N. Y. Polykranas v. Krausz, 77 N. Y. S. 46, 73 App. Div. 583; West v. Banigan, 64 N. Y. S. 884, 51 App. Div. 328, motion to dismiss appeal denied 63 N. E. 1123, 171 N. Y. 632, and affirmed 65 N. E. 1123, 172 N. Y. 622.

N. C. Bradley v. Camp Mfg. Co., 98 S. E. 318, 177 N. C. 153; Patillo v. Same, 98 S. E. 323, 177 N. C. 156.

Pa. Gilchrist v. Hartley, 47 A. 972, 198 Pa. 132; Avery v. Layton, 119 Pa. 604, 13 A. 528.

Tex. Atchison, T. & S. F. Ry. Co. v. Cuniffe (Civ. App.) 57 S. W. 692.

Wis. McCann v. Ullman, 85 N. W. 493, 109 Wis. 574.

[45] Brewer v. Barnett Nat. Bank, 85 S. E. 928, 16 Ga. App. 593; Seaboard Air Line Ry. Co. v. Hunt, 73 S. E. 588, 10 Ga. App. 273; Chambers v. Walker, 80 Ga. 642, 6 S. E. 165; Walker v. Southern Bell Telephone & Telegraph Co., 75 S. E. 1024, 92 S. C. 188.

[46] **Cal.** Hart v. Fresno Traction Co., 167 P. 885, 175 Cal. 489.

Ga. American Trust & Banking Co. v. Harris, 89 S. E. 1095, 18 Ga. App. 610.

Ind. Public Utilities Co. v. Handorf, 112 N. E. 775, 185 Ind. 254.

Me. McLellan v. Wheeler, 70 Me. 285.

Mass. Hadlock v. Brooks, 59 N. E. 1009, 178 Mass. 425.

N. C. Fourth Nat. Bank of Fayetteville v. Wilson, 84 S. E. 866, 168 N. C. 557.

S. C. Holcombe v. Spartanburg Ry., Gas & Electric Co., 78 S. E. 231, 94 S. C. 435; Berry v. City of Greenville, 65 S. E. 1030, 84 S. C. 122, 19 Ann. Cas. 978; Rice v. Lockhart Mills, 55 S. E. 160, 75 S. C. 150; Bryce v. Cayce, 40 S. E. 948, 62 S. C. 546; Westbury v. Simmons, 35 S. E. 764, 57 S. C. 467.

Tenn. Nashville Ry. v. Norman, 67 S. W. 479, 108 Tenn. 324.

Tex. Jones v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 157 S. W. 213; Davis v. Mills, 133 S. W. 1064, 63 Tex. Civ. App. 359; Dudley v. Strain (Civ. App.) 130 S. W. 778; Gulf, C. & S. F. Ry. Co. v. Shults, 129 S. W. 845, 61 Tex. Civ. App. 93.

Wash. Drumheller v. American Surety Co., 71 P. 25, 30 Wash. 530.

Instructions held proper within rule. An instruction in an action on an account for goods sold and delivered, that the only issue in the case was who made the contract, to whom did plaintiff intend to sell, and who intended to buy. C. B. Crosland Co. v. Pearson, 68 S. E. 625, 86 S. C. 313. A charge in an action for injury to land that the plaintiff seeks to recover from the defendant damages in a specific sum "resulting from

plies to the statement of the claims of the prosecution and the defense in a criminal case.[47] A party is entitled to have his theory of the case presented to the jury in connection with the very facts on which he relies to support it,[48] and it is the province of the court, as shown in a subsequent chapter, to determine and define the issues, and the duty of the jury to accept the interpretation of the pleadings made by the court.[49]

Under the above rule an instruction is proper which limits the amount of the recovery to the amount claimed in the petition or complaint,[50] and an instruction that, if the evidence warrants, a plaintiff may recover in an amount not exceeding the sum claimed in the complaint, is not open to the objection of intimating that there is evidence sufficient to authorize a finding for the amount so alleged.[51] It is held, however, in some jurisdictions, that it is error for the court to read to the jury, in a personal injury action, the averments of damages in the pleading of the plaintiff, on the ground that it tends to get figures and amounts into the minds of the jurors independent of the evidence.[52]

§ 37. Limitations of rule

As indicated by the foregoing statement of the general rule, where the trial judge undertakes to express the contentions of the parties, he should do so in a manner not likely to weaken their force with the jury,[53] and an instruction which, by reason of not fairly stating the position of one party or the other, amounts to a practical direction of a verdict for the opposite party, is of course erroneous.[54]

the negligence of defendant in the construction and maintenance of its railroad track over and across his premises by failure to put in and maintain the necessary culverts or sluices," and that the defendant answered by general denial and the statute of limitation of two years and contributory negligence. International & G. N. R. Co. v. Glover (Tex. Civ. App.) 84 S. W. 604.

[47] Hawes v. State, 88 Ala. 37, 7 So. 302; State v. Smith, 65 Conn. 283, 31 A. 206; Linder v. State, 86 S. E. 741, 17 Ga. App. 310; Hill v. State, 78 S. E. 1013, 13 Ga. App. 170; Pritchett v. State, 92 Ga. 65, 18 S. E. 536.

[48] El Paso Electric Ry. Co. v. Ruckman, 107 S. W. 1158, 49 Tex. Civ. App. 45.

[49] Stevens v. Maxwell, 70 P. 873, 65 Kan. 835; Coleman v. Drane, 116 Mo. 387, 22 S. W. 801.

[50] Oglesby v. Missouri Pac. Ry. Co., 150 Mo. 137, 37 S. W. 829, reversed on rehearing 51 S. W. 758, 150 Mo. 137.

[51] Cole v. Seattle, R. & S. Ry. Co., 85 P. 3, 42 Wash. 462.

[52] Hollinger v. York Rys. Co., 74 A. 344, 225 Pa. 419, 17 Ann. Cas. 571; Reese v. Hershey, 29 A. 907, 163 Pa. 253, 43 Am. St. Rep. 795.

[53] Edmondson v. State, 57 S. E. 947, 1 Ga. App. 116.

[54] Wells v. Cumberland Telephone & Telegraph Co., 198 S. W. 721, 178 Ky. 261.

D. STATEMENT AND REVIEW OF EVIDENCE BY COURT

Duty of court and sufficiency of summary, see post, §§ 281, 282.

§ 38. Rule that court may review the evidence

The general rule is that the trial judge may, following the practice at common law, both in civil [55] and in criminal cases,[56] state the testimony, or summarize the facts in evidence, for the purpose of aiding the jury in comprehending the issues and applying the instructions in matters of law.[57]

§ 39. Effect of constitutional or statutory provisions

The restrictive provisions referred to supra [58] have not had the effect in most jurisdictions of taking away such power of the court to state the testimony or sum up the evidence.[59] In Massachusetts such a statutory provision is expressly accompanied by a declaration that judges may state the evidence and the law.[60] But in South Carolina, although under a former constitutional provision forbidding judges to charge on the facts, courts could state the testimony,[61] the rule is otherwise under the present Constitution of 1895, providing that judges shall not charge juries in respect to matters of fact, but shall declare the law;[62] and in Arkansas there is a constitutional provision forbidding judges from summing up the evidence as under the practice at common law.[63]

[55] District of Columbia v. Robinson, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440, affirming judgment 14 App. D. C. 512; Lazenby v. Citizens' Bank, 92 S. E. 391, 20 Ga. App. 53; Dulligan v. Barber Asphalt Pav. Co., 87 N. E. 567, 201 Mass. 227; Eddy v. Gray, 4 Allen, 435; Massey v. Wallace, 32 S. C. 149, 10 S. E. 937.

[56] Driskill v. State, 7 Ind. 338; People v. Clarkson, 22 N. W. 258, 56 Mich. 164; Mimms v. State, 10 Ohio St. 221.

In Michigan the rule is that it is not error for the court in a criminal case to recite the conceded facts in his charge to the jury, and to refuse an instruction that the ultimate determination of such questions rests with them, and that they are not absolutely bound by the opinion of the court thereon. People v. Hawkins, 64 N. W. 736, 106 Mich. 479.

[57] Moseley v. Washburn, 167 Mass. 345, 45 N. E. 753.

[58] Ante, §§ 5, 31.

[59] Shiels v. Stark, 14 Ga. 429; Hamlin v. Treat, 87 Me. 310, 32 A. 909; Kelley v. City of Boston, 87 N. E. 494, 201 Mass. 86.

[60] Plummer v. Boston Elevated Ry. Co., 84 N. E. 849, 196 Mass. 499; Whitney v. Wellesley & B. St. Ry. Co., 84 N. E. 95, 197 Mass. 495.

[61] State v. Johnson, 44 S. E. 58, 66 S. C. 23; Hiott v. Pierson, 35 S. C. 611, 14 S. E. 853; Walker v. Laney, 27 S. C. 150, 3 S. E. 63; State v. Jones, 21 S. C. 596.

[62] Ballentine v. Hammond, 46 S. E. 1000, 68 S. C. 153; Burnett v. Crawford, 27 S. E. 645, 50 S. C. 161; Norris v. Clinkscales, 25 S. E. 797, 47 S. C. 488.

[63] Fitzpatrick v. State, 87 Ark. 238.

§ 40. Manner of exercising power

Where the court exercises its power to recapitulate the evidence, it should be done in such manner as not to influence the verdict or to intimate the opinion of the court as to the truth of the evidence,[64] and in some jurisdictions the jury must be informed, after such a statement of the evidence, that they are the exclusive judges of all questions of fact.[65] Where, however, an unbiased analytical statement of the testimony and the law distinctly indicate the party entitled to prevail, it is held that the defeated party may not complain of such a statement or of the adverse verdict.[66]

E. Reference to, or Singling Out of, Particular Parts of the Evidence, and Comment Thereon

Effect of singling out particular facts as misleading, by giving undue prominence to them, see post, §§ 431–436.

§ 41. Confining jury to part of evidence

Instructions should be based upon the whole evidence,[67] and are an infringement of the province of the jury, if they have a tendency to restrict them in their deliberations to a part of the evidence, or to isolated facts to the exclusion of other facts in evidence,[68] and such instructions are properly refused.[69]

[64] **Ala.** Andrews v. State, 48 So. 858, 159 Ala. 14.

Colo. Rose v. Otis, 5 Colo. App. 472, 39 P. 77.

Ind. McCorkle v. Simpson, 42 Ind. 453.

La. Hewes v. Barron, 7 Mart. (N. S.) 134.

Ohio. Morgan v. State, 48 Ohio St. 371, 27 N. E. 710.

S. C. Richards v. Munro, 30 S. C. 284, 9 S. E. 108.

Instructions sufficient within rule. Where, in order to make clear to the jury the questions they have to determine, it is necessary for the court to present the testimony by way of summing it up, but he admonishes the jury, from time to time, during the charge, that all questions of fact must be solved by them, and that he could not legally do so, the manner of stating the testimony will not be considered error. Moore v. Columbia & G. R. Co., 38 S. C. 1, 16 S. E. 781.

[65] Gately v. Campbell, 57 P. 567, 124 Cal. 520; Horne v. State, 1 Kan. 42, 81 Am. Dec. 499.

[66] Whitney v. Wellesley & B. St. Ry. Co., 84 N. E. 95, 197 Mass. 495.

[67] Barker v. State, 48 Ind. 163.

[68] Perry v. Same, 78 Ala. 22; Carter v. Same, 33 Ala. 429; Holmes v. State, 23 Ala. 17; Pound v. State, 43 Ga. 88; Evans v. State (Miss.) 4 So. 344.

Instructions improper within rule. On a prosecution for homicide, where the facts that deceased had followed defendant and had whistled at his horse were but two of the facts which led up to the main facts of the trouble, a charge on self-defense, that specially mentioned those facts as not justifying defendant in taking the life of deceased, is erroneous, under the statute expressly prohibiting the court from giving a charge on the weight of testimony. Craiger v. State, 88 S. W. 208, 48 Tex. Cr. R. 500. A charge singling out one or more facts in the evidence and limiting motive or interest thereby is on the weight of the evidence. Ballard v. State, 160 S. W. 716, 71 Tex. Cr. R. 587.

[69] Murray v. State, 69 So. 354, 13 Ala. App. 175; Thompson v. State,

§ 42. Reciting parts of testimony and construing testimony of particular witnesses

The rule is, in some jurisdictions, that the trial judge can tell the jury that certain testimony has been given, or state that a particular witness has testified to certain facts;[70] the statement by the judge of his recollection of the testimony not being regarded as an expression of opinion on an issue of fact,[71] and the extent to which he shall go in stating portions of the evidence being committed to his discretion.[72] But in other jurisdictions it is not proper for the court to assist the jury in a recollection of whether certain testimony was presented.[73]

In Georgia there are decisions that a statement by the court in a criminal case to the jury as to what a witness has testified, where such testimony is material and prejudicial to accused, is reversible error,[74] on the theory that such a statement is in effect an expression of opinion as to what has been proved;[75] but there are other decisions in this jurisdiction that such a statement is permissible if the judge does not intimate any opinion as to the weight to be attached to the testimony recited or that it is true.[76]

In Indiana it is error to state that particular witnesses have testified to certain facts,[77] unless the jury is at the same time informed that they are the exclusive judges of the facts, in which case such a statement will be proper.[78] In one jurisdiction there is a constitutional provision which is construed to forbid such a recital of the testimony of particular witnesses.[79]

106 Ala. 67, 17 So. 512; State v. Summers, 92 S. E. 328, 173 N. C. 775.

[70] Folmar v. Siler, 31 So. 719, 132 Ala. 297; Bruce v. Western Pipe & Steel Co., 169 P. 660, 177 Cal. 25; State v. Freeman, 100 N. C. 429, 5 S. E. 921; Hannon v. State, 70 Wis. 448, 36 N. W. 1.

In Nevada, the district judge, upon the trial of a criminal case, has the right to state to the jury, upon their request, the testimony of any witness. State v. Smith, 10 Nev. 106.

Statement where evidence conflicting. Where, in an action against a railroad company for assault by the conductor, the evidence was conflicting as to whether plaintiff actually struck the conductor, or only attempted to do so, at the time the conductor assaulted him, the court may instruct in submitting the case that "it appears in this case that the plaintiff either struck or attempted to strike the conductor." Louisville Ry. Co. v. Frick, 165 S. W. 649, 158 Ky. 450.

[71] Coombs v. Mason, 54 A. 728, 97 Me. 270.

[72] Shaw v. Tompson, 105 Mass. 345.

[73] (Gen. Sess. 1898) State v. Foster, 40 A. 939, 1 Pennewill, 289, affirmed (Sup. 1899) 43 A. 265, 2 Pennewill, 111.

[74] Edwards v. State, 60 S. E. 1033, 4 Ga. App. 167.

[75] Nelson v. State, 52 S. E. 20, 124 Ga. 8.

[76] Saffold v. State, 75 S. E. 338, 11 Ga. App. 329; Tift v. Jones, 77 Ga. 181, 3 S. E. 399.

[77] Killian v. Eigenmann, 57 Ind. 480.

[78] Jones v. State, 53 Ind. 235.

[79] State v. Stello, 27 S. E. 659, 49

It is not for the court to interpret the meaning of the testimony of a particular witness,[80] although it is held that a manifestly correct verdict will not be disturbed because of such an interpretation.[81]

§ 43. Instructions as to weight of particular evidence

In accordance with principles already stated, the court should not, either in civil or criminal cases, single out particular facts or parts of the evidence and charge as to their weight.[82] The province

S. C. 488; State v. Atkins, 27 S. E. 484, 49 S. C. 481.

The rule was otherwise under a former Constitution. Bradley v. Drayton, 26 S. E. 613, 48 S. C. 234; Davis v. Elmore, 40 S. C. 533, 19 S. E. 204; State v. Ezzard, 40 S. C. 312, 18 S. E. 1025; State v. Glover, 27 S. C. 602, 4 S. E. 564; State v. Moorman, 27 S. C. 22, 2 S. E. 621.

[80] Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Simpson v. McBeth, 4 Watts (Pa.) 409; Drevis v. Woods, 71 Wis. 329, 37 N. W. 256.

[81] Duff v. Snider, 54 Miss. 245.

[82] **Ala.** Thomas v. State, 68 So. 799, 13 Ala. App. 246, certiorari denied Ex parte Thomas, 69 So. 1020, 193 Ala. 682.

Cal. People v. Grimes, 64 P. 101, 132 Cal. 30.

Ill. Atterbury v. Chicago, I. & St. L. Short Line Ry. Co., 134 Ill. App. 330.

Ind. Cunningham v. State, 65 Ind. 377.

La. State v. Watkins, 31 So. 10, 106 La. 380.

Mich. Grand Rapids & I. R. Co. v. Judson, 34 Mich. 506.

N. Y. People v. O'Neil, 48 Hun, 36, affirmed in 109 N. Y. 251, 16 N. E. 68.

Okl. Bilby v. Owen, 181 P. 724.

Utah. Valiotis v. Utah-Apex Mining Co., 184 P. 802.

Instructions held improper within rule. A charge to acquit if there is a single fact, proved by the preponderance of the evidence, which is inconsistent with defendant's guilt. Walker v. State, 23 So. 149, 117 Ala. 42. A charge, in an action against connecting carriers for injuries to cattle in transit, where the question of when the cattle were received from the initial carrier by the next connecting carrier was one of fact under all the circumstances, that executing the contract of shipment by the connecting carrier would not constitute a receipt of the cattle. Texas & P. Ry. Co. v. Scoggin & Brown, 90 S. W. 521, 40 Tex. Civ. App. 526. A charge, on a trial for murder committed with a pistol, that the fact, if it was a fact, that accused had a pistol, would not alone authorize the jury to find that he was at fault in bringing on the difficulty. Hays v. State, 46 So. 471, 155 Ala. 40. A charge, which states the things done by accused in approaching decedent, which would not justify decedent in defending himself. Cooper v. State, 138 S. W. 826, 123 Tenn. 37. A charge, in a homicide case, that, as a matter of law, the stopping by the accused and securing a dog at a certain place was not evidence against him that he was not free from fault in bringing on the difficulty, and that the evidence was such that, under the law, accused was free from fault in causing the trouble. Smith v. State, 51 So. 632, 165 Ala. 74. Instructions, in a prosecution of a mayor for failure to disperse riotous assemblage, that testimony to the effect that defendant was advised of other acts of violence than those charged in the indictment would not be sufficient to charge him with knowledge of the purpose of the assemblage. Wright v. State, 201 S. W. 1107, 133 Ark. 16. An instruction on a prosecution for carrying concealed weapons, in which the evidence showed defendant's casual employment at a certain saloon, to the effect that if he worked at all

of the jury is invaded by the court whenever it instructs that any particular evidence is or is not entitled to receive weight or consideration from them.[83] It is therefore error to specify certain evidence as being strong, or weighty, or as of such a character that it should receive great consideration by the jury,[84] or to depreciate particular evidence, or characterize it as of little value or weight,[85] and such instructions are properly refused.[86]

Instructions withdrawing from the consideration of the jury, or tending entirely to discredit or render of nó effect, certain facts or testimony properly admitted in evidence and material to the issue, are erroneous, as on the weight of the evidence,[87] and a requested

times at the saloon when he could get time from other business, and had his clothes there, or a part of them, and that such place was his headquarters, and that he worked there almost every day, it would be his place of business. Hutchins v. State, 101 S. W. 795, 51 Tex. Cr. R. 339.

Instructions held not objectionable within rule. An instruction that the fact of prosecutrix having made complaint soon after the alleged assault was evidence, if proven, but the details of her complaint could not be gone into. Hamilton v. State, 84 S. E. 583, 143 Ga. 265. An instruction that it is not necessary that the prosecuting witness testify that a false pretense induced him to act as he did, but such fact may be proved by the testimony of other witnesses, and from all the facts in the case. People v. Bowman, 142 P. 495, 24 Cal. App. 781.

Effect of marks and brands as evidence of ownership of animals. The court, in submitting a case in which the effect of marks or brands of animals is involved, should not single out any particular mark or brand and tell the jury what its effect as evidence is, but should submit to them all the marks and brands, whether recorded or not, to be considered in connection with all the other evidence of ownership and of identification, to be given such weight as in their judgment they deem them entitled to. Smith v. Cummings, 117 P. 38, 39 Utah, 306, Ann. Cas. 1918E, 129.

[83] Kauffman v. Maier, 29 P. 481, 94 Cal. 269, 18 L. R. A. 124.

[84] **Ark.** Jenkins v. Tobin, 31 Ark. 306.

Cal. People v. Ah Sing, 59 Cal. 400.

Fla. Williams v. Dickenson, 28 Fla. 90, 9 So. 847.

Ga. Shingler v. Bailey, 70 S. E. 563, 135 Ga. 666; Bourquin v. Bourquin, 35 S. E. 710, 110 Ga. 440.

Ill. Kozlowski v. City of Chicago, 113 Ill. App. 513.

Iowa. State v. Kehr, 110 N. W. 149, 133 Iowa, 35.

Tenn. Boyer v. State, 93 Tenn. 216, 23 S. W. 971.

[85] Strickland v. State, 69 S. E. 313, 8 Ga. App. 421; Wannack v. City of Macon, 53 Ga. 162; Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46; State v. Hundley, 46 Mo. 414.

[86] **Ala.** Spivey v. State, 61 So. 607, 7 Ala. App. 36; Bonner v. State, 107 Ala. 97, 18 So. 226; Davenport v. State, 85 Ala. 336, 5 So. 152; Steele v. State, 83 Ala. 20, 3 So. 547.

Ga. Gardner v. Lamback, 47 Ga. 133.

Neb. Smith v. Meyers, 71 N. W. 1006, 52 Neb. 70.

N. Y. People v. Kemmler, 119 N. Y. 580, 24 N. E. 9.

Pa. Bickley's Adm'r v. Biddle, 33 Pa. 276.

[87] **Ala.** Louisville & N. R. Co. v. Lancaster, 25 So. 733, 121 Ala. 471; Anderson v. Timberlake, 22 So. 431, 114 Ala. 377, 62 Am. St. Rep. 105.

Ill. Dornfeld-Kunert Co. v. Volkmann, 138 Ill. App. 421.

Ind. Jones v. State, 64 Ind. 473.

instruction, which, in seeking to explain the meaning of certain words or phrases, overlooks or ignores all the proof offered by the other side, and calls the jury's attention only to the strong features of the evidence in favor of the party making such request, should be refused as a charge on the weight of the testimony.[88] An instruction in a criminal case, under which the jury may look alone to, and base a conviction upon, the isolated testimony of the prosecuting witness, without reference to the other evidence in the case, is erroneous.[89]

Miss. Leverett v. State, 73 So. 273, 112 Miss. 394.

Neb. Zimmermann v. Kearney County Bank, 78 N. W. 366, 57 Neb. 800, reversed on rehearing Zimmerman v. Same, 80 N. W. 54, 59 Neb. 23.

N. Y. Norden v. Duke, 113 N. Y. S. 494, 129 App. Div. 158, judgment affirmed 92 N. E. 1094, 198 N. Y. 562.

Tex. McCullough Hardware Co. v. Burdett (Civ. App.) 142 S. W. 612; Orient Ins. Co. v. Wingfield, 108 S. W. 788, 49 Tex. Civ. App. 202; Clausen v. Jones, 45 S. W. 183, 18 Tex. Civ. App. 376.

Vt. Taplin & Rowell v. Marcy, 71 A. 72, 81 Vt. 428.

Illustrations of instructions improper within rule. A charge that the defendant cannot be convicted if the jury disbelieves the evidence of a certain witness, where there was evidence other than the testimony of that witness upon which they could convict. Tennison v. State, 62 So. 780, 183 Ala. 1. A charge, in an action against a railroad company for injury to live stock en route, which assumed that the written contract of shipment should be considered in determining the measure of liability, though there was evidence tending to show its invalidity. Galveston, H. & S. A. Ry. Co. v. Sparks (Tex. Civ. App.) 162 S. W. 943. A charge, in an action against a railroad to recover damages for loss of weight and depreciation in market value of plaintiff's cattle, alleged to have resulted from defendant's negligence in failing to furnish cars for shipping them within a reasonable time after demand therefor, directing the jury to ignore the rush of business and scarcity of cars, set up in defense, in determining whether or not such cars were furnished within a reasonable time; the action being based on negligence, and not upon the statute. Texas & P. Ry. Co. v. Nelson, 86 S. W. 616, 38 Tex. Civ. App. 605. An instruction, in a suit for injuries caused by falling into a pit in a store basement, in which the evidence showed the degree of light was so small as to prevent an ordinarily prudent person discovering the pit, that there was no evidence to sustain the charge that defendant left the basement without light was erroneous, as withdrawing from consideration evidence of negligence charged arising from failure to sufficiently light the basement. Glaser v. Rothschild, 120 S. W. 1, 221, Mo. 180, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576, affirming judgment 80 S. W. 332, 106 Mo. App. 418. A charge, in an action for the negligent death of a pedestrian on the track at a passway, in which the evidence showed that the company's agents at a station knew that the public used the passway, that decedent was not a licensee on the track unless the track at that place was habitually used by pedestrians as a common pathway for such a length of time that the employés of the company knew, or ought to have known, of such common use, etc.; such charge negativing the giving of any effect to the fact that the agents knew that the public use of the passway had been maintained. International & G. N. R. Co. v. Howell (Tex. Civ. App.) 105 S. W. 560.

[88] Behr v. Connecticut Mut. Life Ins. Co. (C. C.) 4 Fed. 357, 2 Flip. 692.

[89] Tipton v. State, 30 Tex. App. 530, 17 S. W. 1097.

It is error to state that the testimony of a particular witness is at variance with other testimony in the case,[90] or to single out a portion of the testimony, which may have some probative force, and minimize its effect by charging that it is insufficient, standing alone, to prove the fact in issue,[91] or to instruct that a certain inference may or may not be drawn from a particular fact or condition, when such inference must be drawn from all the facts and circumstances in the case relating thereto.[92] It has been held, however, that it is not improper for a judge to analyze the testimony of a witness, and direct attention to dubious incidents of it, although the language of the charge may be susceptible of an inference, unfavorable to such testimony.[93]

It is error, where the testimony is conflicting, to single out witnesses, and tell the jury that, if they believe those witnesses, their verdict shall be so and so,[94] unless the court also charges that, if the jury do not believe such witnesses, but believe the facts are as testified to by other witnesses, they shall find accordingly.[95]

Unless the question is one as to the legal effect of certain instruments in writing, such as deeds or contracts, in which case the question is for the court,[96] the court should not charge as to the weight to be attached to documents admitted in evidence,[97] such an instruction being just as improper as one upon any other circumstance tending to prove or disprove the contention of a party,[98] and an instruction having the effect to cause the jury to discredit, lightly value, or give weight to a particular document properly in evidence, is erroneous.[99]

[90] Sangster v. Hatch, 134 Ill. App. 340.

[91] Philpott v. Jones, 146 N. W. 859, 164 Iowa, 730.

[92] Gallagher v. Neilon (Tex. Civ. App.) 121 S. W. 564.

[93] State v. Means, 50 A. 30, 95 Me. 364, 85 Am. St. Rep. 421; Appeal of Cherryfield & M. Electric R. Co., 50 A. 27, 95 Me. 361.

[94] Weisenfield v. McLean (N. C.) 2 S. E. 56; State v. Rogers, 93 N. C. 523.

[95] Harris v. Murphy, 25 S. E. 708, 119 N. C. 34, 56 Am. St. Rep. 656.

[96] Clegg v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 127 S. W. 1098.

[97] In re Everts' Estate, 125 P. 1058, 163 Cal. 449; Knowles v. Massey (Del.) 81 A. 470.

[98] Clegg v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 127 S. W. 1098.

[99] **Ark.** St. Louis Southwestern Ry. Co. v. Mitchell, 171 S. W. 895, 115 Ark. 339, Ann. Cas. 1916E, 317.

Ga. Stiles v. Shedden, 58 S. E. 515, 2 Ga. App. 317.

Ill. City of Chicago v. Spoor, 60 N. E. 540, 190 Ill. 340, reversing judgment 91 Ill. App. 472.

Mich. Buell v. Adams, 121 N. W. 782, 157 Mich. 248.

Tex. Galveston, H. & S. A. Ry. Co. v. Sparks (Civ. App.) 162 S. W. 943; Clegg v. Gulf, C. & S. F. Ry. Co., 137 S. W. 109, 104 Tex. 280, affirming judgment (Civ. App.) 127 S. W. 1098.

Receipts. Where, in an action against the initial and connecting carriers, for damages to a shipment, each liable only for damages done on its own line, it was shown that it was the custom for the connecting

§ 44. Instructions on right or duty of jury to consider certain facts

The authorities are conflicting as to whether the court may single out a certain part of the evidence and tell the jury that they may consider it along with the rest of the evidence in determining a particular issue of fact. In jurisdictions where the court is allowed to comment on the evidence, such an instruction is proper;[1] and in a considerable number of other jurisdictions, where the court is prohibited from charging on the facts, such an instruction is not deemed a violation of such a prohibition or an improper comment on the evidence.[2] In another jurisdiction, such an instruction is proper, if it does not single out facts favorable to one party or the other, but impartially states the facts to be considered, regardless of their bearing for or against either party.[3] But in this jurisdiction, and in others, such an instruction is improper if it exalts a particular circumstance as a piece of evidence, or makes it the subject of special commendation, or tends to convey to the jury the impression that the court regards the fact so specified as of great importance;[4] and in Texas such an instruction has been unqualifiedly condemned, the view being taken that it must necessarily give the evidence pointed out undue weight, and lead the jury to believe that the court looks upon it as entitled to special consideration, and that it is therefore a charge upon the weight of the evidence or an improper comment thereon,[5] and in Missouri such an instruction is held

carrier to inspect goods received from the initial carrier, and give a receipt for the shipment, reciting that the goods were received in good order, an instruction that the jury might give such weight to the receipt as it was entitled to, and were not required to accept it as conclusive, and if they believed that the evidence preponderated against the fact stated in the receipt they might so find, was prejudicial to the initial carrier, because discrediting the receipt in the minds of the jury. Connelly v. Illinois Cent. R. Co., 97 S. W. 616, 120 Mo. App. 652. It is a charge on the facts for the court, relative to the receipt in evidence being legible and intelligible and so constituting the contract, to say that he could not read it and find the provision claimed, without the aid of the attorneys. Irby v. Southern Express Co., 80 S. E. 613, 96 S. C. 354.

[1] Flick v. Ellis-Hall Co., 165 N. W. 135, 138 Minn. 364; Cathcart v. Commonwealth, 37 Pa. 108: Speer v. Rowley, 32 Leg. Int. 100.

[2] Shea v. City of Muncie (Ind. Sup.) 46 N. E. 138, 148 Ind. 14; Colvin v. Warford, 20 Md. 357; Missouri, O. & G. Ry. Co. v. Collins, 150 P. 142, 47 Okl. 761; Norris v. Hartford Fire Ins. Co., 35 S. E. 572, 57 S. C. 358.

[3] Dow v. Des Moines City Ry. Co., 126 N. W. 918, 148 Iowa, 429. In an early case in this jurisdiction the court held that, while the practice of emphasizing evidence by an instruction was not to be commended, yet it would not reverse because the jury were told to regard as evidence what in fact was evidence. West v. Chicago & N. W. Ry. Co., 77 Iowa, 654, 35 N. W. 479, 42 N. W. 512.

[4] Gehrig v. Chicago & A. R. Co., 201 Ill. App. 287; Wabash Ry. Co. v. Perkins, 137 Ill. App. 514, judgment affirmed Perkins v. Wabash R. Co., 84 N. E. 677, 233 Ill. 458; In re Knox's Will, 98 N. W. 468, 123 Iowa, 24; Galveston, H. & S. A. Ry. Co. v. Knippa (Tex. Civ. App.) 27 S. W. 730.

[5] Glenn Lumber Co. v. Quinn (Tex. Civ. App.) 140 S. W. 863; Dupree v. Texas, etc., Ry. Co. (Tex. Civ. App.)

by the latest decisions to give undue prominence to the facts recited, and to be therefore an improper comment on the evidence.[6]

By the weight of authority an instruction which informs the jury that they must or should, in determining a particular issue, consider certain facts or evidence specifically pointed out, is an invasion of the province of the jury as a charge on the weight of the evidence.[7] Where there is a conflict in the evidence, it is not proper for the court to select any particular line of evidence and tell the jury that it should be considered by them.[8] Thus, where one party relies on circumstantial evidence and the other on direct evidence, it is error to instruct that the facts must be determined by the circumstances at the time of their supposed occurrence.[9] An instruction, however, stating that the jury must consider all the facts and circumstances surrounding the transaction in question, and which mentions particular facts which the evidence tends to prove, but without isolat-

96 S. W. 647; Western Union Telegraph Co. v. Campbell, 91 S. W. 312, 41 Tex. Civ. App. 204; Galveston, H. & S. A. Ry. Co. v. Knippa (Tex. Civ. App.) 27 S. W. 730; Galveston, H. & S. A. R. Co. v. Kutac, 13 S. W. 327, 76 Tex. 473.

An instruction which collates the evidence presented as a defense and directs the attention of the jury thereto is erroneous as impressing the jury with the court's view of the importance of the evidence. Rainey v. Kemp, 118 S. W. 630, 54 Tex. Civ. App. 486.

[6] Andrew v. Linebaugh, 169 S. W. 135, 260 Mo. 623; Swink v. Anthony, 70 S. W. 272, 96 Mo. App. 420.

In this jurisdiction it was held in an early case that simply telling the jury that they might consider certain evidence as tending to prove a particular fact, no comment being made as to its weight or effect, was not for that reason improper. Beattie v. Hill, 60 Mo. 72. In another early case it was held that such an instruction was not a comment on the weight of the evidence, although it might be objectionable as giving undue prominence to the facts recited. Bertram v. People's Ry. Co., 55 S. W. 1040, 154 Mo. 639, affirming judgment 52 S. W. 1119.

[7] E. E. Forbes Piano Co. v. H. C. & W. B. Reynolds, 56 So. 270, 1 Ala. App. 501; Devine v. Brunswick-Balke-Collender Co., 110 N. E. 780, 270 Ill. 504, Ann. Cas. 1917B, 887; Christ v. Chicago Rys. Co., 191 Ill. App. 69; Potera v. City of Brookhaven, 49 So. 617, 95 Miss. 774; Louisiana & Texas Lumber Co. v. Stewart (Tex. Civ. App.) 148 S. W. 1193.

Declarations of innocence. It is not error to refuse to charge that defendant's statements of innocence, brought out by the state on the examination of its witnesses, are evidence to be considered as any other evidence in the case. Childress v. State, 86 Ala. 77, 5 So. 775.

But in Indiana such an instruction may be given. White v. State, 99 N. E. 417, 178 Ind. 317; Indianapolis St. Ry. Co. v. O'Donnell, 73 N. E. 163, 35 Ind. App. 312, rehearing denied 74 N. E. 253, 35 Ind. App. 312.

In Wisconsin, the trial court is permitted to instruct the jury as to a particular matter, calling attention to the evidence on each side, and coupling the same with an admonition that the particular evidence referred to and all other evidence bearing on the question should be considered. Schwantes v. State, 106 N. W. 237, 127 Wis. 160.

[8] San Antonio, etc., Ry. Co. v. McGill (Tex. Civ. App.) 202 S. W. 338.

[9] San Antonio & A. P. Ry. Co. v. McGill (Tex. Civ. App.) 202 S. W. 338.

ing the particular facts, so as to give special emphasis or importance to them over any other facts, is not objectionable as on the weight of the evidence.[10]

§ 45. Stating purpose of evidence

Where evidence in the case is not admissible for the general purposes of the suit, but only for a particular purpose, the rule is that an instruction limiting such evidence to the purpose for which it is competent and relevant is not erroneous, as on the weight of the evidence.[11] Such a charge will be erroneous, however, as on the

[10] Lowe v. Hart, 125 S. W. 1030, 93 Ark. 548.

[11] **Ind.** Smith v. State, 142 Ind. 288, 41 N. E. 595.

Mo. State v. Bersch, 207 S. W. 809, 276 Mo. 397.

N. M. Trujillo v. Territory, 7 N. M. 43, 32 P. 154.

Tex. Hammock v. State, 93 S. W. 549, 49 Tex. Cr. R. 471; Byrd v. State, 93 S. W. 114, 49 Tex. Cr. R. 279; Kipper v. State, 77 S. W. 611, 45 Tex. Cr. R. 377; Houston & T. C. R. Co. v. Harris, 70 S. W. 335, 30 Tex. Civ. App. 179; Galveston, H. & N. Ry. Co. v. Newport, 65 S. W. 657, 26 Tex. Civ. App. 583; Ledbetter v. State, 35 Tex. Cr. R. 195, 32 S. W. 903.

Instructions proper within rule. A charge in a criminal prosecution, that the jury should not consider testimony as to other offenses for any other purpose than in passing on the credibility of the defendant as a witness, if they believed there was testimony showing or tending to show that the defendant had been charged with other offenses. Overstreet v. State, 150 S. W. 899, 68 Tex. Cr. R. 238. A charge as to why the pleadings and judgment in an action in which perjury was charged to have been committed were introduced, and the purpose for which they could be considered. Spearman v. State, 152 S. W. 915, 68 Tex. Cr. R. 449, 44 L. R. A. (N. S.) 243. An instruction, at the request of a prosecuting attorney in a prosecution for burglary, that evidence of defendant having been convicted of another crime and sent to the penitentiary was only admitted for impeaching purposes, and could not be considered for any other purpose. Bruno v. State (Tex. Cr. R.) 58 S. W. 85. An instruction that the evidence on cross-examination of defendant with reference to former charges against her could be considered only as affecting her credibility, and not as tending to show that she committed the theft for which she was on trial. Jasper v. State (Tex. Cr. R.) 61 S. W. 392. A charge that the evidence of certain witnesses, tending to contradict the evidence of defendant's wife, was introduced solely as going to her credibility as a witness, and not as evidence of defendant's guilt, and can be considered only for the purpose for which it was introduced. Messer v. State, 63 S. W. 643, 43 Tex. Cr. R. 97. A charge that the testimony of a witness as to what he heard another witness testify to before the examining court was not criminative evidence against defendant, and must be considered only as it might bear on the credibility of that witness. Banks v. State, 108 S. W. 693, 52 Tex. Cr. R. 480. In a prosecution for indecent exposure, where evidence was admitted of complaints of other similar acts by accused, a charge that the evidence of such other acts should not be considered as substantive testimony of guilt, but only as bearing on accused's intent, was not on the weight of the evidence, on the ground that the word "substantive," as used, was calculated to mislead the jury to believe that the court believed that the evidence was sufficient to authorize a conviction without such evidence. Harvey v. State, 121 S. W. 501, 57 Tex. Cr. R. 5, 136 Am. St. Rep. 971. An instruction which advises the jury that a certain class of tes-

weight of the evidence, unless it is essential to protect one of the parties from the illegitimate consequences of testimony otherwise material and relevant,[12] and such instruction will be erroneous, if it assumes that the evidence in question will operate unfavorably as to the party against whom it is adduced,[13] and in one jurisdiction it is held that, if the court once decides that certain evidence is competent and admissible, it cannot thereafter limit its effect, and that an instruction purporting to do this will be on the weight of evidence.[14]

F. Instructions on Particular Classes of Evidence

§ 46. Admissions

Necessity and sufficiency of instructions, see post, §§ 213, 214.

As a general rule it is error to instruct, and proper to refuse to instruct, as to the weight and effect of the admissions of a party in a civil case,[15] or of a defendant in a criminal prosecution,[16] and instructions discrediting testimony as to the oral admissions of a party,[17] or charging that it should be received with caution,[18] or, on the

timony may be properly weighed by them in determining a fact in issue is in fact explaining to them the purpose for which it was admitted, and that it may be considered by them in the formation of their verdict. Wood v. Samuels, 1 White & W. Civ. Cas. Ct. App. § 922. Where evidence of other similar offenses was admitted to show system and intent, a charge that the jury should not consider such evidence for any other purpose was not objectionable, as on the weight of the testimony, in that it called the minds of the jury to such other transactions and laid undue stress on such testimony. Melton v. State, 140 S. W. 230, 63 Tex. Cr. R. 362.

[12] Texarkana Gas & Electric Co. v. Lanier, 126 S. W. 67, 59 Tex. Civ. App. 198; Kansas City Southern Ry. Co. v. Williams (Tex. Civ. App.) 111 S. W. 196.

[13] Stull v. State, 84 S. W. 1059, 47 Tex. Cr. R. 547.

[14] Maston v. State, 36 So. 70, 88 Miss. 647.

[15] Tobin v. Young, 124 Ind. 507, 24 N. E. 121; Lewis v. Christie, 99 Ind. 377; Linderman v. Carmin, 255 Mo. 62, 164 S. W. 614; Linderman v. Carmin, 127 S. W. 124, 142 Mo. App. 519; Brown v. Atlantic Coast Line R. Co., 64 S. E. 1012, 83 S. C. 53.

[16] Johnson v. Stone, 69 Miss. 826, 13 So. 858.

[17] State v. Fisk, 83 N. E. 995, 170 Ind. 166.

[18] **Cal.** Goss v. Steiger Terra Cotta & Pottery Works, 82 P. 681, 148 Cal. 155; People v. Buckley, 77 P. 169, 143 Cal. 375; Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L. R. A. 124.

Ill. Wickersham v. Beers, 20 Ill. App. 243.

Ind. Newman v. Hazelrigg, 96 Ind. 73.

Mass. Rumrill v. Ash, 47 N. E. 1017, 169 Mass. 341.

Mont. Wastl v. Montana Union R. Co., 17 Mont. 213, 42 P. 772; Knowles v. Nixon, 17 Mont. 473, 43 P. 628.

N. M. Douglas v. Territory, 124 P. 339, 17 N. M. 108.

Tex. Castleman v. Sherry, 42 Tex. 59.

Uncorroborated verbal admissions. A charge that verbal admissions, uncorroborated by other facts or evidence, should be weighed with great caution, invades the province of the jury, as it is for them to determine whether the admission in question was uncorroborated. Bos-

other hand, that it constitutes satisfactory or strong[19] or conclusive[20] evidence, are erroneous, and properly refused. An instruction in a criminal case that the law presumes that what accused said against himself is true, while what he said for himself the jury are not bound to believe, is erroneous as on the weight of the evidence.[21] In one jurisdiction, however, it is held that when, in a criminal prosecution, evidence introduced is entitled to less or more weight than ordinary evidence, such as extrajudicial statements of

well v. Thompson, 49 So. 73, 160 Ala. 306.

Instruction correct as abstract proposition. An instruction that if a person making an admission may not have expressed his own meaning clearly, or if the witnesses may have misunderstood him, or if the witnesses had no reason for remembering the exact language used, or if, from lapse of time, it is seen that the witnesses are liable to be mistaken, or if, from interest or prejudice, the admissions appear to be unreasonable or colored, then as a matter of law but little reliance should be placed upon the testimony of such admission, is erroneous, though it contains a correct abstract proposition of law. Unruh v. State, 4 N. E. 453, 105 Ind. 117.

Casual statements or admissions. An instruction that, as to casual statements or admissions of a party, made in casual conversations to disinterested persons, the jury should consider the liability of witnesses to misunderstand or forget just what was said, depending on the circumstances, and that such evidence is very weak, or even the weakest kind of evidence that can be produced, is proper. Emery v. State, 78 N. W. 145, 101 Wis. 627.

In Missouri, a cautionary instruction, not referring to any statements which the jury may believe a party to have made, but simply warning the jury to consider with care the testimony of witnesses who have undertaken to narrate what it was claimed a party said, off the witness stand and before the trial, may sometimes be proper. Pace v. American Cent. Ins. Co., 158 S. W. 892, 173 Mo. App. 485.

[19] Phœnix Ins. Co. v. Gray, 38 S. E. 992, 113 Ga. 424; Westbrook v. Howell, 34 Ill. App. 571; State v. Gleim, 17 Mont. 17, 41 P. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655; Earp v. Edgington, 64 S. W 40, 107 Tenn. 23.

Illustrations of improper instructions. A charge that a man is not going to make an admission against himself unless it is true is erroneous, as invading the province of the jury. State v. Shorter, 67 S. E. 131, 85 S. C. 170.

Instructions held not objectionable. An instruction on evidence of admissions made by the accused out of court, which carefully warns the jury as to the dangers they should guard against in considering such testimony, and concludes, "If the admissions were freely, voluntarily, without fear, hope of reward, understandingly and deliberately made, and clearly proved, the jury may, in their discretion, and are at liberty to, give them great weight in their deliberations." Koerner v. State, 98 Ind. 7.

In the federal courts it is not error for a judge in his charge to the jury to state that the action of a former owner of land in pointing out a line as its boundary, and in making a deed conveying it by reference to such boundary constitutes "strong evidence" of the true boundary against a party who claims through such deed. (C. C. A. Pa.) Martin v. Hughes, 98 F. 556, 39 C. C. A. 160.

[20] Collins v. Tootle Estate, 137 S. W. 273, 156 Mo. App. 221; Gardner v. Standfield's Heirs, 12 Heisk. 150; Carlton v. Krueger, 115 S. W. 619, 54 Tex. Civ. App. 48, judgment modified on motion, 115 S. W. 1178, 54 Tex. Civ. App. 48.

[21] Clay v. State, 86 P. 17, 15 Wyo. 42.

defendant tending to establish his guilt, an instruction as to how such evidence must be weighed is proper as one on a point of law,[22] and in this jurisdiction, if the state puts in evidence such a statement by the defendant, an instruction that what he said against himself the law presumes to be true, because said against himself, and what he said for himself the jury are not bound to believe, because it was said in a statement proved by the state, but they may believe or disbelieve it as it is shown to be true or false by the evidence, is not a comment on the evidence, but a proper enunciation of the law as to statements made by defendant.[23] In North Dakota a charge in a criminal case that, if the jury believe that defendant has made statements out of court against himself, they have the right to assume that such statements are true, because against himself, is not an unwarranted invasion of the province of the jury.[24]

§ 47. Effect of exculpatory parts of statement of accused given in evidence against him

Where statements of a defendant in a criminal case are given in evidence against him, the exculpatory parts thereof, as well as those which import guilt, are to be received as evidence, and it is the province of the jury, in the light of all the evidence in the case, to decide upon the truth or falsehood of such exculpatory parts, and in some jurisdictions the court may properly instruct them that they have no right to reject or disregard such parts favorable to the defendant, unless there is some other evidence in the case showing them to be false, or unless they are so unreasonable or absurd as to be in the opinion of the jury unworthy of belief.[25] On the other hand, it is held in some jurisdictions that an instruction to give the parts of the defendant's statement favorable to him as much consideration, if not apparently improbable or untrue, as the parts unfavorable to him, invades the province of the jury.[26]

§ 48. Confessions—Fact of confession and weight thereof

Necessity and sufficiency of instructions, see post, §§ 215–221.

The question whether, in a criminal prosecution, certain statements of the defendant amount to a confession, is for the jury,[27] as is the question of the weight and credibility of a confession of an

[22] State v. Creeley, 162 S. W. 737, 254 Mo. 382.

[23] State v. Coats, 74 S. W. 864, 174 Mo. 396.

[24] State v. Hazlet, 113 N. W. 374, 16 N. D. 426.

[25] Blackburn v. State, 23 Ohio St. 146.

[26] State v. Ausplund, 167 P. 1019, 86 Or. 121, judgment affirmed on rehearing, 171 P. 395, 87 Or. 649.

[27] Roszczyniala v. State, 104 N. W. 113, 125 Wis. 414.

accused person.[28] The court, therefore, in those jurisdictions in which the restrictions referred to supra prevail, should express no opinion on the weight of such a confession,[29] and it is not proper to instruct that the confession of defendant received in evidence must or should be weighed with caution,[30] or that evidence of confessions is the weakest or most dangerous kind,[31] and instructions that the law does not favor confessions,[32] or that a strong presumption arises that an uncorroborated confession is untrue,[33] or that if confessions are so contradictory in themselves that they can not be reconciled they may be disregarded,[34] are on the weight of evi-

[28] **Ala.** Clemmons v. State, 52 So. 467, 167 Ala. 20, 140 Am. St. Rep. 21; Goodwin v. State, 102 Ala. 87, 15 So. 571; Long v. State, 86 Ala. 36, 5 So. 443.

Del. State v. Smith (Gen. Sess.) 9 Houst. 588, 33 A. 441.

Kan. State v. Hayes, 187 P. 675, 106 Kan. 253.

Mich. People v. Taylor, 93 Mich. 638, 53 N. W. 777.

[29] Faltin v. State, 151 P. 952, 17 Ariz. 278.

Instructions objectionable within rule. A charge that the jury should find from the evidence whether accused confessed after being properly warned, and, if they so found, convict defendant. McVeigh v. State, 62 S. W. 757, 43 Tex. Cr. R. 17.

Instructions not improper within rule. A charge that, if the jury found confessions were not voluntary, they should acquit, unless they believed from the other evidence that the defendant's guilt had been established beyond a reasonable doubt. Morris v. State, 46 S. W. 253, 39 Tex. Cr. R. 371. A charge that the confession of defendant may be used in evidence against him if it appears that the same was freely made without compulsion or persuasion. * * * The court charges you to wholly disregard the alleged confession of defendant, unless you believe from the evidence that the same, if any, was freely and voluntarily made. If you believe from the evidence that the confession, if any, was made on compulsion or promise on the part of the officer or officers in question, you will wholly disregard the alleged confession. The only way in which you can consider the confession, if any, in evidence, is for you to believe from the evidence that the same, if any, was freely and voluntarily made. Griffin v. State, 93 S. W. 732, 49 Tex. Cr. R. 440.

[30] **Ark.** Owens v. State, 179 S. W. 1014, 120 Ark. 562; Dewein v. State, 170 S. W. 582, 114 Ark. 472.

Ind. Keith v. State, 61 N. E. 716, 157 Ind. 376.

Ky. Blackburn v. Commonwealth, 12 Bush, 181.

Nev. State v. Simas, 62 P. 242, 25 Nev. 432.

S. C. State v. Cannon, 30 S. E. 589, 52 S. C. 452.

Instructions erroneous within rule. A charge that any confession verbally made by defendant, and written down by another, is subject to mistakes that may arise from misunderstanding the meaning of defendant's words, or by using words not used by defendant, or by substituting the language of the person writing it for that of defendant. Hauk v. State, 46 N. E. 127, 148 Ind. 238; Id., 47 N. E. 465, 148 Ind. 238. An instruction that confessions, when satisfactorily established by credible evidence, are the strongest character of testimony, but they should be scanned with great caution, and unless the jury are satisfied of the honesty and veracity of the witnesses by whom the confessions are attempted to be proven such evidence is most unsatisfactory. Blackburn v. Commonwealth, 12 Bush (Ky.) 181.

[31] State v. Fleming, 106 P. 305, 17 Idaho. 471; State v. Bell, 70 Mo. 633.

[32] Becker v. State, 136 N. W. 17, 91 Neb. 352.

[33] Rice v. State, 47 Ala. 38.

[34] Goode v. State, 123 S. W. 597, 57 Tex. Cr. R. 220.

dence, and erroneous. On the other hand, instructions that confessions are the strongest and most satisfactory kind of evidence,[35] or that the law presumes that statements made by an accused against his own interest are true,[36] are equally erroneous.

§ 49. Corroboration of confessions

Sufficiency of instructions, see post, § 218.

The sufficiency of the corroboration of a confession apparently made without improper inducement is for the jury,[37] and the court should not charge that proof of certain facts is sufficient to show such corroboration,[38] and in an instruction that a conviction may be had where a voluntary confession is corroborated only by proof of the corpus delicti, the judge should not use language from which the jury may infer that such a confession, thus corroborated, will require a conviction, but he should leave them free to pass upon the question whether or not the corroborative evidence, together with that relating to the confession, is sufficient to satisfy them beyond a reasonable doubt of the guilt of the accused.[39]

[35] Ledbetter v. State, 21 Tex. App. 344, 17 S. W. 427; Harris v. State, 1 Tex. App. 74; Morrison v. State, 41 Tex. 516.

Instructions improper within rule. An instruction, as to alleged confessions of defendant that, if they were shown to have been understandingly made and correctly remembered by the witnesses and substantially repeated by them on the witness stand, they were "entitled to great weight." State v. Willing, 105 N. W. 355, 129 Iowa, 72.

[36] McLemore v. State, 164 S. W. 119, 111 Ark. 457.

Charge as to conduct of innocent men. In a prosecution for murder, it is a usurpation of the province of the jury to instruct that sane men who are innocent as a rule do not make confession of crime, as it is within the exclusive province of the jury, and not for the court, to say what its experience of men is in certain matters. Knapp v. State, 25 Ohio Cir. Ct. R. 571.

[37] Peterson v. State, 91 S. E. 223, 19 Ga. App. 144.

[38] Coley v. State, 34 S. E. 845, 110 Ga. 271.

Instructions not improper within rule. An instruction that proof beyond a reasonable doubt of the corpus delicti might be, but was not necessarily, sufficient corroboration of a confession, that the law did not fix the amount of corroboration necessary, and that the jury were the judges whether other evidence sufficiently corroborated a confession to justify a conviction, if the jury found the proper confession was made. Dotson v. State, 71 S. E. 164, 136 Ga. 243. An instruction that, if the jury believed a burglary had been committed by somebody as charged in the indictment, then "that would be a sufficient corroboration of the confession to justify a conviction, if the jury believe that it was sufficient corroboration; that is, it might be a form of corroboration, but the jury in every case are the judges of what corroborations are sufficient"—will not be construed as charging, as a matter of law, that proof of the crime having been committed was sufficient corroboration of the confession. Davis v. State, 32 S. E. 158, 105 Ga. 808.

[39] Wimberly v. State, 31 S. E. 162, 105 Ga. 188.

§ 50. Dying declarations

Necessity and sufficiency of instructions on credibility and weight of dying declarations, see post, § 158.

The weight and credibility of the dying declarations of the victim of a crime are for the jury in a criminal prosecution of the alleged criminal.[40] The court cannot, therefore, properly give an instruction as to the weight and conclusiveness of such declarations,[41] and instructions which caution the jury that they should be received with caution, or which disparage the value of evidence of them,[42] as by calling the attention of the jury to the fact that such declarations are not made under oath with opportunity for cross-examination,[43] are erroneous, as invading the province of the jury. Equally erroneous are instructions which state that dying declarations are entitled to receive the same weight and credit as testimony taken under the sanction of an oath,[44] and it is proper to refuse the negative of such a proposition.[45] It is proper, however, to tell the jury that an alleged dying declaration is admitted merely on prima facie evidence of its verity, and that the jury must determine whether it is, as a matter of fact, a dying declaration, such instruction not being open to the objection that it expresses the opinion of the court that there is prima facie evidence as to the truth of such declaration.[46]

[40] Postell v. Commonwealth, 192 S. W. 39, 174 Ky. 272; Gurley v. State, 57 So. 565, 101 Miss. 190.

[41] People v. Amaya, 66 P. 794, 134 Cal. 531.

[42] Shenkenberger v. State, 57 N. E. 519, 154 Ind. 630; State v. McLaughlin, 70 So. 925, 138 La. 958.

[43] People v. Dallen, 132 P. 1064, 21 Cal. App. 770; State v. Clark, 63 S. E. 402, 64 W. Va. 625.

In Mississippi, however, an instruction that the dying declarations of the deceased, made to his wife, are not entitled to the same credit as if the deceased was still alive and testifying under oath, that it is a species of hearsay evidence, and is intrinsically weaker than if the defendant was present, and the jury alone are the judges of its weight and force, has been held not objectionable, as on the weight of evidence. Lipscomb v. State, 23 So. 210, 75 Miss. 559.

[44] People v. Warren, 102 N. E. 201, 259 Ill. 213, Ann. Cas. 1914C, 219; State v. McCanon, 51 Mo. 160; State v. Scott, 142 P. 1053, 37 Nev. 412.

In Georgia, an instruction telling the jury that dying declarations stand on the same plane as testimony given under oath is not objectionable, as dealing with the weight of the testimony. Josey v. State, 74 S. E. 282, 137 Ga. 769; Robinson v. State, 88 S. E. 410, 17 Ga. App. 751. But in this jurisdiction an instruction that dying declarations are admitted on the theory that a person is as "sure" to tell the truth when in the articles of death as when under oath is held erroneous; the use of the word "sure" being considered to indicate the judge's opinion as to the weight and value of dying statements as compared with testimony in conflict with them. Darby v. State, 84 S. E. 724, 16 Ga. App. 171.

[45] Sims v. State, 36 So. 138, 139 Ala. 74, 101 Am. St. Rep. 17; State v. Reed, 137 Mo. 125, 38 S. W. 574.

[46] Waters v. State, 104 S. E. 626, 150 Ga. 623.

§ 51. Opinion and expert evidence

Comparative values of opinion evidence and other evidence, see post, § 56. Sufficiency of instructions, see post, §§ 208–210.

The question of the weight to be given to the opinions of experts is for the jury,[47] and, except in those jurisdictions where the common-law rule of allowing the court to comment on the evidence prevails,[48] the general rule is that instructions which place a value upon such testimony, or indicate its worth,[49] or which, on the one hand, commend, exalt, or attach conclusive effect to the opinions of experts,[50] or, on the other hand, discredit or depreciate such evidence, or permit the jury to disregard it,[51] invade the province of

[47] In re Anderson's Appeal, 66 A. 7, 79 Conn. 535; Colee v. State, 75 Ind. 511; Snyder v. State, 70 Ind. 349; Davis v. State, 35 Ind. 496, 9 Am. Rep. 760.

[48] St. Louis, I. M. & S. Ry. Co. v. Phillips (C. C. A. Ark.) 66 F. 35, 13 C. C. A. 315; Brower v. Emerson, 10 N. J. Law, 279.

[49] Crump v. Knox, 89 S. E. 586, 18 Ga. App. 437; Indianapolis Traction & Terminal Co. v. Taylor, 103 N. E. 812, 55 Ind. App. 309; Louisville & S. I. Traction Co. v. Worrell, 86 N. E. 78, 44 Ind. App. 480; Eggers v. Eggers, 57 Ind. 461; Rivard v. Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

[50] **Ala.** Birmingham Ry., Light & Power Co. v. Drennen, 67 So. 386, 190 Ala. 176; Holloway v. Cotten, 33 Ala. 529.

Ga. Rouse v. State, 69 S. E. 180, 135 Ga. 227; Smith v. State, 56 S. E. 116, 127 Ga. 56; Wall v. State, 37 S. E. 371, 112 Ga. 336; Merritt v. State, 34 S. E. 361, 107 Ga. 675; Ryder v. State, 28 S. E. 246, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334.

Ind. Cuneo v. Bessoni, 63 Ind. 524.

Mich. Stone v. Chicago & W. M. Ry. Co., 66 Mich. 76, 33 N. W. 24.

Mo. Hampton v. Massey, 53 Mo. App. 501.

N. C. Hancock v. Western Union Telegraph Co., 55 S. E. 82, 142 N. C. 163.

[51] **Ala.** Burney v. Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; Gunter v. State, 83 Ala. 96, 3 So. 600.

Cal. In re Hess' Estate, 192 P. 35.

Ill. People v. Harvey, 122 N. E. 138, 286 Ill. 593.

Iowa. Long v. Travelers' Ins. Co., 85 N. W. 24, 113 Iowa, 259; Brush v. Smith, 82 N. W. 467, 111 Iowa, 217; State v. Townsend, 66 Iowa, 741, 24 N. W. 535.

Kan. Ball v. Hardesty, 16 P. 808, 38 Kan. 540.

Mich. People v. Seaman, 107 Mich. 348, 65 N. W. 208, 61 Am. St. Rep. 326.

Mo. Wheeler v. Chestnut, 69 S. W. 621, 95 Mo. App. 546; Hull v. City of St. Louis (Sup.) 39 S. W. 446; Kansas City, N. & Ft. S. R. Co. v. Dawley, 50 Mo. App. 480.

N. Y. People v. Webster, 59 Hun, 398, 13 N. Y. S. 414; Templeton v. People, 3 Hun, 357, 6 Thomp. & C. 81.

N. C. Ferebee v. Norfolk Southern R. Co., 83 S. E. 360, 167 N. C. 290.

Pa. Pannell v. Commonwealth, 86 Pa. 260.

Instructions held improper within rule. An instruction, in proceedings to probate a will, contested on the ground that decedent was not of sound mind, where physicians, without objection, testified as experts, in the form of answering hypothetical questions, that the testimony of experts, dependent on hypothetical questions, was unsatisfactory, because it could not convey the precise reasons why the conclusions were reached, and was unreliable, because frequently based on speculations, and that such opinions were not entitled to as much weight as facts, and that

the jury, and are therefore erroneous, and properly refused, both in civil actions and criminal prosecutions.

Within this rule are instructions that the testimony of experts is supposed to be the best that can be furnished,[52] that such testimony is to be received with caution, or scrutinized with the utmost care,[53]

opinions based on the same facts were often diametrically opposed to each other. In re Blake's Estate, 68 P. 827, 136 Cal. 306, 89 Am. St. Rep. 135. An instruction that the abstract opinion of any witness, medical or of any other profession, is of no importance, but that it was a juror's duty to arrive at his conclusion on his own judgment, exercised in a reasonable way after carefully weighing all the evidence, and that no judical tribunal would be justified in deciding for or against the legal responsibility of one charged with insanity on the opinion of witnesses, however numerous or respectable, was properly refused. People v. Buck, 91 P. 529, 151 Cal. 667.

Rule in Iowa. A statement, in an instruction on expert testimony in a criminal prosecution, that, while the profession of law has not fully kept pace with that of medicine on the subject of insanity, medical authorities have propounded doctrines respecting it as an excuse for criminal acts which a due regard for the safety of the community and an enlightened public policy must prevent juries from adopting as the law of the land has been held improper criticism, State v. McCullough, 87 N. W. 503, 114 Iowa, 532, 55 L. R. A. 378, 89 Am. St. Rep. 382; although a similar instruction was approved in an earlier case, State v. Hockett, 70 Iowa, 442, 30 N. W. 742; a distinction being made between the two cases on the ground that in the earlier case the testimony was given in response to hypothetical questions while in the distinguishing case the experts testified on the basis of personal knowledge.

Instructions held not erroneous within rule. An instruction, in an action on accident policy, in which the evidence as to the cause of insured's death was conflicting, that the opinions of experts as to the cause of insured's death were not binding on the jury, but it was for them to determine from all the facts, including the opinion of such experts, what was the cause of his death, and that the jury should give to the expert evidence such weight as they deemed it entitled to after considering the witness' knowledge and skill as disclosed, and all the other facts shown in their testimony, was not objectionable as belittling the testimony of the physicians. Morrow v. National Masonic Acc. Ass'n, 101 N. W. 468, 125 Iowa, 633. An instruction that the jury should consider expert testimony with great caution; that they should make a painstaking investigation of all the facts, to reach the truth, and must not be confused or misled by such testimony, because, while such testimony is sometimes the only means or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent investigation, was not erroneous, as discriminating too strongly against such evidence, and because it warned the jury not to be misled or confused thereby. Fisher v. Travelers' Ins. Co., 138 S. W. 316, 124 Tenn. 450, Ann. Cas. 1912D, 1246.

[52] Kansas City, W. & N. W. R. Co. v. Ryan, 49 Kan. 1, 30 P. 108.

[53] **Cal.** People v. Wilkins, 111 P. 612, 158 Cal. 530.

Iowa. Madden v. Saylor Coal Co., 111 N. W. 57, 133 Iowa, 699.

Kan. Atchison, T. & S. F. R. Co. v. Thul, 32 Kan. 255, 4 P. 352, 49 Am. Rep. 484.

Miss. Coleman v. Adair, 23 So. 369, 75 Miss. 660; Louisville, N. O. & T. Ry. Co. v. Whitehead, 71 Miss. 451, 15 So. 890, 42 Am. St. Rep. 472.

Neb. Weston v. Brown, 30 Neb. 609, 46 N. W. 826.

Wash. Gustafson v. Seattle Traction Co., 68 P. 721, 28 Wash. 227.

In Michigan it has been held that,

that such evidence is usually of very little value,[54] or that it is generally regarded as of a weak and unsatisfactory character.[55] The court may, however, instruct in general terms that the jury is not bound to accept as true the opinions of expert witnesses,[56] nor to act upon them to the entire exclusion of other testimony,[57] and that the jury should disregard the opinions of expert witnesses, if they believe them to be unreasonable.[58] In other words, the jury may be told that they are to apply the same general rules to the testimony of experts that govern in determining the weight of other testimony.[59]

A general instruction on expert testimony that this kind of evidence is competent, and should be given such weight as in the judgment of the jury it is entitled to receive, is proper, and does not take from the jury the right to determine the weight of such evidence,[60] and where the testimony consists of the opinion of experts, which is uncontradicted, the court may direct a verdict in case the jury believe such testimony.[61] In some jurisdictions it is proper for the court to charge that, in considering the weight to be attached to the

where the issue is as to the insanity of an accused and the evidence of insanity is slight, it is not error to charge that expert testimony is to be weighed with great caution, and is exposed to a reasonable degree of suspicion, which in many instances results from employment. People v. Perriman, 72 Mich. 184, 40 N. W. 425.

[54] Eggers v. Eggers, 57 Ind. 461.

[55] Davis v. Lambert, 95 N. W. 592, 69 Neb. 242; Hayden v. Frederickson, 80 N. W. 494, 59 Neb. 141.

[56] Wiley v. St. Joseph Gas Co., 111 S. W. 1185, 132 Mo. App. 380; Commonwealth v. Shults, 70 A. 823, 221 Pa. 466.

[57] Wagner v. State, 116 Ind. 181, 18 N. E. 833.

[58] Hull v. City of St. Louis, 138 Mo. 618, 40 S. W. 89, 42 L. R. A. 753.

[59] Epps v. State, 102 Ind. 539, 1 N. E. 491; State v. Malloy, 78 S. E. 995, 95 S. C. 441, Ann. Cas. 1915C, 1053, judgment affirmed Malloy v. State of South Carolina, 35 S. Ct. 507, 237 U. S. 180, 59 L. Ed. 905; Atkins v. State, 105 S. W. 353, 119 Tenn. 458, 13 L. R. A. (N. S.) 1031.

Instructions held proper within rule. An instruction that expert testimony must be weighed as other testimony, taking into consideration the knowledge possessed by the witnesses testifying as experts, the matters testified to by them, and the other evidence in the case, that the jury should give to expert testimony such credit only as they deem it justly entitled to receive, etc., does not disparage expert testimony, but cautions the jury against blindly accepting what experts have testified to. Reynolds v. Smith, 127 N. W. 192, 148 Iowa, 264. An instruction on a trial for murder, where the defense was insanity, that the opinions of nonexperts—acquaintances of defendant, who testified to facts from which they concluded he was insane—as to defendant's insanity were to be received and weighed only in the light of the facts related by them, and that the jury must judge of the reasonableness of those opinions from such facts, and give them such weight as they might deem proper, and that both the expert and nonexpert testimony should be subjected to a careful and painstaking investigation. Wilcox v. State, 94 Tenn. 106, 28 S. W. 312.

[60] Powell v. Chittick, 89 Iowa, 513, 56 N. W. 652; Jameson v. Weld, 45 A. 299, 93 Me. 345.

[61] Lawson v. Mobile Electric Co., 85 So. 257, 204 Ala. 318.

testimony of experts, the jury should not overlook their professional standing and experience, the view being taken that jurors should not be left without any direction whatever in passing upon the force of such testimony.[62]

It is for the court to say whether a hypothetical case on which the opinions of experts are based corresponds to, and coincides with, the facts, and it is error to submit that question to the jury.[63]

§ 52. Parol evidence

The rule against the expression of an opinion by the court as to the weight or sufficiency of the evidence has peculiar application where the evidence is entirely oral,[64] and in such a case, although the evidence is all on one side, the court cannot instruct the jury that a certain fact is actually proved thereby.[65]

§ 53. Circumstantial evidence in criminal cases

Necessity and sufficiency of instructions and propriety of particular instructions, see post, §§ 224–235.

In a criminal case it is an invasion of the province of the jury for the court to tell the jury that all the evidence against the defendant is purely circumstantial,[66] or to erect a standard by which to estimate the weight of circumstantial evidence,[67] or to instruct that under stated circumstances the requirements of the law as to the sufficiency of circumstantial evidence will be satisfied,[68] or to lay emphasis upon circumstantial evidence as being legal evidence and sufficient to sustain a conviction.[69] But it does not invade the jury's province to charge that the guilt of the defendant, or certain matters looking

[62] Cosgrove v. Burton, 78 S. W. 667, 104 Mo. App. 698.

In North Carolina, upon an issue involving the mental condition of a party to a contract, a charge, in regard to the evidence of a physician of thirty years' standing, "that the law attaches peculiar importance to the opinion of medical men who have the opportunity of observation upon a question of mental capacity, as by study and experience they become experts in the matter of bodily and mental ailments," was held to be no invasion of the province of the jury; the appellate court saying that such instruction was merely the dictate of common reason. Flynt v. Bodenhamer, 80 N. C. 205.

[63] State v. Wertz, 90 S. W. 838, 191 Mo. 569.

[64] McReynolds v. Quincy, O. & K. C. R. Co., 91 S. W. 446, 115 Mo. App. 676; Richmond & Danville R. R. Co. v. Noell, 86 Va. 19, 9 S. E. 473.

[65] Charleston Ins. & Trust Co. v. Corner, 2 Gill (Md.) 410.

[66] State v. Aughtry, 26 S. E. 619, 49 S. C. 285; Same v. Aughtrey, 27 S. E. 199, 49 S. C. 285.

It is not prejudicial error, however, for a court, in its charge, to say to the jury that the evidence before them is both direct and circumstantial. Davis v. State, 70 N. W. 984, 51 Neb. 301.

[67] Brady v. Commonwealth, 11 Bush (Ky.) 282.

[68] Harris v. State, 137 P. 365, 10 Okl. Cr. 417, judgment affirmed on rehearing 139 P. 846, 10 Okl. Cr. 417.

[69] McCleskey v. State (Tex. App.) 13 S. W. 997; Harrison v. State, 9 Tex. App. 407.

towards his guilt, may be shown by circumstantial evidence,[70] and the court may instruct that circumstantial evidence should be received and considered as other evidence,[71] or that there is nothing in the nature of circumstantial evidence that renders it any less reliable than any other class of evidence,[72] or, in a proper case, that it is entitled to the same weight as direct evidence,[73] and it is not improper to charge that prejudice against a conviction on circumstantial evidence is wrong.[74]

§ 54. Instructions as to effect of good character of accused

Necessity and sufficiency of instructions on this head, see post, §§ 237–242.

The general rule is that it is error to instruct as to the weight to be attached to evidence of the general good character of the defendant in a criminal prosecution,[75] it being for the jury to determine such weight.[76] Thus it is ordinarily error to instruct that evidence of good character will not furnish ground for an acquittal,[77] or that

[70] McArthur v. State, 92 S. E. 234, 19 Ga. App. 747; Brown v. State, 169 S. W. 437, 74 Tex. Cr. R. 356; Suggs v. State, 143 S. W. 186, 65 Tex. Cr. R. 67.

Instructions proper within rule. An instruction, in a prosecution of a physician for soliciting patients by means of a drummer or solicitor, that it was not necessary to prove accused guilty by the testimony of witnesses who had heard him employ a drummer or solicitor to solicit patients for him, but such guilt may be established by proof of facts and circumstances upon which his guilt might reasonably and substantially be implied beyond a reasonable doubt. Burrow v. City of Hot Springs, 108 S. W. 823, 85 Ark. 396. It is not error for the court in giving instructions to the jury, in a criminal case, to group together many facts legitimately provable in such a case, and which the evidence tends to establish, and then state that "such facts as these, if shown by the testimony, constitute circumstantial evidence. Circumstantial evidence is legal evidence, and convictions had upon it are legal convictions. In the case before them the jury will look at all the evidence, and from it make up their minds as to the guilt or innocence of the defendant." State v. Carnahan, 17 Iowa, 256.

[71] State v. Johnson, 44 S. E. 58, 66 S. C. 23.

[72] People v. Simmons, 95 P. 48, 7 Cal. App. 559; Id., 95 P. 51, 7 Cal. App. xiii; People v. Howard, 67 P. 148, 135 Cal. 266.

[73] Roberts v. State, 149 P. 380, 17 Ariz. 159.

[74] State v. Aughtry, 26 S. E. 619, 49 S. C. 285; Same v. Aughtrey, 27 S. E. 199, 49 S. C. 285.

[75] Whitley v. State, 169 S. W. 952, 114 Ark. 243; Lockhart v. State, 3 Tex. App. 567.

[76] State v. Long, 108 A. 36, 7 Boyce (Del.) 397; State v. Northrup, 48 Iowa, 583, 30 Am. Rep. 408; Vincent v. State, 37 Neb. 672, 56 N. W. 320.

[77] State v. Horning, 49 Iowa, 158; People v. Wileman, 44 Hun (N. Y.) 187; Hall v. State, 151 P. 487, 12 Okl. Cr. 20.

Instruction that evidence of good character not a convincing matter. Where defendant introduced evidence of good character, and the court instructed that such evidence was a circumstance to be considered in determining the defendant's guilt or innocence, but that it "was not a convincing matter," but it was evident, from other portions of the charge, that the reference to the convincing character of the evidence was meant merely to indicate that evidence of good character was

such evidence should weigh strongly in favor of the defendant,[78] and, in some jurisdictions, a charge that such evidence may be sufficient, or may be relied on, to raise a reasonable doubt of the guilt of the defendant, is considered to invade the province of the jury.[79]

But where the evidence is conflicting it is proper for the court to charge that evidence of good character should be considered by the jury in connection with the other facts in the case,[80] and the accused is entitled to such an instruction,[81] instead of one merely to the effect that the jury may consider evidence of good character.[82]

G. Comparative Values of Different Kinds or Classes of Evidence

Instructions as to comparative credibility of different classes of witnesses, see ante, § 12.

§ 55. General rule.

The court cannot state to the jury the relative importance of different kinds of evidence, except as that is settled by some rule of law,[83] and as a general rule it is error to instruct and proper to refuse to instruct that one kind of evidence is to be preferred to another, or is of greater or less value than another.[84] Thus an in-

not sufficient to acquit where the jury believed from the evidence as a whole that defendant was guilty, such reference was not cause for reversal as a comment on the facts. State v. Newton, 70 P. 31, 29 Wash. 373.

[78] State v. Jones, 80 P. 1095, 32 Mont. 442; Burns v. State, 79 N. E. 929, 75 Ohio St. 407; State v. Tarrant, 24 S. C. 593.

Instructions held improper within rule. The refusal of requested instruction that the character of the accused when proven is a fact to be considered, and if the jury have any doubt as to the guilt of accused, evidence of his good character should "resolve" that doubt in his favor, was proper; the court correctly substituting an instruction charging that the character of accused is a fact to be considered, and if the jury have any reasonable doubt as to guilt they should acquit, the requested instruction practically taking the case from the jury, by use of the word "resolve." Lufty v. Commonwealth, 100 S. E. 829, 126 Va. 707. A requested instruction, that "it was more probable that a man of bad character would commit a crime than a man of good character," is properly refused. Long v. State, 91 S. W. 26, 76 Ark. 493, denying petition for rehearing 89 S. W. 93, 76 Ark. 493.

[79] Maclin v. State, 44 Ark. 115; State v. Snow, 51 A. 607, 3 Pennewill (Del.) 259; People v. Goodman, 119 N. E. 429, 283 Ill. 414; Anderson v. State, 53 So. 393, 97 Miss. 658; Flege v. State, 133 N. W. 431, 90 Neb. 390.

[80] State v. Leppere, 66 Wis. 355, 28 N. W. 376.

[81] People v. Hoagland, 69 P. 1063, 137 Cal. 218.

[82] People v. McGraw, 72 N. Y. S. 679, 66 App. Div. 372.

[83] People v. Howland, 109 P. 894, 13 Cal. App. 363.

[84] **U. S.** (C. C. A. Tenn.) Coulter v. B. F. Thompson Lumber Co., 142 F. 706, 74 C. C. A. 38.

Fla. Wheeler v. Baars, 33 Fla.

struction that the testimony of witnesses, whose opportunities for acquiring knowledge of the facts in dispute are greater than those of other witnesses, is entitled to greater weight than the testimony of such other witnesses, invades the province of the jury,[85] as does an instruction that the direct and positive knowledge of one is better than the doubtful recollection of many,[86] or an instruction that the jury should give greater weight to the testimony of a witness who testified certainly to a transaction than to a witness who testified vaguely, uncertainly, and indefinitely,[87] nor should the court charge as to the comparative weight of circumstantial and direct

696, 15 So. 584; Williams v. La Penotiere, 32 Fla. 491, 14 So. 157.

Ga. Smalls v. State, 65 S. E. 295, 6 Ga. App. 502; Wilkinson v. Wooten, 59 Ga. 584.

Ill. Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245; Indiana, I. & I. R. Co. v. Otstot, 113 Ill. App. 37, judgment affirmed 72 N. E. 387, 212 Ill. 429.

Ind. State v. Sutton, 99 Ind. 300.

N. J. State v. Skillman, 70 A. 83, 76 N. J. Law, 464, judgment affirmed 76 A. 1073, 77 N. J. Law, 804.

N. Y. Hutchinson v. Market Bank, 48 Barb. 302.

Evidence as to boundaries. Where, in an action involving a disputed boundary line, the true location of the corner is for the jury on conflicting evidence, an instruction that a call for an unmarked prairie line is not such a call for an artificial object as will control a course and distance tends to mislead the jury to believe that a call for distance is of greater weight, and prevails over a call for the corner to be at a certain designated line, and is therefore objectionable as on the weight of the evidence. Clawson v. Wilkins (Tex. Civ. App.) 93 S. W. 1086.

Variance between testimony and documents. When there is a variance between the testimony of a witness and statements made by him in letters at the time of the transaction in question, and the letters are in evidence, it is error to instruct that greater weight must be given to the testimony than to the statements in the letters. Mutual Life Ins. Co. v. Logan (C. C. A. Or.) 87 F. 637, 31 C. C. A. 172.

Statements made when drunk and when sober. The relative credibility of statements made by a defendant, in a criminal action, when drunk and when sober is for the jury, and there is no rule of law giving the preference to those made when sober. Finch v. State, 81 Ala. 41, 1 So. 565.

[85] Himrod Coal Co. v. Clingan, 114 Ill. App. 568; Muncie Pulp Co. v. Keasling, 76 N. E. 1002, 166 Ind. 479, 9 Ann. Cas. 530.

In Pennsylvania, the question turning on the accuracy of certain measurements made on the one hand by trained surveyors, and on the other by unskilled persons, it was not error for the court to call the attention of the jury to the fact that defendant's measurements were made by "a baker, attended by a tinsmith, under the supervision of a lawyer." Omensetter v. Kemper, 6 Pa. Super. Ct. 309, 41 Wkly. Notes Cas. 501.

[86] Dunlap v. Hearn, 37 Miss. 471.

[87] B. F. Roden Grocery Co. v. Leslie, 53 So. 815, 169 Ala. 579.

Comparative positiveness of testimony. It has been held that it is not error for the court to state to the jury that a witness who swears that "to the best of my recollection" an act was done testifies less positively than one who testifies that "it was done." Gable v. Rauch, 27 S. E. 555, 50 S. C. 95.

evidence,[88] and it is proper to refuse to instruct as to the relative importance of surrounding circumstances and inferences.[89]

It is error to instruct that, where the testimony of witnesses is irreconcilably conflicting, the jury, in determining which is entitled to credit, should give great weight to the surrounding circumstances;[90] but an instruction that, in case of such conflicting testimony, the credit to be given to the different witnesses is to be tested by the circumstances and probabilities, no opinion being expressed as to the degree of weight to be attached to such circumstances, is proper.[91]

No general or inexorable rule can be laid down with respect to the comparative weight of testimony in open court and depositions, and it is error to tell the jury that the former class of evidence is entitled to the greater weight,[92] and where a statute permits, to avoid a continuance of an action on account of the absence of witnesses, the reading in evidence of a statement of what it is expected to prove by such witnesses, the court should not distinguish between the testimony of present witnesses and the substitute for the testi-

[88] **Cal.** People v. Verenesenecockockhoff, 58 P. 156, 129 Cal. 497; Id., 62 P. 111, 129 Cal. 497.

Ga. Armstrong v. Penn, 31 S. E. 158, 105 Ga. 229; Hudson v. Best, 30 S. E. 688, 104 Ga. 131.

Idaho. State v. Marren, 107 P. 993, 17 Idaho, 766.

Iowa. State v. Crofford, 96 N. W. 889, 121 Iowa, 395.

Instruction objectionable within rule. An instruction in a criminal prosecution that, though error has sometimes been committed by a reliance on circumstantial evidence, yet this species of evidence is not only proper and necessary, but is sometimes even more satisfactory than the testimony of a single eyewitness, as eyewitnesses may speak falsely. People v. O'Brien, 62 P. 297, 130 Cal. 1. A charge "that law writers say that a chain of circumstances cannot lie, whilst a witness may," because it is calculated to impress on the minds of the jury that the defendant's witnesses have sworn falsely. Cicero v. State, 54 Ga. 156. An instruction, on a trial for murder, in effect announcing to the jury that they need not be alarmed at the idea of finding one guilty on circumstantial evidence, because it was not only legal and competent but frequently more convincing than positive testimony, even though the facts constituting the chain were testified to by witnesses of doubtful credibility, and that they were as likely to make a mistake and convict an innocent man on positive testimony as on circumstantial. Harrison v. State, 8 Tex. App. 183. An instruction in a case, where the evidence is entirely circumstantial, that circumstantial evidence is often more reliable than the direct testimony of eyewitnesses, and that a verdict of guilty in such cases may rest on a surer basis than when rendered upon the testimony of eyewitnesses whose memory must be relied upon, and, whose passions and prejudices may have influenced them. State v. Musgrave, 28 S. E. 813, 43 W. Va. 672.

[89] Perez v. Maverick (Tex. Civ. App.) 202 S. W. 199.

[90] Skow v. Locks, 91 N. W. 204, 3 Neb. (Unof.) 176.

[91] Shepard v. Davis, 59 N. Y. S. 456, 42 App. Div. 462.

[92] Millner v. Eglin, 64 Ind. 197, 31 Am. Rep. 121.

mony of those absent.[93] It is error to instruct that the testimony of witnesses not produced would be superior to that of those testifying in the case.[94] It is proper, however, for the court to give to the jury a statutory rule that a deposition is as good evidence as if the deponent had testified orally in court.[95]

§ 56. Opinion and expert evidence

It is generally considered that it is an invasion of the province of the jury to instruct that the opinions of one class of witnesses are of more or less weight than the opinions of another class,[96] or that the opinions of expert witnesses must yield to some other class of evidence,[97] or that such opinions are not entitled to greater weight than any other evidence,[98] or that the testimony of one class of experts is superior to that of another.[99] In one jurisdiction, however, it has been held that, while it is always dangerous for a court to attempt to say that one class of testimony or one class of witnesses ought, under all circumstances, to be given more credit or weight than another,[1] and that it is error for the trial court to single out a class of witnesses or testimony, and give the jury an opportunity to magnify the importance of such testimony,[2] and that it is proper to refuse to charge, as a matter of law, that the testimony of experts based on personal knowledge is entitled to greater weight than that of those who found their opinions on hypothetical questions,[3] yet the trial court may, in a proper case, advise the jury with reference to the relative value of certain species or classes of evidence;[4] and in this jurisdiction it is held that an instruction that the testimony of medical experts having personal knowledge of a case may be entitled to greater weight than the opinions of experts based upon hypothetical questions, while not commendable, may sometimes be justifiable,[5] and that an instruction that expert testimony on the genuineness of a signature ought not to over-

[93] State v. Underwood, 75 Mo. 230.

[94] Brothers v. Horne, 79 S. E. 468, 140 Ga. 617.

[95] Olcese v. Mobile Fruit & Trading Co., 71 N. E. 1084, 211 Ill. 539, affirming judgment 112 Ill. App. 281.

[96] Smith v. Chicago & W. I. R. Co., 105 Ill. 511; Durham v. Smith, 120 Ind. 463, 22 N. E. 333; Cline v. Lindsey, 110 Ind. 337, 11 N. E. 441; Fulwider v. Ingels, 87 Ind. 414. In re Byrne's Will, 172 N. W. 655, 186 Iowa, 345.

[97] Taylor v. Cox, 153 Ill. 220, 38 N. E. 656; Starett v. Chesapeake & O. Ry. Co., 110 S. W. 282, 33 Ky. Law Rep. 309; Nelson v. McLellan, 71 P. 747, 31 Wash. 208, 60 L. R. A. 793, 96 Am. St. Rep. 902.

[98] Ryan v. People, 114 P. 306, 50 Colo. 99, Ann. Cas. 1912B, 1232; People v. Ferraro, 55 N. E. 931, 161 N. Y. 365.

[99] Breck v. State, 2 O. C. D. 477, 2 Ohio Cir. Ct. R. 160; Persons v. State, 90 Tenn. 291, 16 S. W. 726.

[1] Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072.

[2] Simons v. Mason City & Ft. D. R. Co., 103 N. W. 129, 128 Iowa, 139.

[3] Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072.

[4] In re Knox's Will, 98 N. W. 468, 123 Iowa, 24.

[5] Hofacre v. City of Monticello, 103 N. W. 488, 128 Iowa, 239.

throw the positive and direct evidence of credible witnesses, who testify from their personal knowledge, is proper.[6]

§ 57. Positive and negative testimony

Necessity and sufficiency of instructions, see post, §§ 211, 212.

The jury should not be told to attach no weight to negative testimony,[7] and a charge that, where one witness testifies positively to the existence of a fact and another witness testifies positively to the nonexistence of the supposed fact, the former testimony must prevail, is error, since, while the latter testimony is negative in form, it is affirmative in effect,[8] and while, as a general rule, positive testimony will outweigh evidence purely negative in character, it is for the jury to determine in any particular case the comparative values of such evidence,[9] and, except in jurisdictions where the court is allowed to comment on the evidence or express its opinion thereon,[10] the general rule is, both in civil and in criminal cases, that it is error, as invading the province of the jury, to instruct that more weight should be given to positive testimony than to testimony essentially negative,[11] and such instructions are properly refused.[12]

[6] Ayrhart v. Wilhelmy, 112 N. W. 782, 135 Iowa, 290; Bruner v. Wade, 84 Iowa, 698, 51 N. W. 251.

[7] Louisville & N. R. Co. v. York, 30 So. 676, 128 Ala. 305.

[8] State v. Gates, 20 Mo. 400; Rosser v. Bynum & Snipes, 84 S. E. 393, 168 N. C. 340; Williams v. Kirkman, 3 Lea (Tenn.) 510.

Objection to instruction as abstract, as well as invading province of jury. In an action for an accident at a crossing, it is proper to refuse to instruct the jury that "the affirmative testimony of witnesses that the bell was rung and whistle sounded at a given time and place is of greater force and weight than the negative testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung, or the whistle sounded, or that they did not hear them"; such instruction being a mere abstract proposition, and calculated to influence the jury as to the credit to be given to particular witnesses. Atchison, T. & S. F. R. Co. v. Feehan, 149 Ill. 202, 36 N. E. 1036, affirming 47 Ill. App. 66.

[9] State v. Gee, 85 Mo. 647.

[10] Sevior's Adm'r v. Rutland R. Co., 91 A. 1039, 88 Vt. 107.

[11] **Ala.** Birmingham Ry., Light & Power Co. v. Seaborn, 53 So. 241, 168 Ala. 658.

Ariz. Babb v. State, 163 P. 259, 18 Ariz. 505, Ann. Cas. 1918B, 925.

Ark. Keith v. State, 49 Ark. 439, 5 S. W. 880.

Fla. Sumpter v. State, 33 So. 981, 45 Fla. 106.

Ga. Georgia Ry. & Electric Co. v. Wheeler, 80 S. E. 993, 141 Ga. 363; Alabama Great Southern R. Co. v.

[12] **Ark.** Sibley v. Ratliffe, 50 Ark. 477, 8 S. W. 686.

Ind. Cleveland, C., C. & St. L. Ry. Co. v. Schneider, 82 N. E. 538, 40 Ind. App. 524; Louisville, N. A. & C. Ry. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863.

La. State v. Chevallier, 36 La. Ann. 81.

Mo. Johnson v. Springfield Traction Co., 161 S. W. 1193, 176 Mo. App. 174.

Mont. Kansier v. City of Billings, 184 P. 630, 56 Mont. 250.

Neb. Crabtree v. Missouri Pac. R. Co., 124 N. W. 932, 86 Neb. 33, 136 Am. St. Rep. 663.

Okl. Ayers v. Macoughtry, 117 P. 1088, 29 Okl. 399, 37 L. R. A. (N. S.) 865.

In some jurisdictions such an instruction is not rendered proper by the requirement that the witnesses giving positive testimony shall be equal in credibility and opportunity for knowing the facts in dispute with the witnesses giving the negative testimony.[13] In Utah such an instruction is error, where the negative testimony is strong enough to support a verdict rendered in accordance with such testimony.[14] Conversely, it is error to instruct that testimony of persons that they did not hear a signal is positive testimony, and of equal weight with that of those who say they heard such signal,[15] or that negative testimony by one witness for a party will exactly balance positive testimony by another witness for the opposite party.[16]

Brock, 77 S. E. 20, 139 Ga. 248; Wright v. Western & A. R. Co., 77 S. E. 161, 139 Ga. 343; Peak v. State, 62 S. E. 665, 5 Ga. App. 56; Central of Georgia Ry. Co. v. Sowell, 59 S. E. 323, 3 Ga. App. 142; Central of Georgia Ry Co. v. Orr, 57 S. E. 89. 128 Ga. 76; Cowart v. State, 48 S. E. 198, 120 Ga. 510.

Ill. Sheppelman v. People, 134 Ill. App. 556; Chicago & A. Ry. Co. v. Louderback, 125 Ill. App. 323.

Ind. Vandalia R. Co. v. Baker, 97 N. E. 16, 50 Ind. App. 184; Muncie Pulp Co. v. Keesling, 76 N. E. 1002, 166 Ind. 479, 9 Ann. Cas. 530.

Mo. State ex rel. Essex v. Kansas City, Ft. S. & M. Ry. Co., 70 Mo. App. 634.

Okl. Ft. Smith & W. R. Co. v. Moore (Sup.) 169 P. 904.

Or. Russell v Oregon R. & Nav. Co., 102 P. 619, 54 Or. 128.

Utah. Haun v. Rio Grande W. Ry. Co., 62 P. 908, 22 Utah, 346.

Testimony as to signals by locomotive. In an action against a railroad company to recover for the death of a workman who was run over by one of its trains while working on the track, an instruction that the testimony of witnesses to the effect that the bell and whistle were rung and blown was entitled to more weight than the testimony of persons who testified that they did not hear the bell or whistle is prejudicial error, as, in effect, it tells the jury to believe defendant's witnesses. Chicago & N. W. Ry. Co. v. Dunleavy, 27 Ill. App. 438, affirmed 129 Ill. 132, 22 N. E. 15.

In Wisconsin, as will be more fully shown in a subsequent chapter, where evidence positive in character is arrayed against purely negative evidence, a party will be entitled, in a proper case, to an instruction assigning superior weight to the former evidence. Eggett v. Allen, 82 N. W. 566, 106 Wis. 633.

In North Carolina it is not reversible error in a proper case to declare that positive evidence is entitled to more weight than negative. State v. Murray. 51 S. E. 775, 139 N. C. 540.

[13] Milligan v. Chicago, B. & Q. R. Co., 79 Mo. App. 393; Haskew v. State, 7 Tex. App. 107.

In Georgia it is not error to instruct that positive testimony is rather to be believed than negative testimony, with the qualification of other things being equal and the witnesses being of equal credibility. Southern Ry. Co. v. O'Bryan, 45 S. E. 1000, 119 Ga. 147.

[14] Haun v. Rio Grande W. Ry. Co., 62 P. 908, 22 Utah, 346.

[15] Gray v. Chicago, R. I. & P. R. Co., 121 N. W. 1097, 143 Iowa, 268.

[16] Beckstrom v. Krone, 125 Ill. App. 376.

H. PRESUMPTIONS OF FACT AND INFERENCES FROM EVIDENCE

Necessity and sufficiency of instructions, see post, §§ 185–202.

§ 58. Statement of rule

Presumptions or inferences of fact, excluding those presumptions or inferences which arise so inevitably and necessarily by processes of logic or law from a given state of facts as to be called legal presumptions,[17] and excluding presumptions of fact required by positive law, but rebuttable,[18] fall within the exclusive province of the jury,[19] the chief function of which is to draw their own conclusions from the testimony.[20] Instructions which restrict the right of the jury to draw any reasonable inference from facts in evidence, or direct them as to what inferences of fact they shall draw from the evidence, are er-

[17] **Cal.** People v. Jones, 55 P. 698, 123 Cal. 65; Hill v. Finigan, 77 Cal. 267, 19 Pac. 494, 11 Am. St. Rep. 279.

Ga. Hunt v. State, 81 Ga. 140, 7 S. E. 142.

Mo. State v. Pyscher, 77 S. W. 836, 179 Mo. 140.

S. C. State v. Hardin, 103 S. E. 557, 114 S. C. 280.

Tex. Mitchell v. Stanton (Civ. App.) 139 S. W. 1033.

In California it is held that, notwithstanding the constitutional mandate that courts shall not charge as to matters of fact, an instruction correctly stating a rule of law applicable to the effect of evidence, such as the probative effect of the possession of goods recently stolen, is not ground for reversal, unless some circumstances peculiar to the particular case would make it tend to mislead or confuse the jury. People v. Farrington, 74 P. 288, 140 Cal. 656.

Fire caused by sparks from locomotive. In Texas, in an action against a railroad company for injuries caused by a fire, an instruction that, if the jury find that the fire was caused by sparks escaping from a locomotive, the defendant is prima facie negligent, is not on the weight of the evidence. Houston & T. C. R. Co. v. Washington, 127 S. W. 1126, 60 Tex. Civ. App. 391; St. Louis Southwestern Ry. Co. of Texas v. Ross, 119 S. W. 725, 55 Tex. Civ. App. 622; St. Louis Southwestern Ry. Co. of Texas v. McLeod (Civ. App.) 115 S. W. 85; Texas & P. Ry. Co. v. Prude, 86 S. W. 1046, 39 Tex. Civ. App. 144; Missouri, K. & T. Ry. Co. of Texas v. Florence (Civ. App.) 74 S. W. 802; Gulf, C. & S. F. Ry. Co. v. Jordan, 60 S. W. 784, 25 Tex. Civ. App. 82; Texas & P. Ry. Co. v. Rice, 59 S. W. 833, 24 Tex. Civ. App. 374; Gulf, C. & S. F. Ry. Co. v. Johnson, 50 S. W. 563, 92 Tex. 591, 94 Tex. 649.

[18] Bulen v. Granger, 22 N. W. 306, 56 Mich. 207; Wood v. Dean (Tex. Civ. App.) 155 S. W. 363; White v. McCullough, 120 S. W. 1093, 56 Tex. Civ. App. 383; Gibson v. Hill, 21 Tex. 225.

[19] **Cal.** Pacific Imp. Co. v. Maxwell, 146 P. 900, 26 Cal. App. 265; People v. Walden, 51 Cal. 588.

D. C. Metropolitan R. Co. v. Martin, 15 App. D. C. 552.

Ill. Brant v. Gallup, 5 Ill. App. 262; Eames v. Blackhart, 12 Ill. 195.

Md. Coffin v. Brown, 50 A. 567, 94 Md. 190, 55 L. R. A. 732, 89 Am. St. Rep. 422.

Mo. Winter v. Supreme Lodge K. P. of the World, 69 S. W. 662, 96 Mo. App. 1.

S. C. Lowry v. Atlantic Coast Line R. Co., 75 S. E. 278, 92 S. C. 33.

Vt. In re Hathaway's Will, 53 A. 996, 75 Vt. 137.

[20] Richards v. Fuller, 88 Mich. 653.

roneous, both in civil [21] and in criminal cases,[22] and are properly re-

[21] **Ala.** Alverson v. Little Cahaba Coal Co., 77 So. 547, 201 Ala. 123; Amzi Godden Seed Co. v. Smith, 64 So. 100, 185 Ala. 296; Alabama Great Southern R. Co. v. Demoville, 52 So. 406, 167 Ala. 292; King v. Pope, 28 Ala. 601.

Ark. Missouri Pac. Ry. Co. v. Byars, 58 Ark. 108, 23 S. W. 583.

Cal. Langford v. San Diego Electric Ry. Co., 164 P. 398, 174 Cal. 729.

Fla. Southern Pine Co. v. Powell, 37 So. 570, 48 Fla. 154.

Idaho. Park v. Brandt, 119 P. 877, 20 Idaho, 660.

Ill. Pridmore v. Chicago, R. I. & P. Ry. Co., 114 N. E. 176, 275 Ill. 386, affirming judgment 192 Ill. App. 446; Elston & W. Gravel Road Co. v. People, 96 Ill. 584; Graves v. Colwell, 90 Ill. 612; Bartholomew v. Bartholomew, 18 Ill. 326; Wood v. Olson, 117 Ill. App. 128.

Ind. Louisville, N. A. & C. Ry. Co. v. Falvey, 3 N. E. 389, 104 Ind. 409, rehearing denied 4 N. E. 908, 104 Ind 409; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63.

Iowa. Leiber v. Chicago, M. & St. P. Ry. Co., 84 Iowa, 97, 50 N. W. 547.

La. Gove v. Beedlove, 5 Rob. 78; Hewes v. Barron, 7 Mart. (N. S.) 134.

Md. Wilson v. Smith, 10 Md. 67.

Mich. Wood v. Standard Drug Store, 157 N. W. 403, 190 Mich. 654.

N. Y. Panama R. Co. v. Charlies, 54 Hun, 637, 7 N. Y. S. 528.

Or. Saratoga Inv. Co. v. Kern, 148 P. 1125, 76 Or. 243.

Pa. Lamb v. Prettyman, 33 Pa. Super. Ct. 190.

S. C. Hursey v. Surles, 74 S. E. 618, 91 S. C. 284; Yarborough v. Southern Ry., 58 S. E. 936, 78 S. C. 103.

Tex. Noblett v. Harper (Civ. App.) 136 S. W. 519; White v. McCullough, 120 S. W. 1093, 56 Tex. Civ. App. 383; Western Union Tel. Co. v. Burgess (Civ. App.) 56 S. W. 237; Reynolds v. Weinman (Civ. App.) 33 S. W. 302.

Va. Torbert v. Atlantic Coast Line R. Co., 95 S. E. 635, 122 Va. 682.

Wis. Hawkins v. Costigan, 21 Wis. 545.

Expression of opinion. In some jurisdictions, in accordance with a rule already stated, the expression by a judge in his charge to the jury of his opinion as to an inference of a fact from evidence affords, in general, no ground for exception; but he must not instruct them as to such an inference, in such manner that they might well understand that the inference is matter of law which they are not at liberty to disregard. State v. Lynott, 5 R. I. 295.

Instructions held improper within rule. An instruction that if, after considering all the evidence, they believe the testimony of any witness as to certain facts, then they should find accordingly. Chicago Union Traction Co. v. Shedd, 110 Ill. App. 400. A charge, in an action for injuries to a passenger, when defendant has introduced evidence tending to show that it has used all proper care in avoiding an accident, that the fact of the injury is prima facie evidence of negligence, which defendant must rebut by showing that it has used due care. St. Louis Southwestern Ry. Co. of Texas v. Parks, 76 S. W. 740, 97 Tex. 131, reversing judgment Parks v. St. Louis Southwestern Ry. Co. of Texas, 69 S. W. 125, 29 Tex. Civ. App. 551. A charge, in an action for injuries received in a railway collision, that where "an injury was received by reason of, and as the direct result of, an unusual occurrence, then the law presumes the occurrence so causing the injury to have happened by reason of negligence, unless it further appears by the proof that such unusual occurrence was not the result of negligence, but, on the contrary, was caused by some circumstance or cause which the exercise of the greatest care and prudence could not have prevented." Texas Cent. Ry. Co. v. Burnett, 80 Tex. 536, 16 S. W. 320. A charge that if deceased did not fall off the car, but voluntarily jumped off, then he was guilty of contributory negligence or suicide, and plaintiff could not recover. Perez v. San Antonio & A. P. Ry. Co., 67 S. W. 137, 28 Tex. Civ. App. 255. An in-

[22] See note 22 on page 108.

fused.[28] An instruction which advises the jury as to the proper pro-

struction, in an action for injury to a building by an explosion of gas, that if defendant's pipes, meters, and connections were free from any leak in a week, or less, before the explosion, the presumption is that they were in such condition at the time of the accident, and unless this presumption is removed, the jury must find for defendant. Linforth v. San Francisco Gas & Electric Co., 103 P. 320, 156 Cal. 58, 19 Ann. Cas. 1230. An instruction, in an action on a policy insuring against loss by fire and lightning, but not against loss from winds, where the testimony showed that the building fell when struck by lightning, which preceded a wind, that if the jury from their experience deemed it incredible that such a building could fall by reason of being struck by lightning, and if they found that at or about the time the building was struck by lightning there was a heavy wind sufficient to cause the fall of the building, they might by applying their own knowledge find that the fall of the building was occasioned by wind, was objectionable. Home Ins. Co. v. Gagen, 76 N. E. 927, 38 Ind. App. 680. An instruction that, if the accident was caused by the failure of the city to provide proper lights on its streets near the station grounds of the defendant, then the jury must find for the defendant railway company. Izlar v. Manchester & A. R. Co., 35 S. E. 583, 57 S. C. 332. An instruction, in an action for falling down a stairway, where it was disputed whether the place was light or dark, that if the place was dark it was plaintiff's duty to get a light if he was not familiar with it. Bingham v. Marcotte, Cote & Co., 99 A. 439, 115 Me. 459. An instruction that asserts that "when it has been established that the funds or property has reached the hands of the officer, and that the same was not forthcoming when properly or legally demanded, the law presumes an illegal conversion of such funds or property, and the burden of proving the legal use of such property or money is upon the officer." State v. Smith, 13 Kan. 274. A charge, in an action against a railroad company for killing a dog on the track, that a dog is an animal of superior intelligence, possessing greater ability to avert injury than live stock, and that the presumption is

[28] **Ala.** Lawson v. State, 76 So. 411, 16 Ala. App. 174; Central of Georgia Ry. Co., v. Dothan Mule Co., 49 So. 243, 159 Ala. 225.

Ark. Jenkins v. Midland Valley R. Co., 203 S. W. 1, 134 Ark. 1.

Cal. People v. Williams, 142 P. 124, 24 Cal. App. 646; Wise v. Wakefield, 50 P. 310, 118 Cal. 107.

Ill. People v. Arnold, 93 N. E. 786, 248 Ill. 169.

Ind. Schillinger v. Savage, 115 N. E. 321, 186 Ind. 189.

La. State v. Rideau, 42 So. 973, 118 La. 385.

Md. City & Suburban Ry. of Washington v. Clark, 97 A. 996, 128 Md. 281.

Mass. United Shoe Machinery Co. v. Bresnahan Shoe Machinery Co., 83 N. E. 412, 197 Mass. 206; White v. McPherson, 67 N. E. 643, 183 Mass. 533.

Mich. Lincoln v. Felt, 92 N. W. 780, 132 Mich. 49; Chisholm v. Preferred Bankers' Life Assur. Co., 70 N. W. 415, 112 Mich. 50.

Minn. Kellogg v. Village of Janesville, 34 Minn. 132, 24 N. W. 359.

Mo. State v. Patton, 164 S. W. 223, 255 Mo. 245; Schlinski v. City of St. Joseph, 156 S. W. 823, 170 Mo. App. 380.

Mont. State v. Mahoney, 61 P. 647, 24 Mont. 281.

N. Y. People v. Bartholf, 66 Hun, 626, 20 N. Y. Supp. 782.

N. C. McQuay v. Richmond & D. R. Co., 109 N. C. 585, 13 S. E. 944.

Or. De War v. First Nat. Bank, 171 P. 1106, 88 Or. 541.

S. C. Lewis v. Pope, 68 S. E. 680, 86 S. C. 285; Weaver v. Southern Ry. Co., 56 S. E. 657, 76 S. C. 49, 121 Am. St. Rep. 934.

Tex. City of Dallas v. Beeman, 55 S. W. 762, 23 Tex. Civ. App. 315.

Vt. Taplin & Rowell v. Marcy, 71 A. 72, 81 Vt. 428; In re White's Will, 63 A. 878, 78 Vt. 479.

cess of reasoning on the facts is erroneous, as invading their province.[24]

that he has the instinct and ability to go out of the way of danger, unless his freedom of action is interfered with, and that the diligence which an engineer owes to the owner of a dog is the same as that which he owes to a man walking upon or near the track apparently in possession of his faculties, and that the engineer would be warranted in acting upon the belief that the dog would be aware of the approaching danger and get out of the way in time to avoid injury. St. Louis, I. M. & S. Ry. Co. v. Rhoden, 123 S. W. 798, 93 Ark. 29, 20 Ann. Cas. 915, 137 Am. St. Rep. 73. A charge that if a railroad is running its train very fast, and a person on a street in a safe place knows that fact, and suddenly and negligently crosses in front of the train, and this, concurring with the rapidly moving train, is the proximate cause of the injury, there can be no recovery. Turbyfill v. Atlanta & C. Air Line Ry. Co., 65 S. E. 278, 83 S. C. 325. An instruction that, if plaintiff's animal was killed by a train, then the presumption that the injury was the result of defendant's negligence arises, and tends to contradict the testimony of employés that proper lookout was kept. Mahor v. Kansas City Southern Ry. Co. (Ark.) 223 S. W. 388. An instruction that the charging of goods sold to another against the person who told the merchant to so charge them is a strong circumstance showing the undertaking of such person to be merely a collateral promise and void under the statute of frauds. Clark v. Smith, 87 Ill. App. 409. An instruction which stated that the existence of influence must generally be gathered from circumstances, such as whether testatrix formerly intended a different disposition of her property, whether she was surrounded by those who had an object to accomplish, whether she was of weak mind subject to influence, and whether the proposed will was such as would be urged by the persons surrounding her. In re Kendrick's Estate, 62 P. 605, 130 Cal. 360.

Instructions erroneous as directing that certain facts do not warrant certain inferences. A charge that, if the south line of the P. county school land can be identified on the ground, it will not be presumed, in the absence of evidence, that the surveyor who located the A county school land was ignorant of such line, nor that he intended his lines to conflict with the lines of the P. county school land. Clay County Land & Cattle Co. v. Montague County, 8 Tex. Civ. App. 575, 28 S. W. 704. In an action against connecting carriers for injuries to cattle, a charge that there was no evidence warranting a finding that the cattle were roughly handled by the first carrier, where there was evidence from which that fact might have been inferred, was a charge upon the weight of testimony. Houston & T. C. R. Co. v. Hawkins & Nance (Tex. Civ. App.) 167 S. W. 190. An instruction that the invitation of a conductor, when nearing a station, to the passenger, to "get ready to get off," was too remote a cause of an injury received from alighting from the moving train at a station. Cooper v. Georgia, C. & N. Ry. Co., 39 S. E. 543, 61 S. C. 345. A charge, in an action for injury to a passenger in a street car, alleged to be due to negligence in colliding with a water cart, to the effect that the company was not an insurer of the safety of its passengers, and the mere fact that the car collided with the wagon did not in itself establish liability against defendant. Houston Electric Co. v. Nelson, 77 S. W. 978, 34 Tex. Civ. App. 72. An instruction, in an action by a passenger against a street railroad company for personal injuries alleged to be due to defendant's negligence, in which it was conceded that plaintiff was not at fault, and in which there was substantial evidence, though conflicting, to show that the injury was incurred through the negligence of a motorman, that, under the case and proofs, no presumption of negligence arose against defendant from the mere fact that an accident had occurred. Sullivan v. Market St. Ry. Co., 69 P. 143, 136 Cal. 479. An in-

[24] Brown v. State, 23 Tex. 195.

As a rule, the fact that the conclusions of the jury from the evidence

struction that the mere fact that a deed was carried and placed in bank by parties would not of itself be evidence, whether it was placed in escrow or delivered to grantees. Grayson v. Damme, 158 P. 387, 59 Okl. 214. An instruction, in an action by an employé for personal injuries, that he must prove negligence in the defendant, and that proof of the accident and injury alone will not suffice. Smith v. Gulf, W. T. & P. Ry. Co. (Tex. Civ. App.) 65 S. W. 83. Instructions, in an action against a railway company for injuries to a fireman, that the mere fact an injury occurs is not of itself proof of negligence, and that the mere fact that the fireman was injured by the giving way of the shaker bar attachment is no proof of negligence. Missouri, K. & T. Ry. Co. of Texas v. Lynch, 90 S. W. 511, 40 Tex. Civ. App. 543. An instruction, in freight conductor's action for injuries, that, if plaintiff stumbled over a stake in the yards while at work, that alone would not warrant affirmative answer to a special interrogatory. Galveston, H. & S. A. Ry. Co. v. Miller (Tex. Civ. App.) 192 S. W. 593. An instruction that the fact that a member of the firm sued was not called to prove that certain defendants were not partners would not authorize the jury to infer that they were partners. Wallis v. Wood (Tex. Sup.) 7 S. W. 852. An instruction that a railroad company is presumed to keep its bridges in proper condition, and to make the necessary repairs before they are dangerous, and the fact that repairs are made is not evidence that they were not previously in good condition. Missouri, K. & T. Ry. Co. of Texas v. Parker, 49 S. W. 717, 20 Tex. Civ. App. 470; Id., 50 S. W. 606, 20 Tex. Civ. App. 470. A charge that as the engineer had testified that the engine was properly equipped and handled, no inference could be drawn from proof that the goods were burned by fire from the engine, but that the burden was thereby thrown on plaintiff to prove negligence on defendant's part. Missouri Pac. Ry. Co. v. Bartlett, 81 Tex. 42, 16 S. W. 638. An instruction which, as a matter of law, advises a jury that the placing of cinders alongside of a track and on it would not indicate to a person of ordinary intelligence that the track had been made solid, so that it would not sink. Louisville & N. R. Co. v. Kemper, 53 N. E. 931, 153 Ind. 618. A charge, where a will when received from an express company was found to have been mutilated, that the evidence that the package containing the will was abstracted from the company's safe in the evening, and restored the next morning, after having been opened and resealed, did not prove that the will was mutilated by the person so abstracting or returning it. Webster v. Yorty, 62 N. E. 907, 194 Ill. 408. A charge, on the issue of undue influence in the execution of a will, that there is no evidence authorizing the finding that fraud and deceit were practiced, or that any of the beneficiaries used coercion, there being evidence to show the existence of confidential relations and activity in the preparation and execution of the will. Coghill v. Kennedy, 24 So. 459, 119 Ala. 641.

[22] **Ala.** Easterling v. State, 30 Ala. 46.

Ariz. Barrow v. Territory, 114 P. 975, 13 Ariz. 302.

Cal. People v. Carrillo, 54 Cal. 63.

Colo. Horton v. People, 107 P. 257, 47 Colo. 252.

Fla. Curington v. State, 86 So. 344; Gunn v. State, 83 So. 511, 78 Fla. 599.

Ind. Allison v. State, 42 Ind. 354.

Ky. Tines v. Commonwealth, 77 S. W. 363, 25 Ky. Law Rep. 1233.

Mo. State v. Stewart, 212 S. W. 853, 278 Mo. 177; State v. Stanley, 100 S. W. 678, 123 Mo. App. 294.

Neb. Williams v. State, 46 Neb. 704, 65 N. W. 783.

Tex. Owens v. State, 46 S. W. 240, 39 Tex. Cr. R. 391; Brann v. State (Cr. App.) 39 S. W. 940; Williams v. State, 11 Tex. App. 275; Hull v. State, 7 Tex. App. 593.

Illustrations of instructions held erroneous within rule. An instruction in a prosecution for embez-

in a criminal case differ from those of the accused or the state does not affect its power to make them.[25]

element, that the mere failure on the part of defendant, without explanation, to turn over to his employer the funds in his hands belonging to it, established guilt. Hampton v. State, 54 So. 722, 99 Miss. 176. An instruction that mere uttering of a forgery is a circumstance from which knowledge of the falsity may be presumed, that the jury could presume that accused knew that a deed passed by him was forged, if it was forged, but that he could contradict or explain away the presumption, etc. State v. Hatfield, 118 P. 735, 65 Wash. 550, Ann. Cas. 1913B, 895. An instruction that the mere uttering of a forged instrument is a circumstance from which knowledge of its falsity may be presumed, and that, if the jury found that a mortgage was forged, and that it was uttered by the defendant, a rebuttable presumption arose that the accused knew of its character at the time of passing it, etc. State v. Peeples, 118 P. 906, 65 Wash. 673. An instruction that if accused had possession of a forged check and obtained money upon it his possession raised a presumption of guilt, unless rebutted. State v. McBride, 130 P. 486, 72 Wash. 390. A charge requested by defendants that certain language of one of them to the other would not justify a finding that the speaker intended the other to assail or kill deceased. Wilkinson v. State, 106 Ala. 23, 17 So. 458. A charge, in a prosecution for assault to murder, that, "if there was a sufficient provocation to excite sudden passion, then the presumption is that passion disturbed the sway of reason, and made him regardless of his act." Wigerfall v. State, 82 So. 635, 17 Ala. App. 145. An instruction, on a prosecution for murder, in which it appeared that defendant was present when hounds were put on the trail of the murderer, to the effect that the only purpose for which the jury should consider the fact that defendant was with the hounds, was a mere circumstance tending to show an absence of conscious guilt. Shelton v. State, 42 So. 30, 144 Ala. 106. An instruction, on a trial for homicide committed by the son of accused, that no presumption was to be indulged in against accused because he was present at the place of the killing and had an altercation with decedent just prior thereto. Morris v. State, 41 So. 274, 146 Ala. 66. A charge that the fact that a human body was buried beneath the body of a mule would justify a finding that a murder had been committed, and that those who undertook to conceal the body were criminally concerned with the murder. Sutherlin v. State, 48 N. E. 246, 148 Ind. 695. An instruction, in a prosecution for homicide, in which the deceased's clothing was exhibited to the jury, that the jury cannot draw any conclusion from their inspection of the pockets of the deceased that the defendant committed any robbery on the deceased, or that he at any time placed his hand or fingers in such pockets notwithstanding they may have been turned, and blood-stains may have existed in the shape of fingermarks. Story v. State, 99 Ind. 413. A charge, in a murder case, that defendant did not provoke or bring on the difficulty, and that, if deceased turned towards him and put his right hand in his hip pocket so as to indicate to a reasonable man his purpose to draw a weapon and use it, defendant was authorized to anticipate him and shoot first. Crumpton v. State, 52 So. 605, 167 Ala. 4. An instruction that if, when the defendant's possession of the animals was questioned, he stated where he got them "and if such statement is reasonably and probably true, then, unless the state has shown such explanation of possession to be false, you will acquit the defendant." Jordan v. State, 104 S. W. 900, 51 Tex. Cr. R. 646.

Prima facie indication of guilt. In Iowa an instruction that a certain fact if found by the jury, will be a "prima facie indication" of guilt, has been sustained; the court saying that

[25] Brunaugh v. State, 90 N. E. 1019, 173 Ind. 483.

Under the above rule it is error to instruct and proper to refuse to instruct as to the strength or weakness of a presumption of fact,[26] or as to the amount of proof required to overcome a rebuttable presumption.[27]

§ 59. Limitations of rule

In some jurisdictions it is not error to instruct that the jury should consider certain facts, inferences from which are likely to be drawn to the prejudice of one party or the advantage of another,[28] and while in a few jurisdictions it is an invasion of the province of the jury to instruct that they may draw certain inferences of fact from the evi-

the quoted phrase does not mean presumptive evidence of guilt, but merely that, at first view, the circumstances, whose effect is being considered, suggest guilt. State v. Richards, 102 N. W. 439, 126 Iowa, 497. Where a witness who had testified for accused on a former trial testified on retrial that he and another witness had been bribed by accused to so testify, and that the testimony was false, an instruction that if the jurors believed that defendant, after being charged with the commission of the larceny in question and before the former trial, knowingly induced certain witnesses to testify falsely concerning any material facts in the case, such conduct would be a circumstance to be considered with all the other facts and circumstances in determining the defendant's guilt or innocence, and such fact, if found, was a circumstance which prima facie indicated guilt, and should receive such consideration and weight as the jury deemed it entitled to, was proper. State v. Kimes, 132 N. W. 180, 152 Iowa, 240.

[26] **Cal.** People v. Cline, 74 Cal. 575, 16 P. 391.

Colo. Van Straaten v. People, 56 P. 905, 26 Colo. 184.

Ill. Leiserowitz v. Fogarty, 135 Ill. App. 609.

Kan. State v. Jewell, 127 P. 608, 88 Kan. 130.

Mich. Wilcox v. Young, 66 Mich. 687, 33 N. W. 765.

Utah. Schuyler v. Southern Pac. Co., 109 P. 458, 37 Utah, 581, rehearing denied 109 P. 1025, 37 Utah, 612.

Wash. State v. Bliss, 68 P. 87, 27 Wash. 463.

Wis. Baker v. State, 80 Wis. 416, 50 N. W. 518.

[27] Vickers v. Hawkins, 58 S. E. 44, 128 Ga. 794.

[28] State v. Witten, 100 Mo. 525, 13 S. W. 871.

Contradictory statements. It is not error to refer to the consideration of the jury the alleged untrue or contradictory statements of an accused criminal, in relation to his connection with the offense charged against him, as matters from which a presumption of guilt might be inferred. Cathcart v. Commonwealth, 37 Pa. 108.

In Texas, however, it has been held that an instruction, in a civil action for rape, that, if plaintiff was silent as to the matter after the alleged assault, this was a circumstance which should be considered by the jury, is erroneous as on the weight of evidence. Munk v. Stanfield (Civ. App.) 100 S. W. 213. And for the same reason a charge that the mere silence of accused at the time of being arrested should not be considered as a circumstance against him was properly refused. Clark v. State (Tex. Cr. App.) 59 S. W. 887.

In Missouri it has been held, seemingly in conflict with the text case, that in a criminal case it is error to instruct the jury that defendant's attempts to escape from custody and to procure false testimony are, if proved, circumstances to be considered in determining his guilt or innocence. State v. Sivils, 105 Mo. 530, 16 S. W. 880.

dence,[29] it being considered that to say to the jury that they will be authorized to find a fact because of the existence of another fact is equivalent to stating that the existence of the latter raises the reasonable presumption of the existence of the former,[30] the weight of authority supports such an instruction as one not on the weight of the evidence.[31] In some jurisdictions such an instruction is proper, if the testimony as to the facts from which inferences are sought to be deduced is undisputed,[32] and but a single inference can be drawn therefrom.[33] An instruction that certain inferences may be drawn by the jury from the testimony of a witness, which merely states such testimony in another form, is not objectionable, although such an instruction cannot be of much value.[34]

§ 60. Specific applications of rule

The above rule has been applied, in civil cases, to inferences of or concerning willfulness,[35] or malice,[36] or fraud,[37] or adultery,[38] or testamentary capacity,[39] or that a railroad pass was issued without consideration,[40] or to inferences of negligence from the derailment of a train,[41] or of knowledge of a train schedule,[42] or of knowledge of a

[29] Smith v. Jackson, 202 S. W. 227, 133 Ark. 334; Union Seed & Fertilizer Co. v. St. Louis, I. M. & S. Ry. Co., 181 S. W. 898, 121 Ark. 585; Standard Cotton Mills v. Cheatham, 54 S. E. 650, 125 Ga. 649; Snowden v. Waterman, 31 S. E. 110, 105 Ga. 384.

Contra, Mangham v. State, 75 S. E. 512, 11 Ga. App. 427; Radford v. State, 67 S. E. 707, 7 Ga. App. 600.

[30] Stone v. Geyser, etc., Min. Co., 52 Cal. 315.

[31] **Colo.** Newby v. People, 62 P. 1035, 28 Colo. 16.

Ind. Johnson v. Brady (Ind. App.) 126 N. E. 250; Vandalia Coal Co. v. Moore, 121 N. E. 685, 69 Ind. App. 311; Talge Mahogany Co. v. Hockett, 103 N. E. 815, 55 Ind. App. 303.

Md. Newman v. McComas, 43 Md. 70.

Mass. Commonwealth v. Walsh, 162 Mass. 242, 38 N. E. 436.

Vt. Carrigan v. Hull, 5 Vt. 22.

It is the province of the court to instruct the jury as to what inferences of fact they would be warranted in drawing from the evidence and facts proved; and, if the court should not err as to the kind and extent of such inferences, exception could not be sustained, even though the matter should be so plain as to render it needless to say anything about it to the jury. Brewin v. Farrell's Estate, 39 Vt. 206.

[32] Lynn v. Thomson, 17 S. C. 129.

[33] Bluedorn v. Missouri Pac. Ry. Co. (Mo.) 24 S. W. 57.

[34] Holmes v. Cook, 50 Wis. 172, 6 N. W. 507.

[35] Gwynn v. Citizens' Telephone Co., 48 S. E. 460, 69 S. C. 434, 67 L. R. A. 111, 104 Am. St. Rep. 819.

[36] L. B. Price Mercantile Co. v. Cuilla, 141 S. W. 194, 100 Ark. 316; Clifford v. Lee (Tex. Civ. App.) 23 S. W. 843.

[37] Heckelman v. Rupp, 85 Ind. 286; Warfield v. Clark, 91 N. W. 833, 118 Iowa, 69; Freiberg v. Freiberg, 74 Tex. 122, 11 S. W. 1123; Ross v. W. D. Cleveland & Sons (Tex. Civ. App.) 133 S. W. 315.

[38] Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213.

[39] McBride v. Sullivan, 45 So. 902, 155 Ala. 166.

[40] Nickles v. Seaboard Air Line Ry., 54 S. E. 255, 74 S. C. 102.

[41] Abilene & S. Ry. Co. v. Burleson (Tex. Civ. App.) 157 S. W. 1177; Davis v. Galveston, H. & S. A. Ry. Co., 93 S. W. 222, 42 Tex. Civ. App. 55;

[42] Western Union Telegraph Co. v. Taylor (Tex. Civ. App.) 167 S. W. 289.

town officer of defects in a highway,[43] or of authority of agent,[44] or of payment,[45] or that an officer having custody of a person will protect him in his lawful rights,[46] or a presumption in favor of the proceedings of an administrator,[47] or to an instruction that certain acts did not raise a presumption of dedication,[48] or to inferences from failure to call a witness having knowledge concerning facts in dispute.[49]

It is error to instruct, and proper to refuse to instruct, that the presence of certain circumstances will make it incumbent upon one to exercise more care than if such circumstances were absent,[50] or that greater care is required to be exercised under given circumstances than under others.[51]

In criminal cases such rule has been applied to inferences of or concerning intent, or malice,[52] or identity,[53] or inferences arising from the failure to call witnesses or to cross-examine them,[54] or from making contradictory statements,[55] or from failure to prove an alibi.[56] In a criminal case it is proper to refuse an instruction that if the evidence is susceptible of two constructions, one of which is

Houston E. & W. T. Ry. Co. v. Richards, 49 S. W. 687, 20 Tex. Civ. App. 203.

[43] Bredlau v. Town of York, 92 N. W. 261, 115 Wis. 554.

[44] Gulfport Fertilizer Co. v. Jones, 73 So. 145, 15 Ala. App. 280.

[45] Cole v. Waters, 147 S. W. 552, 164 Mo. App. 567.

[46] Southwestern Portland Cement Co. v. Reitzer (Tex. Civ. App.) 135 S. W. 237.

[47] Doolittle v. Holton, 26 Vt. 588.

[48] Earle v. Poat, 41 S. E. 525, 63 S. C. 439.

[49] Edwards v. St. Louis & S. F. R. Co., 149 S. W. 321, 166 Mo. App. 428.

[50] Waggoner v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 92 S. W. 1028; Ryan v. Union Pac. R. Co., 151 P. 71, 46 Utah, 530.

[51] Texas & P. Ry. Co. v. Durrett, 63 S. W. 904, 26 Tex. Civ. App. 268; Meadows v. Truesdell (Tex. Civ. App.) 56 S. W. 932; Citizens' Ry. Co. v. Holmes, 46 S. W. 116, 19 Tex. Civ. App. 266; Galveston, H. & S. A. Ry. Co. v. Eaten (Tex. Civ. App.) 44 S. W. 562; St. Louis, A. & T. Ry. Co. v. Burns, 71 Tex. 479, 9 S. W. 467.

In an action for injuries to one run down by a street car, an instruction that greater care in operating cars is required in populous cities and crowded streets than in sparsely settled districts and streets or highways upon which there are few travelers, is erroneous, as invading the province of the jury. Indianapolis St. Ry. Co. v. Taylor, 72 N. E. 1045, 164 Ind. 155.

[52] **Ala.** Austin v. State, 40 So. 989, 145 Ala. 37; Thayer v. State, 35 So. 406, 138 Ala. 39; Smith v. State, 29 So. 699, 129 Ala. 89, 87 Am. St. Rep. 47.

Cal. People v. Barker, 70 P. 617. 137 Cal. 557.

Colo. Nilan v. People, 60 P. 485, 27 Colo. 206.

Neb. Flege v. State, 133 N. W. 431, 90 Neb. 390.

Wash. State v. Dolan, 50 P. 472, 17 Wash. 499.

[53] People v. Wong Sang Lung, 84 P. 843, 3 Cal. App. 221.

[54] Frank v. State, 80 S. E. 1016, 141 Ga. 243; Rhea v. Territory, 105 P. 314, 3 Okl. Cr. 230.

[55] People v. Stewart, 75 Mich. 21, 42 N. W. 662; Massey v. State, 1 Tex. App. 563.

[56] Adams v. State, 28 Fla. 511, 10 South. 106.

consistent with the defendant's innocence and the other is not, the jury should adopt the former construction.[57]

§ 61. Presumption or inferences from possession of fruits of crime

Necessity and sufficiency of instructions, see post, § 195.

An instruction that the unexplained possession of the fruits of a crime recently after its commission affords ground for the presumption that the possessor is the real criminal,[58] or that the fact of such possession, in a prosecution for larceny, burglary, or kindred offenses, will be sufficient to support a conviction,[59] is, except in those jurisdictions where a legal presumption of guilt arises from such possession,[60] erroneous, as on the weight of the evidence, as is an instruction, in a prosecution for larceny, that such unexplained possession, if corroborated by other evidence, will authorize a conviction,[61] or an in-

[57] **Ala.** Pippin v. State, 73 So. 340, 197 Ala. 613; Harvey v. State, 73 So. 200, 15 Ala. App. 311; Jones v. State, 68 So. 690, 13 Ala. App. 10; Kelly v. State, 68 So. 675, 13 Ala. App. 39; Key v. State, 58 So. 946, 4 Ala. App. 76; Harrell v. State, 52 So. 345, 166 Ala. 14; Medley v. State, 47 So. 218, 156 Ala. 78; Burkett v. State, 45 So. 682, 154 Ala. 19; Kennedy v. State, 40 So. 658, 147 Ala. 687; Thomas v. State, 103 Ala. 18, 16 So. 4; Mitchell v. State, 94 Ala. 68, 10 So. 518; Tolliver v. State, 94 Ala. 111, 10 So. 428; Fonville v. State, 91 Ala. 39, 8 So. 688.

Wis. State v. Dunn, 102 N. W. 935, 125 Wis. 181.

[58] **Ark.** Long v. State, 216 S. W. 306, 140 Ark. 413.

Cal. People v. Mitchell, 55 Cal. 236.

Minn. State v. Hoshaw, 94 N. W. 873, 89 Minn. 307.

Okl. Cox v. Territory, 104 P. 378, 2 Okl. Cr. 668; Slater v. United States, 98 P. 110, 1 Okl. Cr. 275; Pickering v. Same, 101 P. 123, 2 Okl. Cr. 197.

S. D. State v. Guffey, 163 N. W. 679, 39 S. D. 84.

Tex. Willey v. State, 22 Tex. App. 408, 3 S. W. 570; McCoy v. State, 44 Tex. 616; Foster v. State, 1 Tex. App. 363.

Utah. State v. Overson, 185 P. 364.

Va. Kibler v. Commonwealth, 26 S. E. 858, 94 Va. 804.

W. Va. State v. Heaton, 23 W. Va. 773.

[59] **Ark.** Mitchell v. State, 188 S. W. 805, 125 Ark. 260; Sons v. State, 172 S. W. 1029, 116 Ark. 357; Reeder v. State, 111 S. W. 272, 86 Ark. 341.

Neb. Williams v. State, 83 N. W. 681, 60 Neb. 526.

Tex. Lee v. State, 122 S. W. 389, 57 Tex. Cr. R. 177; Gilford v. State, 87 S. W. 698, 48 Tex. Cr. R. 312; Carson v. State, 86 S. W. 1011, 48 Tex. Cr. R. 157; Neblett v. State (Cr. App.) 85 S. W. 17; Stewart v. State (Cr. App.) 77 S. W. 791; Dyer v. State (Cr. App.) 77 S. W. 456; Ballow v. State, (Cr. App.) 69 S. W. 513; Berry v. State, 38 S. W. 812, 37 Tex. Cr. R. 44.

[60] State v. Hayward, 133 N. W. 667, 153 Iowa, 265; State v. Kelly, 23 So. 543, 50 La. Ann. 597; State v. Stanley, 100 S. W. 678, 123 Mo. App. 294; State v. Givens, 70 S. E. 162, 87 S. C. 525.

In Illinois an instruction, on a prosecution for burglary, that the possession of the property stolen at the time of the burglary was prima facie evidence of guilt, sufficient to warrant a conviction, "unless satisfactorily explained, or unless there appears, from all the evidence, a reasonable doubt" of defendant's guilt, is not objectionable as encroaching on the functions of the jury. Williams v. People, 63 N. E. 681, 196 Ill. 173.

[61] Duckworth v. State, 103 S. W. 601, 83 Ark. 192.

"Strong criminating circumstances." In a prosecution for cattle theft, an instruction that possession of recently stolen property is a circum-

struction that a conviction will be warranted by proof of the falsity of the explanation by defendant of his possession of stolen property.[62] On the other hand, an instruction negativing any presumptions from the possession of stolen property,[63] or stating that such possession is not in itself sufficient to support a conviction,[64] or characterizing the presumption arising from such possession as a weak one,[65] are properly refused. So it is error to charge that, if the explanation by defendant of his possession of recently stolen property appears reasonably true, the jury cannot convict, unless they are satisfied that the other evidence in the case establishes the falsity of such explanation.[66]

§ 62. Presumptions or inferences from flight of accused

Sufficiency of instructions and correctness as statements of legal propositions, see post, § 196.

No legal presumption of guilt arises from the flight of an accused person.[67] Accordingly an instruction, in a criminal prosecution, that the unexplained flight of the defendant makes a prima facie case for the state, or is strong presumptive evidence of guilt, or is a circumstance pointing to guilt, is erroneous, as invading the province of the jury;[68] and, on the other hand, an instruction that the flight of the

stance to be considered, and, when taken in connection with the branding of the animals or obliterating the brand on them, if such facts were proved beyond a reasonable doubt, such possession and the circumstances are strong criminating circumstances tending to prove defendant's guilt, is objectionable, as a charge on the weight of the evidence. Roberts v. State, 70 P. 803, 11 Wyo. 66.

[62] McCarty v. State, 36 Tex. Cr. R. 135, 35 S. W. 994.

Effect of showing falsity of explanation. A charge that if the property was stolen, and recently thereafter was found in defendant's possession, and he gave a reasonable explanation thereof, the jury could not convict unless satisfied of the falsity of his explanation, is on the weight of evidence, and in effect states that the jury could convict on recent possession alone, if the state had shown defendant's explanation thereof false. Hopperwood v. State, 44 S. W. 841, 39 Tex. Cr. R. 15.

[63] Edmonds v. State (Tex. Cr. App.) 51 S. W. 393.

[64] May v. State (Tex. Cr. App.) 51 S. W. 242.

[65] Alexander v. State, 193 S. W. 78, 128 Ark. 35; Reed v. State, 54 Ark. 621, 16 S. W. 819.

[66] Wilson v. State (Tex. Cr. App.) 34 S. W. 284.

[67] People v. Wong Ah Ngow, 54 Cal. 151, 35 Am. Rep. 69.

[68] **U. S.** Starr v. United States, 17 S. Ct. 223, 164 U. S. 627, 41 L. Ed. 577.

Ark. Adkisson v. State, 218 S. W. 165, 142 Ark. 15.

Ga. Kettles v. State, 88 S. E. 197, 145 Ga. 6.

Iowa. State v. Poe, 98 N. W. 587, 123 Iowa, 118, 101 Am. St. Rep. 307.

R. I. State v. Papa, 80 A. 12, 32 R. I. 453.

Tex. Seeley v. State, 63 S. W. 309, 43 Tex. Cr. R. 66.

Instructions held improper within rule. A charge: "The law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take

accused shall not be weighed against him, where the circumstances are such as not apparently to require flight, or are such as may explain the flight, is properly refused.[69] But an instruction that the jury, in determining the question of the guilt of the defendant, may consider evidence that he fled from the scene of the crime,[70] if such flight is not explained,[71] is proper. There must be evidence of the fact of flight to warrant a charge that it may be considered.[72] Slight evidence, however, of an attempt to escape, will render an instruction as to flight proper.[73]

it as an axiom, and apply it to this case." Hickory v. United States, 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474. A charge, on a trial for defacing a public building: "The flight of a person suspected of a crime is a circumstance to be weighed by the jury as tending to prove a consciousness of guilt, * * * not as a part of the doing of the act itself, but as indicative of a guilty mind. At most it is but a circumstance tending to establish a consciousness of guilt in the person fleeing." Cleavenger v. State, 65 S. W. 89, 43 Tex. Cr. R. 273.

Instructions held not obnoxious to rule. An instruction, "Evidence of flight is received, not as part of the things done in connection with the criminal act itself, but as indicative of a guilty mind," and if the jury believe a crime was committed, and immediately thereafter defendant took flight, it is a circumstance to be weighed as tending in some degree to prove a consciousness of guilt, that it is not sufficient of itself to establish guilt of defendant, but its weight is for them to determine in connection with all the other facts in evidence, is not objectionable as equivalent to telling the jury that flight indicates a guilty mind, and as a charge on a question of fact. People v. Gee Gong, 114 P. 81, 15 Cal. App. 28, denying rehearing 114 P. 78, 15 Cal. App. 28.

[69] Green v. State, 51 So. 734, 165 Ala. 79; Miller v. State, 107 Ala. 40, 19 So. 37; Thomas v. State, 107 Ala. 13, 18 So. 229.

[70] People v. Petruzo, 110 P. 324, 13 Cal. App. 569; State v. Deatherage, 77 P. 504, 35 Wash. 326.

Instructions proper within rule. An instruction that defendant's flight with his codefendant from the place of the murder was evidence of guilt and a fact for the jury's consideration was not objectionable as an instruction, as a matter of law, that defendant was guilty if he fled. Stewart v. United States, 211 F. 41, 127 C. C. A. 477.

[71] Shannon v. Vincent, 76 Ga. 837.

Where defendant has given a full explanation of his flight, it is for the jury to say whether or not that explanation is true, untrammeled by any instructions that the evidence of flight is to be weighed by the jury as indicative of consciousness of guilt. People v. Jones, 117 P. 176, 160 Cal. 358. The fact that a defendant has explained his flight, however, does not prevent the court from instructing on the subject of flight, so long as such instruction does not constitute a charge on the facts. People v. Gibson, 178 P. 338, 39 Cal. App. 202.

[72] McBride v. People, 5 Colo. App. 91, 37 P. 953.

Evidence sufficient to sustain instruction. An instruction that the jury may consider the flight of defendant after intimation of a prosecution against him is sufficiently warranted by evidence of an interview with him by the brother of prosecutrix, in which the latter said that he would have trouble if the matter was not fixed up, and that defendant fled the state next day. State v. Heatherton, 60 Iowa, 175, 14 N. W. 230. Where accused left county four days after killing of deceased and was found under circumstances indicating concealment, an instruction upon inferences from flight by accused was justified. State v. Mills, 199 S. W. 131, 272 Mo. 526.

[73] State v. Lem Woon, 107 P. 974,

I. Degree of Proof

§ 63. In general

Instructions that the proof must be clear and convincing should ordinarily not be given,[74] and it is error to instruct that evidence raising a mere probability of the existence of certain facts in issue is not sufficient to enable the jury to find their existence,[75] or to intimate that the uncontradicted testimony of a party will not authorize a verdict in his favor, if, from the nature of the facts to be proved, it appears to the jury that he might have adduced other testimony in proof of such facts,[76] or to tell the jury that if they are in doubt as to whether or not the plaintiff is entitled to recover, or as to where the preponderance of evidence lies, they shall find for the defendant.[77]

§ 64. Preponderance of evidence

Necessity and sufficiency of instructions and correctness as statements of legal propositions, see post, §§ 245–256.

It is proper to instruct that, if the jury find from the evidence that the plaintiff has established the material allegations of his complaint by a preponderance of the evidence, they shall find for him,[78] and the court may [79] and should [80] lay down general rules for determining the preponderance of the evidence. Thus it is proper to instruct the jury that it is not bound to consider the evidence evenly balanced when two witnesses contradict each other, but may consider the surrounding facts for the purpose of determining whether the truth may not lie with one rather than with another.[81]

57 Or. 482, rehearing denied 112 P. 427, 57 Or. 482, and judgment affirmed Lem Woon v. State of Oregon, 33 S. Ct. 783, 229 U. S. 586, 57 L. Ed. 1340; State v. James, 45 Iowa, 412.

[74] Iglehart v. Jernegan, 16 Ill. 513.

[75] Stanton v. Southern Ry. Co., 34 S. E. 695, 56 S. C. 398.

[76] Baines v. Ullmann, 71 Tex. 529, 9 S. W. 543.

[77] Birmingham Ry., Light & Power Co. v. Long, 59 So. 382, 5 Ala. App. 510; Shattuck v. McCartney, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 557.

[78] City of Chicago v. Carlson, 138 Ill. App. 582; Springfield Consol. Ry. Co. v. Farrant, 121 Ill. App. 416; North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463, affirmed 54 N. E. 1006, 182 Ill. 9, 74 Am. St. Rep. 157.

[79] **Ill.** Deering Harvester Co. v. Barzak, 81 N. E. 1, 227 Ill. 71; Jarnecke v. Chicago Consol. Traction Co., 190 Ill. App. 179.

Ind. Lafayette Telephone Co. v. Cunningham, 114 N. E. 227, 63 Ind. App. 136; Indianapolis St. Ry. Co. v. Schomberg (App.) 71 N. E. 237.

Mich. Barkow v. Donovan Wire & Iron Co., 157 N. W. 55, 190 Mich. 563.

S. C. Montgomery v. Seaboard Air Line Ry., 53 S. E. 987, 73 S. C. 503.

[80] Meunier v. Chicago & C. Coal Co., 180 Ill. App. 114.

An instruction is erroneous which tells the jury to determine the preponderance of the evidence "in accordance with the way in which it appears to their minds." Meunier v. Chicago & Carterville Coal Co., 180 Ill. App. 114.

[81] Jarnecke v. Chicago Consol. Traction Co., 190 Ill. App. 179.

Ordinarily it is proper to instruct in the abstract that the preponderance of evidence does not necessarily lie with the party producing the greater number of witnesses.[82] The circumstances of the case may be such, however, that such an instruction will be erroneous, as constituting a comment on the weight of the evidence,[83] and it is error to instruct that, if the testimony of the smaller number of witnesses is of better quality than that of the greater number, the former testimony shall be accorded the greater weight,[84] or to instruct that the jury may decide, or that it is their duty to decide, that the preponderance of evidence lies on the side on which, in their judgment, the more intelligent and better informed witnesses have testified,[85] and an instruction which in effect tells the jury that they need not consider the number of witnesses by which a fact may be established invades the province of the jury, as on the weight of evidence,[86] as does an instruction that the preponderance of evidence in the instant case, as a matter of law, does not depend alone upon the number of witnesses,[87] or an instruction that the jury cannot take the testimony of the smaller number of witnesses in preference to that of the larger number, unless they can say under their oaths that the former testimony is more reasonable, more truthful, more disinterested, and more creditable.[88]

Ordinarily it will be error to tell the jury that certain facts or testimony is sufficient to create as a matter of law a preponderance of

[82] Perkins v. Wabash R. Co., 84 N. E. 677, 233 Ill. 458, affirming judgment Wabash Ry. Co. v. Perkins, 137 Ill. App. 514; Kozlowski v. City of Chicago, 113 Ill. App. 513; Hammond, W. & E. C. Electric Ry. Co. v. Antonia, 83 N. E. 766, 41 Ind. App. 335.

Number of witnesses not controlling. Where plaintiff testifies to a given state of facts and is contradicted by a number of witnesses, it is not error to instruct that the testimony of one witness may be entitled to more weight than the testimony of many others, if the jury believe that such other witnesses have knowingly testified untruthfully and are not corroborated. Strickler v. Gitchel, 78 P. 94, 14 Okl. 523.

[83] St. Louis S. W. Ry. Co. v. Smith, (Tex. Civ. App.) 63 S. W. 1064; Wells Fargo & Co. Express v. Gentry (Tex. Civ. App.) 154 S. W. 363.

[84] Gilmore v. Seattle & R. Ry. Co., 69 P. 743, 29 Wash. 150.

[85] Barnes v. Chicago City Ry. Co., 147 Ill. App. 601; Chicago Union Traction Co. v. Wirkus, 131 Ill. App. 485; W. H. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210; Chicago City Ry. Co. v. Keenan, 85 Ill. App. 367; Eastman v. West Chicago St. R. Co., 79 Ill. App. 585.

[86] Langan v. Chicago City Ry. Co., 145 Ill. App. 249; Dallas Cotton Mills v. Ashley (Tex. Civ. App.) 63 S. W. 160.

[87] Pennsylvania Co. v. Hunsley, 54 N. E. 1071, 23 Ind. App. 37.

[88] Newcomb v. Chicago City Ry. Co., 192 Ill. App. 74.

Rule in criminal cases. The jury, in criminal cases, being the sole judges of the evidence, the accused is not entitled to the unqualified charge that "five witnesses of good character, who are unimpeached, are entitled to greater credit than one witness who swears differently." State v. Breckenridge, 33 La. Ann. 310.

the evidence in favor of one party or the other.[89] So an instruction making it the duty of the jury to give heed to an indefinite something that rings of truth, even as against the preponderance of the evidence, invades their province.[90]

§ 65. Balancing one witness against another

Where two witnesses contradict each other upon a particular issue of fact, a charge to the effect that in such case the evidence is evenly balanced, and that the jury must therefore find the fact in issue not proved, unless additional evidence or corroborating circumstances are produced by one side or the other, is erroneous, as invading the province of the jury.[91] Such rule applies in criminal cases.[92]

§ 66. Instructions on reasonable doubt in criminal cases

Necessity and sufficiency of instructions, see post, §§ 257–278.

An instruction in a criminal case that, if the jury believe from the evidence beyond a reasonable doubt that the elements of the offense charged have been proved, they should convict the defendant, does not invade the province of the jury,[93] and a charge on reasonable doubt,

[89] Witt v. Gallemore, 163 Ill. App. 649; Suse v. Metropolitan St. Ry. Co., 80 N. Y. S. 513, 80 App. Div. 24; Ely v. Tesch, 17 Wis. 202.

[90] Little v. Superior Rapid Transit Ry. Co., 88 Wis. 402, 60 N. W. 705.

[91] **Ga.** Clark v. Cassidy, 62 Ga. 407; McLean v. Clark, 47 Ga. 24; Salter v. Glenn, 42 Ga. 64.

Ill. Johnson v. People, 140 Ill. 350, 29 N. E. 895, affirming 40 Ill. App. 382, and overruling McFarland v. People, 72 Ill. 368; DeLand v. Dixon Nat. Bank, 111 Ill. 323.

Ind. Canada v. Curry, 73 Ind. 246.

Me. Johnson v. Whidden, 32 Me. 230.

Mich. Maltby v. Plummer, 40 N. W. 3, 71 Mich. 578.

Wis. Sickle v. Wolf, 91 Wis. 396, 64 N. W. 1028; Thomas v. Paul, 87 Wis. 607, 58 N. W. 1031; Mariner v. Pettibone, 14 Wis. 195; Kuehn v. Wilson, 13 Wis. 104.

Instructions improper within rule. An instruction in an action for injuries to plaintiff at a railroad crossing that, if the evidence was evenly balanced as to the speed of an engine, and the witnesses as to this matter were equally credible, it was the jury's duty to give credence to those witnesses who testified that the speed did not exceed five miles per hour. Southern Ry. Co. v. Weatherlow, 51 So. 381, 164 Ala. 151. An instruction that the defense of fraud to an action on a note is not proven if the jury find that the maker supported such fraud by his own testimony alone, that his statements were denied by the payee, that both parties were equally credible, had equal opportunities for knowing, and testified with equal fairness, candor, and truthfulness, and that neither was corroborated by other evidence, facts, or circumstances. Chariton Plow Co. v. Davidson, 16 Neb. 374, 20 N. W. 256.

[92] Patton v. State, 46 So. 862, 156 Ala. 23; Childs v. State, 76 Ala. 93.

[93] **Ind.** Blocher v. State, 98 N. E. 118, 177 Ind. 356; Reynolds v. State, 46 N. E. 31, 147 Ind. 3.

Miss. Brett v. State, 47 So. 781, 94 Miss. 669.

Tex. Melton v. State, 140 S. W. 781, 63 Tex. Cr. R. 573; Young v. State, 113 S. W. 276, 54 Tex. Cr. R. 417; Gardenhire v. State (Cr. App.) 107 S. W. 836; Trail v. State (Cr. App.) 107 S. W. 545.

that the evidence should be such as would control and decide the conduct of reasonable men in the most important affairs of life, and not a mere conjecture, a trivial supposition, a bare possibility of the innocence of defendant, does not discredit defendant's evidence, or his statement, or intimate judicial disapproval of an acquittal;[94] but an instruction that proof of a single fact inconsistent with guilt will be sufficient to raise a reasonable doubt, and require the jury to acquit, invades their province,[95] as does, ordinarily, an instruction that certain facts, if found by the jury, are sufficient to raise a reasonable doubt of defendant's guilt.[96] And while a reasonable doubt in the minds of the jury, arising from testimony in support of the good character of the accused, constitutes a legitimate basis for an acquittal, the court has no right to instruct that such testimony is sufficient for that purpose.[97]

J. Corroboration of Witnesses in Criminal Cases

§ 67. Corroboration of prosecuting witness

Ordinarily an instruction that certain matters do not corroborate, or are not sufficient to corroborate, the evidence of the prosecuting witness, invades the province of the jury,[98] and it is error, in a prosecution for a sexual crime, to instruct that the testimony of the prosecutrix must be strongly corroborated by other evidence,[99] or, on the other hand, that the prosecutrix has been corroborated.[1]

[94] Clay v. State, 60 S. E. 1028, 4 Ga. App. 142.

[95] Pinson v. State, 78 So. 876, 201 Ala. 522; Cowan v. State, 72 So. 578, 15 Ala. App. 87.

[96] State v. Vance, 70 P. 34, 29 Wash. 435.

Instructions held improper. An instruction that if the jury have a doubt such as a reasonable man would entertain in affairs of his own concern, "under the facts and evidence as strong as that in this case," that would be a reasonable doubt. State v. Davis, 31 S. E. 62, 53 S. C. 150, 69 Am. St. Rep. 845.

[97] State v. Batecham, 186 P. 5, 94 Or. 524.

[98] Watts v. State, 63 So. 18, 8 Ala. App. 264; Jones v. State, 141 S. W. 953, 63 Tex. Cr. R. 394.

[99] State v. Sublett, 90 S. W. 374, 191 Mo. 163.

[1] Lanphere v. State, 89 N. W. 128, 114 Wis. 193.

Instructions held not to be on the weight of the evidence. An instruction, in a prosecution for seduction, that circumstantial evidence may be relied on to establish the corroboration required by statute, and if it be shown by evidence other than that of the prosecuting witness that defendant visited her, that they kept company together, and acted as lovers usually do, such evidence would be sufficient to justify a conviction, if, when considered in connection with other evidence, the jury was satisfied beyond a reasonable doubt of defendant's guilt; but that the jury should bear in mind that they were the judges of the sufficiency of the corroborating evidence, in connection with another instruction stating that mere proof of acquaintance and opportunity to have committed the offense is not sufficient, but the corroborating evidence must be such as tends to con-

§ 68. Corroboration of accomplice

Sufficiency of instructions on corroboration of accomplice, see post, § 176.

In jurisdictions where the testimony of an accomplice must be corroborated in order to constitute a basis of conviction, the determination as to whether there is evidence independent of the testimony of an accomplice tending to connect the accused with the commission of the crime is for the court,[2] and according to some of the cases the court can instruct, where such is the case, that there is corroborating evidence sufficient to authorize the jury to consider the testimony of the accomplice, no comment being made on the weight of the corroborating evidence.[3]

Where there is some evidence tending to corroborate the testimony of an accomplice, its weight is for the jury,[4] and it is ordinarily error

nect the defendant with the commission of the offense and corroborate the evidence of prosecutrix in relation to the crime. State v. Smith, 100 N. W. 40, 124 Iowa, 334.

Harmless error. A charge, in a prosecution for rape, that if the mother of the prosecutrix was the first person she saw, in whom she was expected to place confidence, after the offense was alleged to have been committed, and that she communicated to her at the first opportunity that she had been outraged, the jury might consider such circumstance as corroborative of the testimony of the prosecutrix, is not prejudicial error, since this only tells the jury what they already know. People v. Benc, 62 P. 404, 130 Cal. 159.

[2] United States v. Murphy (D. C. N. Y.) 253 F. 404; Quong Yu v. Territory, 100 P. 462, 12 Ariz. 183; Kent v. State, 41 S. W. 849, 64 Ark. 247; People v. Josephs, 128 N. Y. S. 257, 143 App. Div. 534; People v. Kathan, 120 N. Y. S. 1096, 136 App. Div. 303.

[3] Quong Yu v. Territory, 100 P. 462, 12 Ariz. 183; People v. Hummel, 104 N. Y. S. 308, 119 App. Div. 153.

In Alabama, however, a charge that certain matters constituted corroborative evidence tending to connect defendant with the commission of the offense, if committed, has been held one on the effect of the evidence, and erroneous when a material inquiry of fact rested in inference. Burney v. State, 87 Ala. 80, 6 So. 391.

In Oregon, an instruction that, when other corroborating evidence has been offered "as in this case," it is for the jury to determine the weight of the testimony of the accomplice is held to be erroneous as stating that corroborating evidence has been received. State v. Bunyard, 144 P. 449, 73 Or. 222.

[4] **Ariz.** Quong Yu v. Territory, 100 P. 462, 12 Ariz. 183.

Cal. People v. Kunz, 73 Cal. 313, 14 P. 836.

Ga. Brown v. State, 89 S. E. 342, 18 Ga. App. 288; Dixon v. State, 67 S. E. 699, 7 Ga. App. 604; Rice v. State, 84 S. E. 609, 16 Ga. App. 128.

Iowa. State v. O'Meara, 177 N. W. 563; State v. Cox, 10 Iowa, 351; State v. Dorsey, 134 N. W. 946, 154 Iowa, 298.

Ky. Craft v. Commonwealth, 81 Ky. 250, 50 Am. Rep. 160; Neal v. Commonwealth, 6 Ky. Law Rep. (abstract) 368.

N.Y. People v. Becker, 109 N. E. 127, 215 N. Y. 126, Ann. Cas. 1917A, 600, rehearing denied 109 N. E. 1086, 215 N. Y. 721; People v. O'Farrell, 67 N. E. 588, 175 N. Y. 323, reversing order 77 N. Y. S. 1135, 73 App. Div. 626; People v. Doyle, 177 N. Y. S. 641, 107 Misc. Rep. 268.

Okl. Campbell v. State, 157 P. 49,

to instruct that certain matters are [5] or are not [6] corroborative of the testimony of an accomplice, or that slight evidence may satisfy the requirements of the statute as to corroboration.[7]

K. Undisputed Facts

§ 69. In general

Necessity of instructions, see post, § 279.

The provisions set out supra,[8] refer only to disputed facts, and not to those concerning which there is no dispute, or which are admitted.[9] Where facts are admitted,[10] or are not disputed,[11] the court may so tell the jury, and the court may charge as facts, or direct the jury to find as facts, matters shown by the undisputed evidence,[12] and, in some

12 Okl. Cr. 349; McGill v. State, 120 P. 297, 6 Okl. Cr. 512; Hill v. Territory, 79 P. 757, 15 Okl. 212.

S. D. State v. Walsh, 125 N. W. 295, 25 S. D. 30.

[5] Dickenson v. State (Tex. Cr. App.) 63 S. W. 328.

[6] Follis v. State, 101 S. W. 242, 51 Tex. Cr. R. 186.

[7] State v. James, 89 P. 460, 32 Utah, 152.

[8] Section 29.

[9] Harvey v. Dodge, 73 Me. 316; Mullaly v. Smyth, 79 S. E. 634, 96 S. C. 14; Galveston, H. & S. A. Ry. Co. v. Roberts (Tex. Civ. App.) 91 S. W. 375; Lownsdale v. Gray's Harbor Boom Co., 78 P. 904, 36 Wash. 198.

[10] Schulman v. Stock, 93 A. 531, 89 Conn. 237; Cooley v. Bergstrom, 60 S. E. 220, 3 Ga. App. 496; De Saulles v. Leake, 56 Ga. 365; Weekes v. Cottingham, 58 Ga. 559; Barkley v. Quick, 156 N. W. 544, 33 N. D. 124.

[11] Texas & P. Ry. Co. v. Gentry, 163 U. S. 353, 16 S. Ct. 1104, 41 L. Ed. 186.

[12] **Ala.** St. Louis & S. F. R. Co. v. Hall, 65 So. 33, 186 Ala. 353; Speakman v. Vest, 51 So. 980, 166 Ala. 235; Rutledge v. Rowland, 49 So. 461, 161 Ala. 114; Stephenson v. Wright, 111 Ala. 579, 20 So. 622.

Cal. Low v. Warden, 77 Cal. 94, 19 Pac. 235.

Conn. Schoefield Gear & Pulley Co. v. Schoefield, 40 A. 1046, 71 Conn. 1.

Ga. Marshall v. Morris, 16 Ga. 368.

Iowa. Fleming v. Stearns, 79 Iowa, 256, 44 N. W. 376.

Me. McLellan v. Wheeler, 70 Me. 285.

Mass. Rock v. Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401.

Mich. Burt v. Long, 106 Mich. 210, 64 N. W. 60; Welch v. Olmstead, 90 Mich. 492, 51 N. W. 541.

Mo. Hall v. Missouri Pac. Ry. Co., 74 Mo. 298.

Okl. Wichita Falls & N. W. Ry. Co. v. Woodman, 168 P. 209, 64 Okl. 326.

Pa. Devlin v. Snellenburg, 132 Pa. 186, 18 A. 1119.

S. C. Burns v. Kendall, 80 S. E. 621, 96 S. C. 385; Bryan v. Donnelly, 69 S. E. 840, 87 S. C. 388; McGee v. Wells, 37 S. C. 365, 16 S. E. 29.

Tex. Kirby Lumber Co. v. Bratcher (Civ. App.) 191 S. W. 700; Missouri, K. & T. Ry. Co. of Texas v. Rogers (Civ. App.) 141 S. W. 1011; El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922; Brunner Fire Co. v. Payne, 118 S. W. 602, 54 Tex. Civ. App. 501; Houston & T. C. R. Co. v. Wilkins (Civ. App.) 98 S. W. 202; Texas & P. Ry. Co. v. Jones (Civ. App.) 39 S. W. 124.

Utah. Cooper v. Denver & R. G. R. Co., 11 Utah, 46, 39 P. 478.

Wash. Washington Boom Co. v. Chehalis Boom Co., 156 P. 24, 90 Wash. 350.

Wis. Lappley v. State, 174 N. W. 913, 170 Wis. 356, 7 A. L. R. 1279;

jurisdictions, the court should not submit to the jury an issue of fact about which there is no conflict.[13] The mere fact, however, that evidence in support of certain facts has not been directly contradicted by other evidence does not make it proper for the court to state that such facts are proved,[14] since the jury may disbelieve evidence, although uncontradicted.[15] Thus the fact that, in a criminal prosecution, all the

Harriman v. Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

In North Carolina the rule is that, where there is no evidence contrary to certain testimony, the court may instruct the jury that, if they find such facts to be as testified to, they shall consider them as established, together with the statutory inferences therefrom. Myers v. Petty, 69 S. E. 417, 153 N. C. 462.

Instructions proper within rule. It was not error to charge that a train, with its platform, coupling lights, etc., at the time, was such as was usual and customary with all passenger trains then being operated in the place, where such facts were undisputed. Sickles v. Missouri, K. & T. Ry. Co. of Texas, 13 Tex. Civ. App. 434, 35 S. W. 493. Where the evidence clearly shows that plaintiffs are the cousins, on the father's side, of one who died seised of the land in controversy, and that the decedent left neither wife, child, brother, nor sister, it is proper to instruct the jury that, in order for plaintiffs to be the heirs of the decedent, he must have died leaving neither father, mother, grandfather, nor grandmother. Byers v. Wallace (Tex. Civ. App.) 25 S. W. 1043. In an action against a railroad company for injuries to an employé alleged to have been caused by a defect in a hand car and in a rail, a charge that the promise of the section master to repair the rail some days before, and the fact that he had sent the car to the shop for repairs, and had again put it in use, might be considered on the question of contributory negligence, is not a charge on the weight of evidence, where the uncontradicted evidence shows the facts recited in it. Missouri Pac. Ry. Co. v. James (Tex.) 10 S. W. 332. Where, in an action between heirs for the partition of an estate, all the witnesses speak of the estate as that of the heirs' mother, the jury were properly instructed that they should treat it as the separate estate of the mother. Ellis v. Stewart (Tex. Civ. App.) 24 S. W. 585. In an action against a town to recover for injuries caused by an obstruction in the highway, where the undisputed testimony is that there was a stone or stones in the traveled track, it is not error for the court to state to the jury the substance of the testimony on both sides as to the size and situation of the stone, and say that "there is no question at all under the testimony that there was a stone there. Its size and character and location you are to determine." Salladay v. Town of Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541. An instruction that "there is no question, under the evidence, that the horse fell by reason of his foot getting into one of these holes," is justifiable, where the uncontradicted evidence proves that the court stated the correct reason for the horse's fall. Wall v. Town of Highland, 72 Wis. 435, 39 N. W. 560.

[13] Hall v. Hilley, 67 S. E. 428, 134 Ga. 77; Bee Bldg. Co. v. Weber Gas & Gasoline Engine Co., 125 N. W. 518, 86 Neb. 326; International & G. N. R. Co. v. Lewis (Tex. Civ. App.) 63 S. W. 1091, rehearing denied (Tex. Civ. App.) 64 S. W. 1011; Houston & T. C. R. Co. v. Harvin (Tex. Civ. App.) 54 S. W. 629.

In Iowa, however, it is not error to charge that the party alleging a material fact in issue must prove it, though there is no conflict of testimony about it. Blotcky v. Caplan, 91 Iowa, 352, 59 N. W. 204.

[14] Green v. State, 30 So. 656, 43 Fla. 556; State v. Austin, 80 N. W. 303, 109 Iowa, 118; State v. Cannon, 27 S. E. 526, 49 S. C. 550.

[15] Ryan v. Fall River Iron Works Co., 86 N. E. 310, 200 Mass. 188.

witnesses concur in the statement that the defendant's general character as a peaceable, law-abiding citizen is good, does not make it proper for the court to charge that the defendant has proved a good character, since such testimony only expresses the opinion of the witnesses,[16] and in one jurisdiction it is held to be error to tell the jury that there is no dispute in the testimony on a certain point, or that anything is conclusively proved. This, however, is under a constitutional provision considered to be more restrictive than the constitutional provisions of any other state.[17]

§ 70. Stating legal effect of undisputed facts

A charge upon the legal effect of admitted or uncontroverted facts is not one upon the weight of the evidence;[18] but, where the undisputed facts cannot properly be considered, disconnected from other testimony bearing on the same point, an instruction stating what such facts show should be refused.[19]

L. Affirming Existence or Nonexistence of Evidence or Tendencies Thereof

§ 71. Failure or absence of proof

Necessity of instructions, see post, § 280.

It is error, as invading the province of the jury, to instruct that there is no evidence of a given fact,[20] where there is evidence, however slight,

[16] Reid v. State, 61 So. 324, 181 Ala. 14.

[17] Bardwell v. Ziegler, 3 Wash. 34, 28 P. 360.

[18] **U. S.** (C. C. A. Minn.) Northwestern Fuel Co. v. Danielson, 57 F. 915, 6 C. C. A. 636.

Ala. Riley v. Fletcher, 64 So. 85, 185 Ala. 570.

Mo. Sessinghaus v. Knoche, 118 S. W. 104, 137 Mo. App. 323; Slayback v. Gerkhardt, 1 Mo. App. 333.

Neb. Whelan v. Union Pac. R. Co., 136 N. W. 20, 91 Neb. 238.

S. D. Wright v. Lee, 72 N. W. 895, 10 S. D. 263.

Determination of powers of an agent. Where the undisputed evidence shows that a fire policy was issued by insurer on an application authoritatively taken, it is the duty of the court in its charge to recognize the existence of the agency and to determine the powers and limitations of the agent. Smith v. Mutual Cash Guaranty Fire Ins. Co., 113 N. W. 94, 21 S. D. 433.

[19] Morris v. Osterhout, 55 Mich. 262, 21 N. W. 339.

[20] **Ala.** Wheat v. Union Springs Guano Co., 70 So. 631, 195 Ala. App. 180; Woodmen of the World v. Wright, 60 So. 1006, 7 Ala. App. 255; National Chemical Co. v. National Aniline & Chemical Co., 57 So. 114, 3 Ala. App. 469; Mobile & O. R. Co. v. Barber, 56 So. 858, 2 Ala. App. 507; Crenshaw v. State, 45 So. 631, 153 Ala. 5; Parham v. State, 42 So. 1, 147 Ala. 57.

Ind. Van Camp Hardware & Iron Co. v. O'Brien, 62 N. E. 464, 28 Ind. App. 152.

Okl. Smith v. Gillis, 151 P. 869, 51 Okl. 134.

R. I. Perry v. Sheldon, 75 A. 690, 30 R. I. 426.

tending to prove such fact;[21] but, where there is no legal evidence of the existence of certain facts, or there is a total lack of evidence to sustain the necessary allegations of fact in a pleading, the court may,[22] and in some jurisdictions should,[23] on request, so instruct. Such a charge is not within a statutory provision forbidding the court to give instructions on the effect of the evidence except upon request.[24]

[21] **Ala.** James v. State, 72 So. 299, 14 Ala. App. 652; Western Union Telegraph Co. v. Northcutt, 48 So. 553, 158 Ala. 539, 132 Am. St. Rep. 38; Way v. State, 46 So. 273, 155 Ala. 52; Southern Coal & Coke Co. v. Swinney, 42 So. 808, 149 Ala. 405; Garth v. North Alabama Traction Co., 42 So. 627, 148 Ala. 96.

Cal. Thompson v. Southern Pac. Co., 161 P. 21, 31 Cal. App. 567.

Ill. Morton v. Gateley, 1 Scam. 211; Dornfeld-Kunert Co. v. Volkmann, 138 Ill. App. 421.

Mo. Sills v. Burge, 124 S. W. 605, 141 Mo. App. 148; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331.

Neb. Sheibley v. Nelson, 121 N. W. 458, 84 Neb. 393.

N. C. State v. Allen, 48 N. C. 257; Wells v. Clements, 48 N. C. 168.

Pa. Shoninger v. Latimer, 165 Pa. 373, 30 A. 985.

S. C. Howard v. Wofford, 16 S. C. 148.

Tex. International & G. N. R. Co. v. McVey (Civ. App.) 81 S. W. 991, rehearing denied (Civ. App.) 83 S. W. 34, and reversed 87 S. W. 328, 99 Tex. 28.

Vt. Rogers v. Judd, 6 Vt. 191.

[22] **U. S.** (Sup.) Parks v. Ross, 11 How. 362, 13 L. Ed. 730; (C. C. A. Cal.) Connecticut Mut. Life Ins. Co. v. McWhirter, 73 F. 444, 19 C. C. A. 519.

Ala. Edmondson v. Anniston City Land Co., 29 So. 596, 128 Ala. 589.

Cal. People v. Perry, 65 Cal. 568, 4 P. 572; People v. Vasquez, 49 Cal. 560; People v. Welch, 49 Cal. 174; People v. Dick, 34 Cal. 663; People v. King, 27 Cal. 507, 87 Am. Dec. 95.

Fla. Carr v. State, 34 So. 892, 45 Fla. 11.

Ga. Underwood v. American Mortgage Co., 97 Ga. 238, 24 S. E. 847; East Tennessee, V. & G. Ry. Co. v. Markens, 88 Ga. 60, 13 S. E. 855, 14 L. R. A. 281.

Ill. Scott v. Parlin & Orendorff Co., 92 N. E. 318, 245 Ill. 460, affirming judgment 146 Ill. App. 92.

Ind. Beckner v. Riverside & B. G. Turnpike Co., 65 Ind. 468; Kline v. Spahr, 56 Ind. 296.

Kan. Case v. Hannahs, 2 Kan. 490.

Me. Rogers v. Percy, 12 Atl. 545.

Md. Webb v. McCloskey, 68 Md. 196, 11 A. 715; Sheppard v. Willis, 28 Md. 631; Farmers' Bank v. Duvall, 7 Gill & J. 78.

Mass. Farnum v. Pitcher, 151 Mass. 470, 24 N. E. 590; Carter v. Goff, 141 Mass. 123, 5 N. E. 471.

Mo. State v. Hottman, 94 S. W. 237, 196 Mo. 110.

Neb. Graham v. Hartnett, 10 Neb. 517, 7 N. W. 280.

N. C. Newsome v. Western Union Telegraph Co., 56 S. E. 863, 144 N. C. 178; Woodbury v. Evans, 30 S. E. 2, 122 N. C. 779; State v. Byrd, 28 S. E. 353, 121 N. C. 684; Hinson v. King, 50 N. C. 393.

Or. Latshaw v. Territory, 1 Or. 140.

S. C. Trapp v. Western Union Telegraph Co., 75 S. E. 210, 92 S. C. 214; Bryce v. Cayce, 40 S. E. 948, 62 S. C. 546.

Tenn. Slattery v. Lea, 11 Lea, 9.

Tex. Burrell v. State, 18 Tex. 713.

Va. Norfolk Southern R. Co. v. Norfolk Truckers' Exchange, 88 S. E. 318, 118 Va. 650.

Wash. State v. McPhail, 81 P. 683, 39 Wash. 199.

[23] Davis v. Davis, 7 Har. & J. (Md.) 36; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Humphrey v. Morgan, 120 P. 577, 30 Okl. 343.

[24] Cole Motor Car Co. v. Tebault, 72 So. 21, 196 Ala. 382; Thomas v. State, 43 So. 371, 150 Ala. 31; Huggins v. Southern Ry. Co., 41 So. 856, 148 Ala. 153.

§ 72. Declaring tendency of evidence

By the weight of authority, it is not an improper comment on the weight of the evidence, and does not trench upon the province of the jury, for the court to state the tendencies of the evidence, or, if such is the case, that there is some evidence tending to prove certain facts,[25] the tendency of the evidence being regarded as a question of law.[26] In some jurisdictions such an instruction should also advise the jury that they are the exclusive judges of the facts and the credibility of the witnesses,[27] or that it is for them to judge of the credibility of the testimony whose tendency is thus indicated.[28]

[25] **U. S.** (Sup.) Williams v. Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. Ed. 778.

Ala. Graves v. State, 52 So. 34, 166 Ala. 671; Crain v. State, 52 So. 31, 166 Ala. 1.

Ark. Walker v. State, 212 S. W. 319, 138 Ark. 517; Hogue v. State, 124 S. W. 783, 130 S. W. 167, 93 Ark. 316.

Cal. People v. Flannelly, 60 P. 670, 128 Cal. 83; People v. Cummings, 113 Cal. 88, 45 P. 184; Morris v. Lochman, 68 Cal. 109, 8 P. 799.

Ind. White v. State, 54 N. E. 763, 153 Ind. 689; Huffman v. Cauble, 86 Ind. 591; Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165; Helms v. Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147; Ball v. Cox, 7 Ind. 453.

Mass. Carmody v. Boston Gaslight Co., 162 Mass. 539, 39 N. E. 184.

Mich. Campau v. Langley, 39 Mich. 451, 33 Am. Rep. 414.

Minn. State v. Minneapolis Milk Co., 144 N. W. 417, 124 Minn. 34, 51 L. R. A. (N. S.) 244; State v. Rose, 47 Minn. 47, 49 N. W. 404; State v. Taunt, 16 Minn. 109 (Gil. 99).

Miss. Garnett v. Kirkman, 33 Miss. 389.

Nev. State v. Loveless, 30 P. 1080, 17 Nev. 424; State v. Watkins, 11 Nev. 30.

N. Y. People v. Walker, 83 N. Y. S. 372, 85 App. Div. 556, judgment affirmed 70 N. E. 1105, 178 N. Y. 563.

N. C. Lewis v. Norfolk & W. Ry. Co., 43 S. E. 919, 132 N. C. 382.

Or. Smitson v. Southern Pac. Co., 60 P. 907, 37 Or. 74; Coos Bay, R. & E. R. & Nav. Co. v. Siglin, 53 P. 504, 34 Or. 80.

S. C. Wingo v. New York Life Ins. Co., 101 S. E. 653.

Va. Michie v. Cochran, 25 S. E. 884, 93 Va. 641.

Wash. Farraris v. S. E. Slade Lumber Co., 152 P. 680, 88 Wash. 106.

Wis. Spick v. State, 121 N. W. 664, 140 Wis. 104.

Under a statute prohibiting the court from presenting the facts of the case to the jury, an instruction, in a murder case, that there is evidence "to the effect" or "tending to show" a certain fact, and instructing the jury that, if they find it to be a fact, to consider it in determining the degree of the defendant's guilt, is not erroneous as being a presentation of facts. State v. Brown, 28 Or. 147, 41 P. 1042.

Instructions not proper within rule. A statement that "the evidence on the part of the state goes to show that this defendant fired all three of those shots" goes beyond the rule that the judge may state tendency of evidence on both sides, and invades the province of the jury. Andrews v. State, 48 So. 858, 159 Ala. 14.

In Oregon such an instruction has been mildly criticized, the court stating that, while the use of the word "tending," to a jury of men skilled in the law, would be unexceptionable, its use with the ordinary jury is likely to mislead. State v. Rader, 124 P. 195, 62 Or. 37.

[26] Druse v. Wheeler, 26 Mich. 189; Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506.

[27] State v. Rose, 47 Minn. 47, 49 N. W. 404.

[28] Davis v. Gerber, 69 Mich. 246, 37 N. W. 281.

In some jurisdictions the power of the court to give such an instruction is made to depend upon whether there is any evidence controverting the evidence tending to prove the specified facts. In Iowa, in the absence of any conflicting evidence, such an instruction is upheld,[29] while in Oklahoma, if there is evidence both affirming and denying the existence of certain facts in issue, it is error to instruct that the evidence tends to prove such facts.[30] In two jurisdictions an instruction stating the tendency of the evidence to show certain facts seems to be unqualifiedly condemned as on the weight of the evidence.[31]

§ 73. Declaring that there is some evidence of particular facts

In accordance with the general rule above stated, it is within the province of the court to instruct that there is some evidence of certain facts for the consideration of the jury,[32] and in a criminal case the court may in some jurisdictions in a proper case instruct that there is sufficient evidence to sustain a conviction if the jury believe it,[33] or if it satisfies the jury beyond a reasonable doubt.[34]

[29] State v. Meshek, 16 N. W. 143, 61 Iowa, 316.

[30] St. Louis & S. F. R. Co. v. Wilson, 124 P. 326, 32 Okl. 752.

[31] **Ga.** Stephens v. State, 45 S. E. 619, 118 Ga. 762; Chapman v. State, 34 S. E. 369, 109 Ga. 157.

Tex. McCleary v. State, 122 S. W. 26, 57 Tex. Cr. R. 139; Cavaness v. State, 74 S. W. 908, 45 Tex. Cr. R. 209; Cortez v. State (Cr. App.) 74 S. W. 907; Hollar v. State (Cr. App.) 73 S. W. 961; Reese v. State (Cr. App.) 70 S. W. 424; Reese v. State, 68 S. W. 283, 44 Tex. Cr. R. 34; Santee v. State (Cr. App.) 37 S. W. 436.

[32] Commonwealth v. Mulrey, 170 Mass. 103, 49 N. E. 91; People v. Mingey, 103 N. Y. S. 627, 118 App. Div. 652, judgment affirmed 82 N. E. 728, 190 N. Y. 61.

[33] People v. Johnson, 104 Cal. 418, 38 P. 91.

[34] People v. Spiegel, 143 N. Y. 107, 38 N. E. 284, affirming 75 Hun, 161, 26 N. Y. S. 1041.

In Texas, however, it has been held that a court can never legitimately instruct the jury that any evidence before them is sufficient to convict of the crime charged. Lunsford v. State, 9 Tex. App. 217.

CHAPTER IV

ASSUMPTION OF EXISTENCE OR NONEXISTENCE OF FACTS BY THE COURT

A. Assumption of Facts When They are in Dispute.

§ 74. Statement of rule.
75. Limitations or qualifications of rule.
76. Specific applications of rule in civil cases.
77. Specific applications of rule in criminal cases.

B. Facts Admitted, Not Controverted, or Conclusively Established.

78. General rule.
79. Limitations of rule.
80. Specific applications of rule.

C. Assumption of Nonexistence of Facts.

81. Where there is some evidence of particular facts.
82. Where no conflict in evidence.

A. Assumption of Facts When They are in Dispute

§ 74. Statement of rule

In all jurisdictions, both in civil [1] and in criminal cases,[2] the rule is that instructions which assume the existence of material facts in

[1] **U. S.** Snyder v. Rosenbaum, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186, affirming judgment Snyder v. Stribling, 89 P. 222, 18 Okl. 168; (C. C. A. Ga.) Southern Ry. Co. v. Hopkins, 161 F. 266, 88 C. C. A. 312; (C. C. A. Mich.) Crosley v. Reynolds, 196 F. 640, 116 C. C. A. 314; (C. C. A. Neb.) Chicago, B. & Q. R. Co. v. Blunt, 206 F. 425, 124 C. C. A. 307; (C. C. A. Va.) American Locomotive Co. v. Thornton, 259 F. 405, 170 C. C. A. 381.

Ala. Marbury Lumber Co. v. Lamont, 53 So. 773, 169 Ala. 33; Garden v. Houston Bros., 50 So. 1030, 163 Ala. 300; Selma St. & S. Ry. Co. v. Campbell, 48 So. 378, 158 Ala. 438.

Ark. Missouri Pac. R. Co. v. Carey, 212 S. W. 80, 138 Ark. 563; Solomon v. Robinson, 198 S. W. 109; St. Louis, I. M. & S. R. Co. v. Wirbel, 149 S. W. 92, 104 Ark. 236, Ann. Cas. 1914C, 277; Maryland Casualty Co. v. Chew, 122 S. W. 642, 92 Ark. 276.

Cal. Sterling v. Cole, 106 P. 602, 12 Cal. App. 93; Johnston v. Beadle, 91 P. 1011, 6 Cal. App. 251.

Colo. King Solomon Tunnel & Development Co. v. Mary Verna Mining Co., 127 P. 129, 22 Colo. App. 528.

Conn. Kelley v. Town of Torrington, 68 A. 855, 80 Conn. 378.

Del. Daniels v. State, 48 A. 196, 2 Pennewill, 586, 54 L. R. A. 286.

Fla. Southern Pine Co. v. Powell, 37 So. 570, 48 Fla. 154; Florida Cent. & P. R. Co. v. Foxworth, 25 So. 338, 41 Fla. 1, 79 Am. St. Rep. 149.

Ga. Central of Georgia Ry. Co. v. Woodall, 78 S. E. 781, 13 Ga. App. 50; Ozmore v. Coram, 65 S. E. 448, 133 Ga. 250; Augusta Ry. & Electric Co. v. Lyle, 60 S. E. 1075, 4 Ga. App. 113; Atlanta & B. A. L. Ry. v. McManus, 58 S. E. 258, 1 Ga. App. 302.

Ill. Flanagan v. Chicago City Ry. Co., 90 N. E. 688, 243 Ill. 456, affirming judgment 145 Ill. App. 56; Moreen v. Devillez, 212 Ill. App. 208; Adams v. Elgin & Belvidere Electric Co., 204 Ill. App. 1; Levy v. Chicago Rys. Co., 167 Ill. App. 527; Forster, Waterbury

[2] See note 2 on page 130.

dispute are erroneous, as invading the province of the jury, and

& Co. v. Peer, 120 Ill. App. 199; Turner v. Righter, 120 Ill. App. 131; Faulkner v. Birch, 120 Ill. App. 281; Illinois Cent. R. Co. v. Berry, 81 Ill. App. 17.

Ind. Kuhn v. Bowman, 93 N. E. 455, 46 Ind. App. 677; Southern Ry. Co. v. Limback, 85 N. E. 354, 172 Ind. 89; Sasse v. Rogers, 81 N. E. 590, 40 Ind. App. 197; Manion v. Lake Erie & W. Ry. Co., 80 N. E. 166, 40 Ind. App. 569.

Iowa. First Nat. Bank of Shenandoah v. Cook, 153 N. W. 169, 171 Iowa, 41; Snips v. Minneapolis & St. L. R. Co., 146 N. W. 468, 164 Iowa, 530; Heisler v. Heisler, 131 N. W. 676, 151 Iowa, 503; Jones v. De Moss, 130 N. W. 914, 151 Iowa, 112; Neville v. Chicago & N. W. Ry. Co., 79 Iowa, 232, 44 N. W. 367; Perigo v. Chicago, R. I. & P. R. Co., 55 Iowa, 326, 7 N. W. 627.

Kan. Busalt v. Doidge, 136 P. 904, 91 Kan. 37.

Ky. Log Mountain Coal Co. v. White Oak Coal Co., 174 S. W. 721, 163 Ky. 842; Baltimore & O. S. W. R. Co. v. Sheridan, 101 S. W. 928, 31 Ky. Law Rep. 109.

La. State v. King, 64 So. 1007, 135 La. 117.

Md. American Fidelity Co. of Montpelier, Vt., v. State, 109 A. 99, 135 Md. 326; City of Baltimore v. Ault, 94 A. 1044, 126 Md. 402; Crown Cork & Seal Co. v. O'Leary, 69 A. 1068, 108 Md. 463; Orem Fruit & Produce Co. of Baltimore City v. Northern Cent. Ry. Co., 66 A. 436, 106 Md. 1, 124 Am. St. Rep. 462.

Mass. Hannah v. Connecticut River R. Co., 154 Mass. 529, 28 N. E. 682.

Mich. Rimmele v. Huebner, 157 N. W. 10, 190 Mich. 247; McQuillan v. Eckerson, 144 N. W. 510, 178 Mich. 281; Ruthruff v. Faust, 117 N. W. 902, 154 Mich. 409; Karrer v. City of Detroit, 106 N. W. 64, 142 Mich. 331.

Minn. Larkin v. City of Minneapolis, 127 N. W. 1129, 112 Minn. 311.

Miss. Reid v. Yazoo & M. V. R. Co., 47 So. 670, 94 Miss. 639; Griffin v. Griffin, 46 So. 945, 93 Miss. 651; Coleman v. Adair, 23 So. 369, 75 Miss. 660.

Mo. Blair v. Union Electric Light & Power Co., 213 S. W. 976, 201 Mo. App. 571; Oliver v. St. Louis-San Francisco Ry. Co. (App.) 211 S. W. 699; Hunt v. City of St. Louis, 211 S. W. 673, 278 Mo. 213; Pearson v. Chicago, M. & St. P. Ry. Co. (App.) 200 S. W. 441; Neeley v. Snyder (App.) 193 S. W. 610; Bryan v. United States Incandescent Lamp Co., 159 S. W. 754, 176 Mo. App. 716; Simon v. Metropolitan St. Ry. Co., 132 S. W. 250, 231 Mo. 65, 140 Am. St. Rep. 498; Wilson v. City of St. Joseph, 123 S. W. 504, 139 Mo. App. 557; Williamson v. Wabash R. Co., 122 S. W. 1113, 139 Mo. App. 481; Glaser v. Rothschild, 120 S. W. 1, 221 Mo. 180, 22 L. R. A. (N. S.) 1045, affirming judgment 80 S. W. 332, 106 Mo. App. 418; Morrell v. Lawrence, 101 S. W. 571, 203 Mo. 363.

Mont. Stephens v. Elliott, 92 P. 45, 36 Mont. 92; Gallick v. Bordeaux, 78 P. 583, 31 Mont. 328.

Neb. Willman v. Sandman, 162 N. W. 419, 101 Neb. 92; Herold v. Coates, 129 N. W. 998, 88 Neb. 487; Deitrich v. Hutchinson, 20 Neb. 52, 29 N. W. 247.

N. Y. Anderson v. Dyer, 176 N. Y. S. 758; Milano v. Stuyvesant Auto Trading Co., 164 N. Y. S. 26; Knapp v. Niagara Junction Ry. Co., 158 N. Y. S. 640, 171 App. Div. 126.

N. C. Third Nat. Bank of St. Louis v. Exum, 79 S. E. 498, 163 N. C. 199; Dixie Fire Ins. Co. v. American Bonding Co., 78 S. E. 430, 162 N. C. 384; Marcus v. C. D. Loane & Co., 45 S. E. 354, 133 N. C. 54.

Ohio. Toledo Rys. & Light Co. v. Mayers, 112 N. E. 1014, 93 Ohio St. 304.

Okl. Chicago, R. I. & P. Ry. Co. v. Stibbs, 87 P. 293, 17 Okl. 97.

Or. West v. McDonald, 136 P. 650, 67 Or. 551.

Pa. Whitehead v. Pittsburg Rys. Co., 79 A. 240, 230 Pa. 79.

R. I. Taber v. New York, P. & B. R. Co., 67 A. 9, 28 R. I. 269.

S. C. Pearson v. Piedmont & N. Ry. Co., 99 S. E. 811, 112 S. C. 220; Hiller v. Bank of Columbia, 79 S. E. 899, 96 S. C. 74; Lee v. Northwestern R. Co., 65 S. E. 1031, 84 S. C. 125.

S. D. Whaley v. Vidal, 132 N. W.

such an instruction is properly refused.[3] The above rule has been

248, 27 S. D. 642; Richardson v. Dybedahl, 98 N. W. 164, 17 S. D. 629.

Tenn. Ellis v. Spurgin, 48 Tenn. (1 Heisk.) 74.

Tex. Anders v. California State Life Ins. Co. (Civ. App.) 214 S. W. 497; Texas & Pacific Coal Co. v. Sherbley (Civ. App.) 212 S. W. 758; Southern Traction Co. v. Owens (Civ. App.) 198 S. W. 150; Texas & P. Ry. Co. v. Wooldridge & Hamby, 126 S. W. 603, 59 Tex. Civ. App. 384; St. Louis Southwestern Ry. Co. v. Patton, 118 S. W. 798, 55 Tex. Civ. App. 59; Chicago, R. I. & G. Ry. Co. v. Groner, 111 S. W. 667, 51 Tex. Civ. App. 65; Thompson v. Galveston, H. & S. A. Ry. Co., 106 S. W. 910, 48 Tex. Civ. App. 284; Dallas Consol. Electric St. Ry. Co. v. Ely (Civ. App.) 91 S. W. 887.

Utah. Bills v. Salt Lake City, 109 P. 745, 37 Utah, 507; Davidson v. Utah Independent Telephone Co., 97 P. 124, 34 Utah, 249.

Va. Cardozo v. Middle Atlantic Immigration Co., Inc., 82 S. E. 80, 116 Va. 342.

W. Va. Williams v. Schehl, 100 S. E. 280, 84 W. Va. 499; Cobb v. Dunlevie, 60 S. E. 384, 63 W. Va. 398.

Wis. Northern Supply Co. v. Wangard, 100 N. W. 1066, 123 Wis. 1, 107 Am. St. Rep. 984; Clifford v. Minneapolis, St. P. & S. S. M. Ry. Co., 81 N. W. 143, 105 Wis. 618; Owen v. Long, 72 N. W. 364, 97 Wis. 78; Gillet v. Phelps, 12 Wis. 392.

Illustrations of instructions improper within rule. In an action for injuries to street passenger an instruction that if plaintiff attempted to board a moving car he was guilty of contributory negligence was erroneous as importing some degree of negligence on defendant's part. Hanton v. Pacific Electric Ry. Co., 174 P. 61, 178 Cal. 616. In an action for the value of cotton destroyed by fire while on a station platform, where the jury might have found that plaintiff put the cotton on the platform for his own convenience, and not to be held by defendant as warehouseman, an instruction requiring plaintiff to establish defendant's negligence would have been erroneous, as assuming that it held the cotton as warehouseman; negligence not otherwise being an essential element. St. Louis & S. F. Ry. Co. v. Black, 218 S. W. 377, 142 Ark. 41. In an action to recover for personal injuries sustained by a cattle shipper who had been invited to ride in one of defendant's trains, as the result of being brushed off a cattle car when it passed under a bridge, an instruction assuming that an engine is a safe place in which to ride is improper. Wall v. Chesapeake & O. Ry. Co., 210 Ill. App. 136. In passenger's action for injuries sustained in alighting from train, an instruction on duty of assistance, which assumed the fact in issue, that place where passenger alighted was dangerous, was erroneous. Nashville, C. & St. L. Ry. Co. v. Newsome, 206 S. W. 33, 141 Tenn. 8. In a servant's action for injuries, a charge assuming decrease in the servant's earning capacity as a proven fact from statement of a physician that plaintiff would always have a weak arm was erroneous, since the weakened condition of the arm need not necessarily decrease plaintiff's earning capacity. Texas & Pacific Coal Co. v. Ervin (Tex. Civ. App.) 212 S. W. 234. Where suits of passenger in automobile and of the driver's administrator were tried together, requested instruction that, if either driver or passenger was guilty of negligence contributing to the accident, and without which it would not have occurred, verdict should be for defendant in both cases, was erroneous, as assuming that the relation of the occupants warranted imputing negligence of one of them to the other. Robison v. Oregon-Washington R. & Nav. Co., 176 P. 594, 90 Or. 490. In action for injuries sustained by plaintiff while driving across defendant's street car tracks at a crossing, an instruction assuming that plaintiff, when near the track, was in a position of danger, was erroneous as invading the province of the jury. Terre Haute, I & E. Traction Co. v. Ellsbury (Ind. App.) 123 N. E. 810. In an action for

[3] See note 3 on page 135.

frequently violated by instructions given or requested which, in

death resulting from collision between a vehicle driven by deceased and defendant's automobile, it is error to instruct that, if the jury believe from the evidence that at time of the accident deceased was violating an ordinance regulating the manner in which vehicles shall proceed in turning corners to the left, and that such violation was negligence which proximately contributed to the accident, then they should find for defendant, as thereby there is an assumption that violation of the ordinance was conclusive of the fact that deceased was negligent, instead of being, at the most, mere prima facie evidence thereof. Culver v. Harris, 211 Ill. App. 474.

Instructions not objectionable under rule. An instruction, "If the jury find the issues for plaintiff, * * * you will * * * take into consideration mental and physical pain endured by her since said injury," etc., was not erroneous as assuming that plaintiff was injured. Breen v. United Rys. Co. of St. Louis (Mo.) 204 S. W. 521. In personal injury action, an instruction, authorizing damages in such reasonable sum as jury shall award plaintiff on account of pain and anxiety she has suffered by reason of her injuries, was not objectionable as assuming that plaintiff had in fact suffered pain and anxiety, though there was testimony that plaintiff was stolid and reticent concerning her injuries. Brinck v. Bradbury, 176 P. 690, 179 Cal. 376. Instruction "that the law does not justify nor excuse parents in willfully and maliciously interfering with the domestic affairs of their married children" is not subject to objection that it is a direct assertion by the court that defendants interfered in the domestic affairs of plaintiff and her husband. Wagner v. Wagner (Mo. App.) 215 S. W. 784. An instruction predicating verdict for plaintiff on a finding that the negligence, if any, in construction of a platform consisted in certain defects, was not erroneous as assuming as a fact the existence of those defects. Deming v. Alpine Ice Co. (Mo. App.) 214 S. W. 271. In wagon driver's personal injury action against street railroad, instruction limiting consideration of reasonable care to the situation at the time of the accident, and not upon anything subsequently discovered, which could not with reasonable diligence have been discovered before accident, was not erroneous in assuming that wagon driver was not negligent, such instruction not purporting to cover all matters of law involving right of recovery. Indianapolis & Cincinnati Traction Co. v. Senour (Ind. App.) 122 N. E. 772. Instruction that motorman, operating street car at reasonable speed with due care, may assume that others on the street will exercise ordinary care, and will see that which is plainly to be seen, was not objectionable, as assuming that the street car could be plainly seen. Busch v. Los Angeles Ry. Corporation, 174 P. 665, 178 Cal. 536, 2 A. L. R. 1607. In an action for injuries received in collision between vehicles on a street, an instruction, expressly conditioned on the jury finding for the plaintiff under rules given, one of which was an instruction stating that in order to enable plaintiff to recover she must establish by a fair preponderance of the evidence that she received some part of injuries as alleged in complaint, does not assume the fact of plaintiff's injuries. Spickelmeir v. Hartman (Ind. App.) 123 N. E. 232.

[2] **U. S.** Dolan v. United States (C. C. A. Alaska) 123 F. 52, 59 C. C. A. 176, reversing judgment on rehearing 116 F. 578, 54 C. C. A. 34.

Ala. Pounds v. State, 73 So. 127, 15 Ala. App. 223; Bone v. State, 68 So. 702, 13 Ala. App. 5; Jones v. State, 68 So. 690, 13 Ala. App. 10; Rector v. State, 66 So. 857, 11 Ala. App. 333; Brooks v. State, 62 So. 569, 8 Ala. App. 277, judgment reversed 64 So. 295, 185 Ala. 1; Naftel v. State, 57 So. 386, 3 Ala. App. 34; Johnson v. State, 55 So. 321, 1 Ala. App. 102; Morris v. State, 41 So. 274, 146 Ala. 66; Wilson v. State, 37 So. 93, 140 Ala. 43; Hall v. State, 32 So. 750, 134 Ala. 90.

referring to some or all of the evidentiary facts necessary to be

Ark. Marsh v. State, 188 S. W. 815, 125 Ark. 282.

Cal. People v. McPherson, 91 P. 1098, 6 Cal. App. 266; People v. Thomson, 79 P. 435, 145 Cal. 717; People v. Matthai, 67 P. 694, 135 Cal. 442.

Colo. Harris v. People, 135 P. 785, 55 Colo. 407.

Conn. State v. Alderman, 78 A. 331, 83 Conn. 597.

Fla. Bates v. State, 84 So. 373, 78 Fla. 672; Johnson v. State, 40 So. 678, 51 Fla. 44; Melbourne v. State, 40 So. 189, 51 Fla. 69; Wallace v. State, 26 So. 713, 41 Fla. 547; Doyle v. State, 22 So. 272, 39 Fla. 155, 63 Am. St. Rep. 159.

Ga. Wilson v. State, 70 S. E. 193, 8 Ga. App. 816; Phillips v. State, 62 S. E. 239, 131 Ga. 426; Cooper v. State, 59 S. E. 20, 2 Ga. App. 730.

Idaho. State v. Schweitzer, 111 P. 130, 18 Idaho, 609.

Ill. People v. Pezutto, 99 N. E. 677, 255 Ill. 583; Miller v. People, 82 N. E. 391, 229 Ill. 376; People v. Johnson, 150 Ill. App. 424.

Ind. Koerner v. State, 98 Ind. 7; Binns v. State, 66 Ind. 428.

Iowa. State v. Teale, 142 N. W. 235, 162 Iowa, 451.

Kan. State v. Shew, 57 P. 137, 8 Kan. App. 679; State v. Johnson, 50 P. 907, 6 Kan. App. 119.

Ky. Rand v. Commonwealth, 195 S. W. 802, 176 Ky. 343.

La. State v. Fontenot, 23 So. 634, 50 La. Ann. 537, 69 Am. St. Rep. 455.

Mich. People v. Auerbach, 141 N. W. 869, 176 Mich. 23, Ann. Cas. 1915B, 557; People v. Schick, 42 N. W. 1008, 75 Mich. 592.

Miss. De Silva v. State, 47 So. 464. 93 Miss. 635.

Mo. State v. Fish, 195 S. W. 997; State v. Langley, 154 S. W. 713, 248 Mo. 545; State v. Webb, 146 S. W. 805, 163 Mo. App. 275; State v. Bonner, 77 S. W. 463, 178 Mo. 424.

Neb. Titterington v. State, 110 N. W. 678, 78 Neb. 8; Parker v. State, 108 N. W. 121, 76 Neb. 765.

Nev. State v. Buralli, 71 P. 532, 27 Nev. 41.

N. Y. People v. Brown, 96 N. E. 367, 203 N. Y. 44, Ann. Cas. 1913A, 732; People v. Walker, 91 N. E. 806, 198 N. Y. 329, reversing judgment 118 N. Y. S. 1132, 134 App. Div. 909.

N. C. State v. Hand, 86 S. E. 1005, 170 N. C. 703; State v. Medlin, 36 S. E. 344, 126 N. C. 1127.

Okl. Gray v. State, 122 P. 265, 7 Okl. Cr. 102; Kirk v. Territory, 60 P. 797, 10 Okl. 46.

Or. State v. Stiles, 160 P. 126, 81 Or. 497; State v. Bock, 88 P. 318, 49 Or. 25; State v. Andrews, 58 P. 765, 35 Or. 388.

Pa. Commonwealth v. Ronello, 89 A. 553, 242 Pa. 381; Commonwealth v. Calhoun, 86 A. 472, 238 Pa. 474.

Tenn. Powers v. State, 97 S. W. 815. 117 Tenn. 363.

Tex. Sarli v. State, 189 S. W. 149, 80 Tex. Cr. R. 161; Leary v. State, 117 S. W. 822, 55 Tex. Cr. R. 547; Schwartz v. State, 111 S. W. 399, 53 Tex. Cr. R. 449; Hazlett v. State, (Cr. App.) 96 S. W. 36; Spivey v. State, 77 S. W. 444, 45 Tex. Cr. R. 496; Bradshaw v. State, 70 S. W. 215, 44 Tex. Cr. R. 222; Owens v. State, 46 S. W. 240, 39 Tex. Cr. R. 391.

Utah. State v. Seymour, 163 P. 789. 49 Utah, 285.

Va. Boswell v. Commonwealth, 20 Grat. 860.

Wash. State v. Phillips, 67 P. 608, 27 Wash. 364.

W. Va. State v. Dickey, 33 S. E. 231, 46 W. Va. 319; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

Wis. Cupps v. State, 97 N. W. 210, 120 Wis. 504, 102 Am. St. Rep. 996, rehearing denied 98 N. W. 546, 120 Wis. 504, 102 Am. St. Rep. 996.

Instructions obnoxious to rule. A charge that the absence of any probable motive for the commission of the crime was a circumstance which should be considered in defendant's favor. State v. Bobbitt, 114 S. W. 511, 215 Mo. 10. A charge, on a prosecution of a boy under 14 years old, that, in determining whether he had sufficient intelligence to entertain a criminal intent, the fact that he was a bright boy may be considered, is erroneous in as-

found in order to find an ultimate fact, have assumed the existence

suming that he was a bright boy. Neville v. State, 41 So. 1011, 148 Ala. 681. An instruction that, if defendant and the third person connived together to make a sale to the witness for the purpose of evading the law, the transaction was a sale, is erroneous for assuming the fact of connivance, not shown by the evidence. Randell v. State, 90 S. W. 1012, 49 Tex. Cr. R. 261. An instruction on a trial for murder that accused could not invoke the aid of the doctrine of self-defense, for acts done after he had disabled deceased with a pistol shot, is erroneous, as it assumes that deceased was disabled. McCrory v. State (Miss.) 25 So. 671. A charge, in a prosecution for homicide, that he who slays another in a duel, whether formally or suddenly improvised, and however fairly conducted, is legally a murderer, and is guilty of murder is erroneous, as assuming that the altercation between defendant and deceased constituted a duel. Stringer v. State (Miss.) 38 So. 97. A charge, in a prosecution for assault with intent to murder, that defendant was attacked at his own house, and that the law does not require that he retreat in order to plead self-defense, and the principle extends to his dwelling house with so much additional space as is used for the purpose of a dwelling assumes that defendant was attacked. Pearson v. State, 41 So. 733, 148 Ala. 670. A requested instruction on self-defense, commencing, "If you believe the defendant, at the time of the killing, had a reasonable apprehension and belief that deceased was about to execute his threat to kill him," is erroneous, as declaring as a fact that deceased had threatened to kill defendant. People v. Roemer, 45 P. 1003, 114 Cal. 51. A charge in a prosecution for homicide, that if, at the time of the killing, deceased was attacking, or about to attack, defendant with a deadly weapon, defendant was not bound to retreat, assumes that defendant could not have retreated without endangering his safety. Gafford v. State, 25 So. 10, 122 Ala. 54. A charge that, if deceased was near the place of the killing, in concealment, early in the morning of the killing, and this fact was communicated to accused, he had a right to arm himself, and, believing that deceased had left the place where he had been between defendant and his oxen, the action of defendant in hunting his oxen was the action of a prudent man, and, if assaulted, he was justified in taking the life of deceased. Hisler v. State, 42 So. 692, 52 Fla. 30. A requested instruction if defendant was in danger of his life or of serious bodily harm, or if he reasonably believed he was, and defendant was free from fault in bringing on difficulty, he had right to strike in self-defense, was properly refused, because assuming that defendant used no more force than was necessary to repel alleged danger to his life or the apparent grievous injury to his person. Buckner v. State, 81 So. 687, 17 Ala. App. 57. An instruction, in a prosecution for violating a city ordinance as to transportation of intoxicating liquor, that, if the jury believed that defendant "had hired a taxicab or had the control or direction of the taxicab in which the suit cases containing liquor were carried" from the station to a certain point, he was transporting liquor within the meaning of the city ordinance, was erroneous as assuming that the suit cases were carried and taken by defendant or under his direction. City of Spokane v. Dale, 192 P. 921, 112 Wash. 533. A statement in an instruction, if "at any time between the time they took these turkeys to the buggy," is error, as assuming a fact; the evidence being conflicting as to who took them there, and this being a matter of importance. Commonwealth v. Light, 45 A. 933, 195 Pa. St. 220. An instruction, in a prosecution for concealing stolen property, that if defendant, in concealing the property as alleged in the indictment, etc. Oddo v. State, 44 So. 646, 152 Ala. 51. An instruction that de-

of such evidentiary facts or which state that if a certain proposition

fendant's possession of a buggy, alleged to have been stolen, recently after the commission of the offense, "unsatisfactorily accounted for," was prima facie evidence that defendant committed the offense is erroneous as assuming that defendant's explanation of his possession was unsatisfactory. Miller v. People, 82 N. E. 391, 229 Ill. 376. Where accused denied that he carried a weapon at all at the time he was charged with carrying one concealed, an instruction "that if the pistol" was carried so exposed to view that it could be readily recognized as a pistol he carried it openly, but if he carried it concealed, even for a minute, the offense was complete, etc., was erroneous as eliminating the defense alleged. Jenkins v. State, 58 S. E. 1063, 2 Ga. App. 626.

Instructions not improper within rule. A paragraph in an instruction on reasonable doubt that a juror may not create materials of doubt by resorting to trivial suppositions and remote conjecture, as to a possible state of facts different from that established by the evidence. State v. Crean, 114 P. 603, 43 Mont. 47, Ann. Cas. 1912C, 424. An instruction in a prosecution for bigamy that, in determining the criminal intent, the jury might consider the fact, "if such be the fact," that in making application for license to marry defendant's second wife he misstated his name and residence, and falsely concealed his former marriage, was not objectionable as assuming that defendant in fact did so conceal such former marriage. Fletcher v. State, 81 N. E. 1083, 169 Ind. 77, 124 Am. St. Rep. 219. An instruction that, where two or more persons are associated together for purpose of doing an unlawful act, the act of one is deemed act of all is not objectionable as assuming existence of conspiracy. State v. Chong Ben, 173 P. 258, 89 Or. 313. In a prosecution of two defendants for conspiracy, an instruction that the jury may convict either or both of the defendants, provided that those, the one or both to be convicted, conspired together or with some other person or persons jointly indicted, or that the jury might find either or both not guilty, is not objectionable as assuming that one or both of the defendants were to be convicted. Imboden v. People, 90 P. 608, 40 Colo. 142. An instruction, in a prosecution for forging a deed, that, while the jury cannot find defendant guilty on proof that the acknowledgment was forged, yet, if the jury believe it was forged, and that the body of the deed was written by the same person, then, in determining whether the deed was a forgery, the forged acknowledgment can be considered along with other facts and circumstances, is not objectionable, as assuming that the acknowledgment was forged. State v. Pyscher, 77 S. W. 836, 179 Mo. 140. An instruction, in a prosecution for the fraudulent conversion of property, that if the jury believed that defendant was in the possession of the property of another by virtue of a contract of hiring, and unlawfully converted the property to his own use, he was guilty, etc., did not assume that there was a contract of hiring. Lewallen v. State, 87 S. W. 1159, 48 Tex. Cr. R. 283. An instruction that, if accused assaulted the deceased, the latter had a right to use such force as was necessary to prevent the assault, and that, if defendant killed the deceased when he was only making such resistance as was necessary to defend himself from the assault of defendant, defendant would be justifiable in killing deceased, is not erroneous as assuming that defendant assaulted the deceased. Tolbirt v. State, 53 S. E. 327, 124 Ga. 767. An instruction, on a prosecution for murder, that if the jury believe that defendant brought on the difficulty, and was the first assailant, he cannot avail himself of the right to self-defense, however imminent to the danger in which he may have found himself in the progress of the affray, is not open to the objection that it

is true certain results will follow, and in the hypothesized proposi-

assumes there was a difficulty, and that there was an affray, since, in the absence of a difficulty and affray, the killing would not have taken place. Henry v. People, 65 N. E. 120, 198 Ill. 162. An instruction that if defendant was without fault in bringing on the shooting at a place where he had a right to be, and was assaulted by the injured party, and from said assault defendant believed, and had reasonable ground to believe, he was in great danger of losing his life or receiving great bodily harm from the injured party, he would be justified in any defense necessary to protect himself, and in that view of the case he should be acquitted, and if the jury has reasonable doubt as to whether the defendant acted in self-defense when he fired the shot he should not be convicted, does not assume that defendant brought on the shooting. Whitney v. State, 57 N. E. 398, 154 Ind. 573. A charge in homicide, that if deceased cursed defendant, and defendant, while under the heat of passion, aroused by the insult, secured a pistol, and killed deceased, he would be guilty of manslaughter, is not subject to the objection of assuming that defendant was in the heat of passion aroused by having been cursed by deceased. Moore v. State, 38 So. 504, 86 Miss. 160. An instruction, on a prosecution for murder, that, if defendant had been informed that decedent had been guilty of insulting conduct toward defendant's wife, and that soon thereafter defendant met decedent, etc., was not erroneous as telling the jury that the insult must have been established as a fact. Bays v. State, 99 S. W. 561, 50 Tex. Cr. R. 548. In a prosecution for murder, an instruction that defendant could not justify the killing of deceased by evidence that, after defendant had fired the fatal shot and killed deceased, friends or relatives of deceased fired on and wounded defendant, but that the acts of deceased or other persons, in order to give defendant the right to kill in self-defense, must have occurred or existed before he fired the fatal shot, and not afterwards, is not erroneous as assuming facts, instead of stating them hypothetically, and thus excluding defendant's theory of justification. Nash v. State, 95 S. W. 147, 79 Ark. 120. On a prosecution for assault with intent to rape, an instruction that if the jury believed beyond a reasonable doubt that defendant induced prosecutrix to enter his buggy, and after he got her in the buggy he took hold of her with intent to have intercourse with her, against her will and with an intent to accomplish his object at all events by his strength and power against any resistance she might offer, then he was guilty of an assault with intent to rape, whether he succeeded in his purpose or not, is not erroneous as assuming by the words "his object" that he had a criminal purpose. Donovan v. People, 74 N. E. 772, 215 Ill. 520. An instruction on a prosecution for homicide that if defendant slew deceased with a razor, and that said razor was a deadly weapon, to find defendant guilty, does not tell the jury that the razor was a deadly weapon. Spears v. State, 56 S. W. 347, 41 Tex. Cr. R. 527. On a prosecution for homicide, an instruction that though there may be some mental derangement, still, if the accused at such time had mental capacity sufficient to adequately comprehend the nature and consequences of his acts, and a mind sufficient to deliberate and premeditate, and to form an intent and purpose to kill—an unimpaired will power sufficient to control an impulse to commit crime—he was not entitled to an acquittal on the ground of mental incapacity, is not bad as assuming that accused had sufficient mental capacity to commit the crime. Hoover v. State, 68 N. E. 591, 161 Ind. 348. An instruction that no man can, by his own lawless act, create a necessity for acting in self-defense, when considered with instructions properly defining self-defense, is not erroneous as assuming that defendant created the necessity

tion facts are involved which are assumed.[4] So such rule is broken

by his own lawless act to produce a fear that his life was in danger from deceased, and taking advantage of the plea of self-defense made it necessary to kill. Robinson v. Territory, 85 P. 451, 16 Okl. 241, reversed Same v. Territory of Oklahoma, 148 F. 830, 78 C. C. A. 520. A charge, in prosecution for incest, that if jury believed that parties were uncle and niece they would be within statute. Griffin v. State, 202 S. W. 87, 83 Tex. Cr. R. 157. An instruction, in a prosecution for hog theft, that, if the offense was committed, it was complete when the hog was taken, and if so taken, and if defendant was guilty as a principal in the original taking, under circumstances making it theft, he could not be relieved from punishment by reason of his failure to aid in bringing the hog to town after such taking, if any. Newberry v. State (Tex. Cr. App.) 74 S. W. 774. An instruction on a trial for malicious shooting, that the principles of the law of self-defense in murder cases applied to to "malicious shooting cases," does not assume the fact of malice on the part of defendant, since the terms used indicated the class of cases to which the one on trial belonged, as shown by the indictment or charge, rather than by the evidence, and referred not to the case on trial but to such class of cases. State v. Lavin, 60 S. E. 888, 64 W. Va. 26. An instruction that if the jury found that an assault with intent to rape was upon a female under 18 years, "to wit, of the age of 15 years," does not assume the age of the victim to be 15 years. Dickens v. People, 152 P. 909, 60 Colo. 141.

U. S. White v. Van Horn, 159 U. S. 3, 15 Sup. Ct. 1027, 40 L. Ed. 55.

Ala. Denton Bros. v. Foster, 70 So. 152, 195 Ala. 53; Smith v. E. T. Davenport & Co., 68 So. 545, 12 Ala. App. 456; Continental Gin Co. v. Milbrat, 65 So. 424, 10 Ala. App. 351, certiorari denied Ex parte Continental Gin Co., 66 So. 1008, 191 Ala. 660; Vinegar Bend Lumber Co. v. Soule Steam Feed Works, 62 So. 279, 182 Ala. 146; Western Union Telegraph Co. v. Burns, 51 So. 373, 164 Ala. 252.

Ark. St. Louis, I. M. & S. Ry. Co. v. Rhoden, 128 S. W. 798, 93 Ark. 29, 137 Am. St. Rep. 73, 20 Ann. Cas. 915; St. Louis, I. M. & S. Ry. Co. v. Fambro, 114 S. W. 230, 88 Ark. 12; Western Coal & Mining Co. v. Burns, 104 S. W. 535, 84 Ark. 74.

Cal. Tousley v. Pacific Electric Ry. Co., 137 P. 31, 166 Cal. 457; Still v. San Francisco & N. W. Ry. Co., 98 P. 672, 154 Cal. 559, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177.

Colo. Finding v. Gitzen, 131 P. 1042, 24 Colo. 38; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 523, 29 Pac. 21; Downing v. Brown, 3 Colo. 571.

Conn. Wilson v. Waltersville School Dist., 46 Conn. 400; Miles v. Douglas, 34 Conn. 393.

Ill. Commercial State Bank of Forreston v. Folkerts, 200 Ill. App. 385; Carlisle v. Novak, 196 Ill. App. 385; Muenter v. Moline Plow Co., 193 Ill. App. 261; McDermott v. Griffiths, 190 Ill. App. 53; Devine v. L. Fish Furniture Co., 189 Ill. App. 136; Wilkinson v. Ætna Life Ins. Co., 144 Ill. App. 38, judgment affirmed 88 N. E. 550, 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269.

Ind. Cleveland, C., C. & St. L. Ry. Co. v. Cloud, 110 N. E. 81, 61 Ind. App. 256; Lake Shore & M. S. Ry. Co. v. W. H. McIntyre Co., 108 N. E. 978, 60 Ind. App. 191; Ohio & M. Ry. v. Pearcy, 27 N. E. 479, 128 Ind. 197.

Iowa. Severs v. Cleveland Coal Co., 159 N. W. 194, 179 Iowa, 235; Case v. Chicago Great Western Ry. Co., 126 N. W. 1037, 147 Iowa, 747; Connors v. Chingren, 82 N. W. 934, 111 Iowa, 437.

Kan. Baughman v. Penn, 33 Kan. 504, 6 P. 890; Jardicke v. Scrafford, 15 Kan. 120.

Ky. Louisville City Ry. Co. v. Mercer, 11 Ky. Law Rep. (abstract) 810.

Md. American Towing & Lighter-

[4] See note, on page 136.

by instructions which, in leaving to the jury the question of wheth-

ing Co. v. Baker-Whiteley Coal Co., 75 A. 341, 111 Md. 504; Monumental Brewing Co. v. Larrimore, 72 A. 596, 109 Md. 682.

Mass. Bisbee v. McManus, 118 N. E. 192, 229 Mass. 124; Dunham v. Holmes, 113 N. E. 845, 225 Mass. 68; Edwards v. Willey, 107 N. E. 450, 219 Mass. 443; Maionica v. Piscopo, 104 N. E. 839, 217 Mass. 324; Clark v. American Express Co., 83 N. E. 365, 197 Mass. 160.

Minn. Macy v. St. Paul & D. Ry. Co., 35 Minn. 200, 28 N. W. 249; Faber v. St. Paul, M. & M. Ry. Co., 29 Minn. 465, 13 N. W. 902.

Mo. Lamport v. General Accident, Fire & Life Assur. Corp., 197 S. W. 95, 272 Mo. 19; Carpenter v. Gruendler Mach. Co., 141 S. W. 1147, 162 Mo. App. 296; Hartley v. Calbreath, 106 S. W. 570, 127 Mo. App. 559.

Mont. Trogdon v. Hanson Sheep Co., 139 P. 792, 49 Mont. 1; Lindsley v. McGrath, 87 P. 961, 34 Mont. 564.

Neb. Van Dorn v. Kimball, 160 N. W. 953, 100 Neb. 590; Ottens v. Fred Krug Brewing Co., 78 N. W. 622, 58 Neb. 331.

N. J. Heindel v. Hetzel, 82 A. 511.

N. Y. Schoenholtz v. Third Ave. R. Co. (Sup.) 16 Misc. Rep. 7, 37 N. Y. S. 682; Rettig v. Fifth Ave. Transp. Co. (Super.) 6 Misc. Rep. 328, 26 N. Y. S. 896; Trask v. Payne, 43 Barb. 569.

N. C. Pigford v. Norfolk-Southern R. Co., 75 S. E. 860, 160 N. C. 93, 44 L. R. A. (N. S.) 865; Horton v. Seaboard Air Line Ry., 58 S. E. 993, 145 N. C. 132.

N. D. Landis v. Fyles, 120 N. W. 566, 18 N. D. 587.

Okl. Waldock v. First Nat. Bank of Idabel, 143 P. 53, 43 Okl. 348.

Or. Kemp v. Portland Ry., Light & Power Co., 145 P. 274, 74 Or. 258; Heiser v. Shasta Water Co., 143 P. 917, 71 Or. 566.

Pa. Fern v. Pennsylvania R. Co., 95 A. 590, 250 Pa. 487; Friedland v. Altoona & Logan Valley Electric Ry. Co., 59 Pa. Super. Ct. 539.

R. I. National Machinery Co. v. Kirby, 94 A. 149.

S. C. Southern Realty & Inv. Co. v. Keenan, 83 S. E. 39, 99 S. C. 195; Thornton v. Seaboard Air Line Ry., 82 S. E. 433, 98 S. C. 348.

S. D. Davis v. C. & J. Michel Brewing Co., 140 N. W. 694, 31 S. D. 284; Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783.

Tenn. Gulf Compress Co. v. Insurance Co. of Pennsylvania, 167 S. W. 859, 129 Tenn. 586.

Tex. Chicago, R. I. & G. Ry. Co. v. Smith (Civ. App.) 197 S. W. 614; McCulloh v. Reynolds Mortgage Co. (Civ. App.) 196 S. W. 565; Fidelity & Deposit Co. of Maryland v. Anderson (Civ. App.) 189 S. W. 346; Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.) 151 S. W. 586; Pecos & N. T. Ry. Co. v. Coffman (Civ. App.) 121 S. W. 218.

Vt. Taplin & Rowell v. Marcy, 71 A. 72, 81 Vt. 428.

Wash. Larson v. McMillan, 170 P. 324, 99 Wash. 626; Phœnix Assur. Co. v. Columbia & P. S. R. Co., 159 P. 369, 92 Wash. 419, opinion modified 162 P. 519, 94 Wash. 323.

W. Va. Harrison v. Farmers' Bank, 4 W. Va. 393.

Wis. Mickuczauski v. Helmholz Mitten Co., 134 N. W. 369, 148 Wis. 153; Ferguson v. Truax, 110 N. W. 395, 132 Wis. 478, rehearing granted 111 N. W. 657, judgment reversed 112 N. W. 513, 14 L. R. A. (N. S.) 350, 13 Ann. Cas. 1092.

[4] **Ala.** Birmingham Ry., Light & Power Co. v. Lipscomb, 73 So. 962, 198 Ala. 653; Western Ry. of Alabama v. Mays, 72 So. 641, 197 Ala. 367; Alabama Great Southern R. Co. v. Hanbury, 49 So. 467, 161 Ala. 358; Mobile Light & R. Co. v. Walsh, 40 So. 560, 146 Ala. 295; Birmingham Ry., Light & Power Co. v. Mullen, 35 So. 701, 138 Ala. 614; Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 So. 495; Alabama Great Southern R. Co. v. Roebuck, 76 Ala. 277.

Cal. Kahn v. Triest-Rosenberg Cap Co., 73 P. 164, 139 Cal. 340.

Fla. Florida East Coast Ry. Co., v. McElroy, 72 So. 459, 72 Fla. 90.

Ill. Illinois Cent. R. Co. v. Johnson, 77 N. E. 592, 221 Ill. 42, affirming

er a party had knowledge of certain matters, assume the existence

judgment 123 Ill. App. 300; Momence Stone Co. v. Turrell, 68 N. E. 1078, 205 Ill. 515, affirming judgment 106 Ill. App. 160; Chicago & A. R. Co. v. Winters, 51 N. E. 901, 175 Ill. 293, affirming judgment 65 Ill. App. 435; Lord v. Board of Trade of Wichita, 45 N. E. 205, 163 Ill. 45; Chicago, St. L. & P. R. Co. v. Hutchinson, 120 Ill. 587, 11 N. E. 855; Adams v. Elgin & Belvidere Electric Co., 204 Ill. App. 1; Osborn v. City of Mt. Vernon, 197 Ill. App. 267; Chicago & A. R. Co. v. Gore, 92 Ill. App. 418; Chicago & A. R. Co. v. Bloomfield, 7 Ill. App. (7 Bradw.) 211.

Iowa. Selensky v. Chicago Great Western Ry. Co., 94 N. W. 272, 120 Iowa. 113.

Md. Baltimore & O. R. Co. v. State. 64 A. 304, 104 Md. 76.

Mich. McCullough v. Minneapolis, St. P. & S. S. M. Ry. Co., 101 Mich. 234, 59 N. W. 618.

Mo. Klein v. St. Louis Transit Co., 93 S. W. 281, 117 Mo. App. 691; Freeman v. Metropolitan St. Ry. Co., 68 S. W. 1057, 95 Mo. App. 94; Garesche v. Boyce, 8 Mo. 228.

N. M. Pryor v. Portsmouth Cattle Co., 6 N. M. 44, 27 P. 327.

N. C. Bumgardner v. Southern Ry. Co., 43 S. E. 948, 132 N. C. 438.

Tex. Gulf, C. & S. F. Ry. Co. v. Sullivan (Civ. App.) 190 S. W. 739; Dallas Consol. Electric St. Ry. Co. v. Kelley (Civ. App.) 142 S. W. 1005; St. Louis, S. F. & T. Ry. Co. v. Bowles, 131 S. W. 1176, 63 Tex. Civ. App. 23; Long v. Consumers' Light & Heating Co., 121 S. W. 172, 55 Tex. Civ. App. 298; Suderman & Dolson v. Kriger, 109 S. W. 373, 50 Tex. Civ. App. 29; Texas Midland R. Co. v. Booth, 80 S. W. 121, 35 Tex. Civ. App. 322; Texas & P. Ry. Co. v. Berry, 72 S. W. 423, 32 Tex. Civ. App. 259; Gulf, C. & S. F. Ry. Co. v. Shelton, 69 S. W. 653, 30 Tex. Civ. App. 72, rehearing denied 70 S. W. 359, affirmed 72 S. W. 165, 96 Tex. 301.

Wash. Wren v. City of Seattle, 170 P. 342, 100 Wash. 67, 3 A. L. R. 1123.

Instructions improper within rule. An instruction that, if a carrier's agent was negligent in delivering to plaintiff's wife a ticket to the wrong station, and if such negligence directly and proximately produced any injury, such as the allegations and proof established, if any, then defendants were liable for such injuries as were created as the direct and proximate cause thereof, if any, was objectionable as on the weight of the evidence, and as inducing the jury to believe that it was established that the agent was negligent in selling the ticket, and that such negligence resulted in injury to plaintiff's wife. International & G. N. R. Co. v. Doolan, 120 S. W. 1118, 56 Tex. Civ. App. 503. An instruction, in a action by an employé for injuries by a ladder breaking, in which there was no evidence as to how he adjusted his weight in descending the ladder, that if it broke because he improperly adjusted his weight on it so as to throw his weight on one side piece, and if he had not so thrown his weight, but had kept it leaning on the ladder in the way it was intended the ladder should carry it, the ladder would not have broken, he could not recover. Adams v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 105 S. W. 526. An instruction, in an action by a servant against a railroad company for injuries, that if defendant's servants, in charge of its locomotive, knew or could have known that plaintiff was in the car to which the coupling was made, and of his perilous condition and surroundings therein, and they negligently propelled defendant's locomotive against the car with greater force than necessary, causing the car door to fall on him, and that plaintiff, in remaining in the car, exercised ordinary care, they should find for plaintiff, is erroneous, as it assumes that plaintiff was in a perilous position. St. Louis S. W. Ry. Co. of Texas v. Sibley, 68 S. W. 516, 29 Tex. Civ. App. 896. An instruction, in an action by a servant against a railroad for injuries received while in the latter's employ, that, if defendant's servants in charge of its locomotive knew, or could have known, that plaintiff was in the car to which cou-

of such matters,[5] or by instructions on whether a wrong has been done or a breach of contract committed, which assume that damages have resulted from any such wrong or breach of contract,[6] or by instructions on the measure of damages which assume that the alleged tort or breach of contract on which the action is founded was committed,[7] or by instructions on the right to exemplary damages which assume that the tort for which the action is brought is of such a character as to warrant the allowance of exemplary damages.[8]

§ 75. Limitations or qualifications of rule

An instruction which merely asserts an abstract legal proposition, without attempting to apply it to the facts in the case on trial, does not assume the existence of facts within the above rule.[9] It

pling was made, and of his perilous condition and surroundings therein, and they negligently propelled defendant's locomotive against the car with greater force than necessary, causing the car door to fall on plaintiff, and that plaintiff, in remaining in the car, exercised ordinary care, they should find for the plaintiff. St. Louis S. W. Ry. Co. of Texas v. Sibley, 68 S. W. 516, 29 Tex. Civ. App. 396. Where a servant of a railroad company was killed by the falling of a car which was raised upon jacks, because of the breaking of a timber upon which one of the jacks rested, and it was an issuable fact whether the servant was negligent in using that timber, a charge that, if the falling of the car was caused by the breaking of the timber, there could be no recovery, was properly refused, being in effect a peremptory instruction. Gulf, C. & S. F. Ry. Co. v. Kennedy (Tex. Civ. App.) 139 S. W. 1009. An instruction, in an action to recover damages for the obstruction of navigable waters, thereby preventing plaintiff from floating his logs to market, directing the jury to find for plaintiff, if they believed from the preponderance of the evidence that defendant unreasonably detained plaintiff's logs by reason of wrongfully obstructing their passage "along said navigable waters," is incorrect as being on the weight of the evidence; the question of the navigability of those waters being controverted. Orange Lumber Co. v. Thompson (Tex. Civ. App.) 113 S. W. 563.

[5] Straight Creek Coal Co. v. Haney's Adm'r, 87 S. W. 1114, 27 Ky. Law Rep. 1117.

[6] Walter v. Alabama Great Southern R. Co., 39 So. 87, 142 Ala. 474; Crossley v. St. Louis, I. M. & S. Ry. Co., 199 Ill. App. 195; Dougherty v. Vanderpool, 35 Miss. 165; Gulf, C. & S. F. Ry. Co. v. White (Tex. Civ. App.) 32 S. W. 322.

[7] **Ill.** Gibbons v. Southern Illinois Ry. & Power Co., 199 Ill. App. 154.

Ind. Steele v. Davis, 75 Ind. 191.

Mich. Prentiss v. Ross' Estate, 96 Mich. 83, 55 N. W. 613.

Minn. Smith v. Dukes, 5 Minn. 373 (Gil. 301).

Mo. Orscheln v. Scott, 79 Mo. App. 534.

Pa. Hayes v. Pennsylvania R. Co., 45 A. 925, 195 Pa. 184.

Tex. Strawn Coal Co. v. Trojan (Civ. App.) 195 S. W. 256; International & G. N. R. Co. v. Bingham, 89 S. W. 1113, 40 Tex. Civ. App. 469; St. Louis S. W. Ry. Co v. Smith (Civ. App.) 63 S. W. 1064.

[8] Percifull v. Coleman, 72 S. W. 29, 24 Ky. Law Rep. 1685.

[9] People v. Wilkins, 111 P. 612, 158 Cal. 530; People v. Lawrence, 76 P. 893, 143 Cal. 148, 68 L. R. A. 193; Florida Cent. & P. R. Co. v. Foxworth, 25 So. 338, 41 Fla. 1, 79 Am. St. Rep. 149; Illinois Steel Co. v. Hanson, 97 Ill. App. 469, judgment affirmed 195 Ill. 106, 62 N. E. 918.

is not improper for the court to assume facts merely for the purpose of illustrating the law of the case.[10] The court may assume facts which are a matter of common knowledge, and of which, therefore, it may take judicial notice,[11] and a statement by the court of the claims of the parties, as made in their pleadings or otherwise, is not objectionable as assuming the existence of the facts alleged as the basis of such claim;[12] this rule applying to statements by the court in a criminal prosecution as to the theory of the prosecution or as to matters alleged in the indictment or information.[13]

An instruction cannot be objected to, as assuming facts, if it submits such facts as issues to the jury.[14] Thus an instruction that

[10] **Miller v. State**, 74 So. 840, 16 Ala. App. 3; **Masters v. Town of Warren**, 27 Conn. 293.

[11] **U. S.** (C. C. N. Y.) **Hoagland v. Canfield**, 160 F. 146.

Cal. People v. Mayes, 45 P. 860, 113 Cal. 618.

Ill. Harris v. Shebek, 151 Ill. 287, 37 N. E. 1015; City of Joliet v. Shufeldt, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750, affirming 42 Ill. App. 208.

Mich. Lewis v. Bell, 109 Mich. 189, 66 N. W. 1091.

Mo. State v. Nerzinger, 119 S. W. 379, 220 Mo. 36.

Utah. Spiking v. Consolidated Ry. & Power Co., 93 P. 838, 33 Utah, 313.

[12] **U. S.** (C. C. A. Alaska) **Lindblom v. Fallett**, 145 F. 805, 76 C. C. A. 369.

Cal. Anderson v. Seropian, 81 P. 521, 147 Cal. 201; Carraher v. San Francisco Bridge Co., 81 Cal. 98, 22 P. 480; Jarman v. Rea, 70 P. 216, 137 Cal. 339.

Colo. De St. Aubin v. Field, 62 P. 199, 27 Colo. 414.

Fla. Florida Ry. Co. v. Dorsey, 52 So. 963, 59 Fla. 260.

Ill. Illinois Cent. R. Co. v. Davenport, 52 N. E. 266, 177 Ill. 110, affirming judgment 75 Ill. App. 579; Nipper v. Wabash R. Co., 187 Ill. App. 353.

Ind. Kreag v. Anthus, 2 Ind. App. 482, 28 N. E. 773.

Me. Skene v. Graham, 100 A. 938, 116 Me. 202.

Neb. Hotel Ass'n of Omaha v. Walter, 23 Neb. 280, 36 N. W. 561.

N. Y. West v. Banigan, 65 N. E. 1123, 172 N. Y. 622, affirming judgment 64 N. Y. S. 884, 51 App. Div. 328; Polykranas v. Krausz, 77 N. Y. S. 46, 73 App. Div. 583.

Tex. Missouri, K. & T. Ry. Co. of Texas v. Kyser & Sutherland, 95 S. W. 747, 43 Tex. Civ. App. 322; Texas & N. O. R. Co. v. Kelly, 80 S. W. 1073, 34 Tex. Civ. App. 21; International & G. N. R. Co. v. Locke (Civ. App.) 67 S. W. 1082; San Antonio & A. P. Ry. Co. v. Keller, 11 Tex. Civ. App. 569, 32 S. W. 847.

[13] People v. Worden, 45 P. 844, 113 Cal. 569; Knights v. State, 78 N. W. 508, 58 Neb. 225, 76 Am. St. Rep. 78; Burk v. State, 95 S. W. 1064, 50 Tex. Cr. R. 185.

[14] **Ala.** Emerson v. Lowe Mfg. Co., 49 So. 69, 159 Ala. 350; Seaboard Mfg. Co. v. Woodson, 94 Ala. 143, 10 So. 87; Hall v. Posey, 79 Ala. 84.

Ill. Fitzgerald v. Benner, 76 N. E. 709, 219 Ill. 485, affirming judgment 120 Ill. App. 447; Globe Mut. Life Ins. Ass'n v. Ahern, 60 N. E. 806, 191 Ill. 167, affirming judgment 92 Ill. App. 326; Smith v. Henline, 51 N. E. 227, 174 Ill. 184; Siegel, Cooper & Co. v. Connor, 49 N. E. 728, 171 Ill. 572, affirming judgment 70 Ill. App. 116; Brown v. Leppo, 194 Ill. App. 243; Raxworthy v. Heisen, 191 Ill. App. 457; Flynn v. St. Louis Nat. Stock Yards, 165 Ill. App. 646.

Ind. Cleveland, C., C. & St. L. Ry. Co. v. Clark, 97 N. E. 822, 51 Ind. App. 392.

Iowa. Lauer v. Banning, 131 N. W. 783, 152 Iowa, 99; Jensen v. Damm. 103 N. W. 798, 127 Iowa, 555;

the jury may take into consideration certain matters, "if any," etc., will usually not be held erroneous, as assuming the existence of

Fitch v. Mason City & C. L. Traction Co., 100 N. W. 618, 124 Iowa, 665.

Ky. Evans' Adm'r v. Spillman, 6 B. Mon. 334.

Md. Fulton v. Maccracken, 18 Md. 528, 81 Am. Dec. 620.

Mass. Wyman v. Whicher, 60 N. E. 612, 179 Mass. 276; Emmons v. Alvord, 59 N. E. 126, 177 Mass. 466.

Mo. Roy v. Kansas City, 224 S. W. 132, 204 Mo. App. 332; Cooley v. Dunham, 195 S. W. 1058, 196 Mo. App. 399; Warnke v. A. Leschen & Sons Rope Co., 171 S. W. 643, 186 Mo. App. 30; Torreyson v. United Rys. Co. of St. Louis, 152 S. W. 32, 246 Mo. 696, affirming judgment 145 S. W. 106, 164 Mo. App. 366; Southern Missouri & A. Ry. Co. v. Woodard, 92 S. W. 470, 193 Mo. 656; O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764; O'Connell v. St. Louis Cable & W. Ry. Co., 106 Mo. 482, 17 S. W. 494.

Neb. Tunnicliffe v. Fox, 94 N. W. 1032, 68 Neb. 811.

N. Y. Nugent v. Breuchard, 51 N. E. 1092, 157 N. Y. 687, affirming judgment and order Nugent v. Breuchard, 36 N. Y. S. 102, 91 Hun, 12.

Pa. Bretz v. Diehl, 117 Pa. 589, 11 A. 893, 2 Am. St. Rep. 706.

S. C. Pooler v. Smith, 52 S. E. 967, 73 S. C. 102.

Tex. Glover v. Pfeuffer (Civ. App.) 163 S. W. 984; Missouri, K. & T. Ry. Co. of Texas v. McCormick (Civ. App.) 160 S. W. 429; Chicago, R. I. & G. Ry. Co. v. De Bord (Civ. App.) 146 S. W. 667; Ft. Worth & R. G. Ry. Co. v. Montgomery (Civ. App.) 141 S. W. 813; San Antonio Traction Co. v. Warren (Civ. App.) 85 S. W. 26; St. Louis Southwestern Ry. Co. of Texas v. Wright (Civ. App.) 84 S. W. 270; Blake v. Austin, 75 S. W. 571, 33 Tex. Civ. App. 112; Galveston, H. & S. A. Ry. Co. v. Lynch, 55 S. W. 389, 22 Tex. Civ. App. 336; St. Louis S. W. Ry. Co. of Texas v. Casseday, 50 S. W. 125, 92 Tex. 525, reversing judgment (Civ. App.) 48 S. W. 6; Texas & N. O. R. Co. v. Echols, 41 S. W. 488, 17 Tex. Civ. App. 677; Austin & N. W. Ry. Co. v. Beatty, 73 Tex. 592, 11 S. W. 858.

Va. McCrorey v. Thomas, 63 S. E. 1011, 109 Va. 373, 17 Ann. Cas. 373; Virginia Fire & Marine Ins. Co. v. Hogue, 54 S. E. 8, 105 Va. 355; Norfolk & W. R. Co. v. Cottrell, 83 Va. 512, 3 S. E. 123.

Wash. Nolan v. Stillwater Lumber Co., 118 P. 340, 65 Wash. 445.

Wis. Lee v. Hammond, 90 N. W. 1073, 114 Wis. 550.

Instructions proper within rule. An instruction that proof of defendant's liability is made out "when" certain facts are shown is not objectionable, as assuming that such proof has been made. Elledge v. National City & O. Ry. Co., 100 Cal. 282, 34 P. 720, 38 Am. St. Rep. 290; Id., 34 P. 852. An instruction that plaintiff can recover on certain facts if she gave the conductor reasonable notice to stop the car does not assume that the notice given by plaintiff was reasonable. Springfield Consol. Ry. Co. v. Hoeffner, 51 N. E. 884, 175 Ill. 634, affirming judgment 71 Ill. App. 162. An instruction stating, "if you find from the greater weight of the evidence that the defendant acting by its duly authorized agent, agreed," etc., is not erroneous as assuming that a contract was made with a duly authorized agent of defendant. Neff v. Harwood Barley Mfg. Co., 193 Ill. App. 439. An instruction, in an action for goods sold and delivered, that if there was no evidence that defendant authorized the furnishing of the goods, if the jury believed that defendant, subsequent to the furnishing of the goods, for which charge was made, promised to pay for them, he was liable, is not objectionable, as assuming any facts to the injury of defendant. Reynolds v. Blake, 111 Ill. App. 53. An instruction which tells the jury "to consider all the facts and circumstances in evidence surrounding the transaction in regard to the releasing the defendant from the obligation to pay the sum claimed to be released," does not assume that the defendant was in fact released. Kemmerer v. Kokendifer, 65 Ill. App. 31. A charge, in an action for injuries to an employé working

any of such matters,[15] and an instruction that if the jury find certain

at a machine as a helper, that if the employer did not use ordinary care in the premises, but at the time of the accident the machine was in a defective condition, dangerous to those working at or near it, and the defect was known to the employer, or in the exercise of ordinary care would have been known to it, then, on their so finding, the employer was guilty of negligence, and that, "unless they so found," the verdict must be for the employer, was not erroneous as assuming that the machine was in a defective condition. Fries v. Bettendorf Axle Co., 101 N. W. 859, 126 Iowa, 138. An instruction that if the evidence showed that plaintiff and her husband treated certain paper as their joint property, and each permitted the other to exercise ownership over it, it would authorize a finding that each had a half interest, and that any interest either had inconsistent therewith was relinquished to the other, did not tell the jury that proof of such facts was conclusive of joint ownership, but only that they might find it therefrom. Owen v. Christensen, 76 N. W. 1003, 106 Iowa, 394. An instruction, if the railroad engineer, after seeing plaintiff, failed to use ordinary care to stop the train or prevent injury, to find for plaintiff, was not objectionable, as assuming that he saw plaintiff, where in the first part of the instruction the question whether he saw plaintiff was submitted for the jury's determination. Louisville & N. R. Co. v. Allen, 154 S. W. 1095, 153 Ky. 252. An instruction, in an action for injuries from a collision, that if the jury believed that the motorman saw, or by ordinary care could have seen, the plaintiff's wagon in dangerous nearness to the track, held not objectionable as assuming that the car was "in dangerous nearness thereto" without the qualification, "If you so find." Johnson v. Springfield Traction Co., 161 S. W. 1193, 176 Mo. App. 174. An instruction, in an action for the death of a person in a collision, "If therefore you find from the evidence that M. L. K. (decedent) was at the time and place in question in a position of imminent peril of being struck by the car mentioned in evidence, and by reason of the fact that the buggy in which he was seated was upon or approaching the track on which said car was running," etc., did not assume that he was in a place of danger simply because his buggy was on or near the track, but required the jury to find those facts to be true in the light of other facts and circumstances stated in the instruction. Kinlen v. Metropolitan St. Ry. Co., 115 S. W. 523, 216 Mo. 145. An instruction that, while plaintiff, in accepting employment of defendant, assumed all the risks incident to the employment in which he was engaged, yet he did not assume those risks, if any such there were, arising from the negligence, if any, of defendant's employé, B., was not objectionable as assuming that B. was negligent. Wright v. Dinger Mining Co., 147 S. W. 213, 163 Mo. App. 536. An instruction, in an action for injuries received by an employé from falling into an unguarded elevator shaft, that, if the room near the shaft was insufficiently lighted, etc., plaintiff was entitled to recover, was not objectionable as assuming that the room was unlighted. Wendler v. People's House Furnishing Co., 65 S. W. 737, 165 Mo. 527. In an action for injuries, where an instruction required the jury to believe and find from the evidence that there was near the usual stopping place of a street car a depression in the street, and that "said depression, if any," was dangerous, its subsequent reference to the depression as "said depression," without adding "if any," was not erroneous. Costello v. Kansas City, 219 S. W. 386, 280 Mo. 576. A charge that, "if" a will was the result of undue influence, that alone was sufficient to impeach it, is not erroneous, as assuming that there was undue influence. Gordon v. Burris, 54 S. W. 546, 153 Mo. 223. An instruc-

[15] Evans v. City of Joplin, 84 Mo. App. 296; Western Union Tel. Co. v. Chambers, 77 S. W. 273, 34 Tex. Civ. App. 17.

facts, etc., does not improperly assume the existence of such facts.[16]

tion, in an action against a railroad company, that plaintiff could recover, under a certain state of facts, "if the jury find from the evidence that the defendant's engine was derailed by reason of the cracked, defective, and dangerous condition of said wheel," does not assume the defective condition of the wheel, but properly submits such question to the jury. Geary v. Kansas City, O. & S. R. Co., 138 Mo. 251, 39 S. W. 774, 60 Am. St. Rep. 555. An instruction, in an action on a dramshop keeper's bond, for permitting plaintiff's minor son to enter and remain in the saloon, that if plaintiff showed that the keeper permitted the minor to enter and remain in the saloon the jury should render a verdict for plaintiff, while if plaintiff failed to so prove the verdict must be for defendant, was not erroneous as assuming that the minor entered and remained in the saloon, but left that question to the jury. McElroy v. Sparkman (Tex. Civ. App.) 139 S. W. 529. An instruction, in an action for injuries to a street car passenger while endeavoring to alight, in which the court left it to the jury to say whether or not the car stopped, that it was the motorman's duty when he stopped the car to let passengers on or off to exercise such care as a reasonably prudent motorman would exercise under similar circumstances, etc., was not objectionable, in that it assumed that the car was stopped to let off passengers at the time of the injury. Citizens' Ry. Co. v. Hall (Tex. Civ. App.) 138 S. W. 434. An instruction in an action for injuries to an employé, that though the jury might believe that defendant's employés were guilty of negligence, still if plaintiff negligently placed himself in such position that he would probably be injured, and that he was guilty of negligence in so doing, the verdict should be for defendant, was not erroneous, as assuming any fact. St. Louis Southwestern Ry. Co. of Texas v. Norvell (Tex. Civ. App.) 115 S. W. 861. A charge, in an action against a railroad for injuries to a switchman caused by a handhold on a box car giving way while plaintiff was descending from the car, that plaintiff had a right to presume that defendant had exercised ordinary care to furnish a reasonably safe handhold for his use, and was not required to inspect such handhold before using it, but if the fact that the handhold was insecurely fastened was open and obvious to plaintiff, or if he knew of the same, or must necessarily have discovered the same while engaged in the discharge of his duties, he would assume the resulting risk, was not subject to the objection of assuming that the handhold was insecurely fastened, but submitted that question to the jury. Missouri, K. & T. Ry. Co. of Texas v. Box (Tex. Civ. App.) 93 S. W. 134. The language of a charge, in an action for injury to a passenger while boarding a car, that if the jury believe the train was not stopped long enough for the passenger "in his physical condition as known to the conductor," will not be held to take from the jury the issue whether the conductor knew his physical condition, where the intention to submit such issue is clear from the preceding part of the charge. Houston & T. C. R. Co. v. Copley, 87 S. W. 219, 38 Tex. Civ. App. 568. An instruction that if, on the day of his injury, plaintiff was employed as a laborer, and carrying a ladle filled with molten material to defendant's molding room, and walked over a certain path established by the defendant for the use of its employés, etc., was not objectionable as assuming that defendant had established the path for the use of its employés. San Antonio Foundry Co. v. Drish, 85 S. W. 440, 38 Tex. Civ. App. 214. A charge that if the jury believe that plaintiff attempted to alight from a car after it had stopped, etc., is not objectionable as assuming the fact to be that the car had stopped when she attempted to alight. San Antonio Traction Co. v. Welter (Tex. Civ. App.) 77 S. W. 414. A charge that "if, from the evidence, you believe that sparks or cinders escaped from de-

[16] Caywood v. Seattle Electric Co., 110 P. 420, 59 Wash. 566.

So long as the court confines its statement of the law to principles,

fendant's engine, and got into plaintiff's eyes, which caused plaintiff's injuries," etc., was not objectionable as assuming that plaintiff's eyes were injured by sparks or cinders that escaped from the locomotive. St. Louis S. W. Ry. Co. v. Parks (Tex. Civ. App.) 73 S. W. 439. An instruction that "if the jury believed that plaintiff was inexperienced in jumping off moving trains and ignorant of the dangers, and if they believed it was no part of his ordinary duty to do so," etc., was not objectionable as assuming the truth of the recitals made. Galveston, H. & S. A. Ry. Co. v. Sanchez (Tex. Civ. App.) 65 S. W. 893. A charge that the jury should find for plaintiff if defendant had abandoned his business in a store, sought to be subjected to execution, and was not using the store house in connection with his dwelling for the purpose of carrying on a boarding-house business, was not erroneous, as being on the weight of evidence, in that it assumed that defendant was engaged in the boarding-house business. Freeman v. Cates, 55 S. W. 524, 22 Tex. Civ. App. 623. A charge, in an action for injuries to a passenger through the derailment of a train, that the company is liable if the bad condition of the track, roadbed, and switch, or the fast running of the train, were concurring proximate causes of the wreck, and were brought about by the company's negligence, does not assume as facts the bad condition of the track and the fast running of the train. Houston, E. & W. T. Ry. Co. v. Summers (Tex. Civ. App.) 49 S. W. 1106, affirmed 51 S. W. 324, 92 Tex. 621. A charge that if the jury believed that "by reason of a defective road crossing, cattle guards, ditches, and bridge, or either of them, the car on which plaintiff was riding was derailed," etc., plaintiff is entitled to recover, is not an assumption of the existence of said defects. Galveston, H. & S. A. Ry. Co. v. Waldo (Tex. Civ. App.) 32 S. W. 783. An instruction to the effect that defendant would not be liable if plaintiff continued in its service after he knew of the defect which caused the accident, "unless you further find from the evidence that the plaintiff, by reason of his ignorance and inexperience, did not know, or could not have reasonably known, the danger incident to said defect," is not open to the objection that it assumes that plaintiff was ignorant and inexperienced. Gulf, C. & S. F. R. Co. v. Wells (Tex. Sup.) 16 S. W. 1025. An instruction that a servant did not accept risks which grew out of any defect in the road, rendering it more hazardous than reasonable, unless he had knowledge thereof, does not assume that defects existed. Taylor, B. & H. Ry. Co. v. Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316. An instruction that if the jury believed that the injury was caused both by the defective construction or unfitness of the engine for the purposes for which it was then used, and the negligence of the engineer and yard foreman, combined with the defect in the engine, the company would be liable, is not obnoxious to the objection that it assumed as a fact that the engine was defective and unsuitable. Missouri Pac. Ry. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838. An instruction that to authorize a verdict plaintiff must show, inter alia, that the injury was the immediate result of the negligence of defendant's agent "in directing plaintiff to use said implement in an unskillful and dangerous manner, the plaintiff himself being inexperienced in the work, * * * and by reason thereof was ignorant of the danger," etc., is not objectionable as assuming that plaintiff was inexperienced, especially where the question of his experience was expressly submitted to the jury in the preceding instruction. Texas Mexican Ry. Co. v. Douglas, 73 Tex. 325, 11 S. W. 333. An instruction that if the jury believe from the evidence that plaintiff was in actual possession of the land, and claimed title thereto by virtue of a certain deed of partition, and defendants entered and took possession of part of it within the 15 years next preceding commencement of the action, they shall find for plaintiff, does not assume adversary pos-

the application of which is called for by facts which the jury may find from the evidence, without saying or in any way indicating an opinion that they have been proved, it cannot be said that the existence of any fact has been assumed.[17] An instruction, however, which begins properly by leaving certain questions to the jury, but in the body thereof contains a direct statement with reference to the existence of such facts, is improper.[18]

As indicated by the statement of the general rule, the assumption of the existence of immaterial facts is not error which will work a reversal.[19]

§ 76. Specific applications of rule in civil cases

This rule has been applied to a great variety of facts. Thus it is error to assume on conflicting evidence that a certain relation existed,[20] the existence of a contract,[21] that a contract made was with a certain person,[22] that a contract was completely executed and delivered,[23] that an agreement was not in writing,[24] that a deed or patent was executed,[25] that a signature to a note or bond was genuine,[26] that a grantor in a deed intended to deliver it,[27] that a deed was accepted,[28] that the alleged consideration for a note was received by the maker,[29] that an application for an insurance policy was annexed to it,[30] that a contract of sale was made,[31] that goods

session in plaintiff of the land claiming under the deed of partition. Whealton & Wisherd v. Doughty, 72 S. E. 112, 112 Va. 649.

[17] Olson v. Swift & Co., 182 S. W. 903, 122 Ark. 611; State v. Willis, 132 P. 962, 24 Idaho, 252; State v. Wright, 85 P. 493, 12 Idaho, 212; State v. Taylor, 50 S. E. 247, 57 W. Va. 228.

[18] Lichter v. Aurora, E. & C. R. Co., 179 Ill. App. 216.

[19] Pecos & N. T. Ry. Co. v. Trowe, 130 S. W. 588, 61 Tex. Civ. App. 53.

[20] Schroeder v. Brown & McCabe, 116 P. 335, 59 Or. 181.

[21] **Ala.** Green v. Southern States Lumber Co., 37 So. 670, 141 Ala. 680.
Ill. Nolan v. O'Sullivan, 148 Ill. App. 316.
Md. Ellicott v. Turner, 4 Md. 476.
S. C. Frasier v. Charleston & W. C. Ry. Co., 52 S. E. 964, 73 S. C. 140.
Tex. Missouri, K. & T. Ry. Co. of Texas v. De Bord, 53 S. W. 587, 21 Tex. Civ. App. 691; McCallon v. Cohen (Civ. App.) 39 S. W. 973.

[22] Gaines v. McAlister, 29 S. E. 844, 122 N. C. 340.

[23] Rutherford v. Holbert, 142 P. 1099, 42 Okl. 735, L. R. A. 1915B, 221.

[24] Glenn v. Rogers, 3 Md. 312.

[25] Fitzgerald v. Goff, 99 Ind. 28; Holloran v. Meisel, 87 Va. 398, 13 S. E. 33.

[26] Black v. Miller, 138 N. W. 535, 158 Iowa, 293; State ex rel. Welch v. Morrison, 148 S. W. 907, 244 Mo. 193.

[27] Walker v. Nix, 64 S. W. 73, 25 Tex. Civ. App. 596.

[28] Haney v. Marshall, 9 Md. 194.

[29] Halsey v. Bell (Tex. Civ. App.) 62 S. W. 1088.

[30] Monjeau v. Metropolitan Life Ins. Co., 94 N. E. 302, 208 Mass. 1.

[31] **Ala.** Atlantic Coast Line R. Co. v. Dahlberg Brokerage Co., 54 So. 168, 170 Ala. 617.
Ark. L. & A. Scharff Distilling Co. v. Dennis, 168 S. W. 141, 113 Ark. 221; Watkins v. Curry, 147 S. W. 43, 103 Ark. 414, 40 L. R. A. (N. S.) 967.

sold were delivered to the purchaser,[32] that the purchaser of goods accepted them,[33] that the relation of passenger and carrier existed,[34] that the relation of master and servant, or of principal and agent, existed,[35] that there was an agreement authorizing an attorney to commence suit on behalf of another,[36] that the relation of partnership existed between certain persons,[37] that the relation of landlord and tenant existed,[38] that the relation of debtor and creditor existed,[39] that a note was altered,[40] that a contract was still in force,[41] that the relation of master and servant was terminated,[42] that the nature or terms of a contract were of a certain kind or description,[43] that a certain transaction constituted a loan, and not a dis-

Iowa. Case v Burrows, 52 Iowa, 146, 2 N. W. 1045.

Md. Gaither v. Martin, 3 Md. 146.

Mo. Moody v. Cowherd (App.) 199 S. W. 586.

Tex. Landman v. Glover (Civ. App.) 25 S. W. 994.

[32] Wood v. Tomlinson, 53 Cal. 720; Jaehnig & Peoples v. Fried, 85 A. 321, 83 N. J. Law, 361.

[33] Ross Attley Lumber Co. v. Columbia Hardwood Lumber Co., 200 Ill. App. 65.

[34] Georgia R. & Banking Co. v. Radford, 85 S. E. 1006, 144 Ga. 22; Carroll v. Chicago City Ry. Co., 180 Ill. App. 309; Wise v. Columbia Ry., Gas & Electric Co., 77 S. E. 924, 94 S. C. 254; Northern Texas Traction Co. v. Nicholson (Civ. App.) 188 S. W. 1028; Dallas Rapid Transit Co. v. Payne, 82 S. W. 649, 98 Tex. 211, reversing judgment Dallas Rapid Transit Ry. Co. v. Payne (Civ. App.) 78 S. W. 1065.

[35] **Ga.** Vaughn v. Miller, 76 Ga. 712.

Ky. Castleman v. Rustenholtz, 140 S. W. 170, 145 Ky. 146.

Md. Baltimore Consol. Ry. Co. v. State, 46 A. 1000, 91 Md. 506.

Mich. American Seed Co. v. Cole, 140 N. W. 622, 174 Mich. 42.

Or. Salomon v. Cress, 22 Or. 177, 29 P. 439.

Tenn. Roper v. Stone, Cooke, 497.

Tex. Ft. Worth & D. C. Ry. Co. v. Lynch (Civ. App.) 136 S. W. 580; Messer v. Walton, 92 S. W. 1037, 42 Tex. Civ. App. 488; East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713.

[36] Briseno v. International & G. N. R. Co. (Tex. Civ. App.) 81 S. W. 579.

[37] Bond v. Nave, 62 Ind. 505; Bowen v. Epperson, 118 S. W. 528, 136 Mo. App. 571; Wright v. Fonda, 44 Mo. App. 634; Lawrence v. Westlake, 73 P. 119, 28 Mont. 503; Peters Branch of International Shoe Co. v. Blake (Okl.) 176 P. 892.

[38] Brayton v. Boomer, 107 N. W. 1099, 131 Iowa, 28.

[39] Cropper v. Pittman, 13 Md. 190; Lyle v. McInnis (Miss.) 17 So. 510; Metcalfe v. Lowenstein, 81 S. W. 362, 35 Tex. Civ. App. 619.

[40] Lanier v. Clarke, 133 S. W. 1093, 63 Tex. Civ. App. 266.

[41] Stalleto v. Plumley & Sargent, 85 A. 975, 86 Vt. 444.

[42] Derby Cycle Co. v. White, 64 Ill. App. 245.

[43] **Ala.** Wellman v. Jones, 27 So. 416, 124 Ala. 580.

Ark. Allen-West Commission Co. v. Hudgins & Bro., 86 S. W. 289, 74 Ark. 468.

Conn. Plumb v. Curtis, 66 Conn. 154, 33 A. 998.

Ga. Bashinski v. J. H. & W. W. Williams Co., 90 S. E. 223, 18 Ga. App. 646.

Ill. Adams v. Neu, 108 Ill. App. 50.

Ind. Kepler v. Jessup, 37 N. E. 655, 11 Ind. App. 241.

Ky. Locke & Ellison v. Lyon Medicine Co., 84 S. W. 307, 27 Ky. Law Rep. 1.

Mass. Nonantum Worsted Co. v. North Adams Mfg. Co., 156 Mass. 331, 31 N. E. 293.

Mo. Galamba v. Harrisonville Pump & Foundry Co. (App.) 191 S.

count,[44] that a contract with a carrier was a written one, or contained certain provisions,[45] that a contract was performed,[46] that certain acts constituted a material deviation from the terms of a contract,[47] that a party to a contract refused to permit the other to proceed under it,[48] that a heating plant was sufficient,[49] that there was a proper demand of performance,[50] that a claim for damages for delay in carrying out a contract was waived,[51] that certain debts or notes were paid,[52] that certain facts constitute negligence,[53] to assume facts bearing on question of whether due care was exercised

W. 1084; Bowen v. Buckner (App.) 183 S. W. 704.

Pa. Hershey v. Hershey, 8 Serg. & R. 333.

Tex. Grigg v. Jones (Civ. App.) 26 S. W. 885.

Vt. Leahey v. Allen, 47 Vt. 463.

[44] Sallee v. Security Bank & Trust Co., 177 S. W. 1133, 119 Ark. 484.

[45] Evansville & T. H. R. Co. v. McKinney, 73 N. E. 148, 34 Ind. App. 402; Same v. Keyekordes, 73 N. E. 1135, 35 Ind. App. 706; San Antonio & A. P. Ry. Co. v. Grady (Tex. Civ. App.) 171 S. W. 1019; Gulf, C. & S. F. Ry. Co. v. Batte (Tex. Civ. App.) 94 S. W. 345.

[46] Bates v. Harte, 26 So. 898, 124 Ala. 427, 82 Am. St. Rep. 186; Grayling Lumber Co. v. Hemingway, 194 S. W. 508, 128 Ark. 535.

[47] Alexander v. Smith, 57 So. 104, 3 Ala. App. 501.

[48] McDonough v. Almy, 105 N. E. 1012, 218 Mass. 409, Ann. Cas. 1915D, 855.

[49] Morse v. Tochterman, 132 P. 1055, 21 Cal. App. 726.

[50] Steagall v. McKellar, 20 Tex. 265.

[51] Pike v. Stratton, 56 So. 929, 174 Ala. 541.

[52] Chipps v. Buxton, 109 Ill. App. 88; Schultz v. Schultz, 71 N. W. 854, 113 Mich. 502.

[53] **Ala.** Birmingham Ry., Light & Power Co. v. Donaldson, 68 So. 596, 14 Ala. App. 160; Western Steel Car & Foundry Co. v. Cunningham, 48 So. 109, 158 Ala. 369.

Ark. Western Coal & Mining Co. v. Jones, 87 S. W. 440, 75 Ark. 76.

Ga. Western & A. R. Co. v. Casteel, 75 S. E. 609, 138 Ga. 579.

Ill. Weil v. Chicago City Ry. Co., 182 Ill. App. 109; Lewman v. Danville St. Ry. & Light Co., 161 Ill. App. 582; Nelson v. Knetzger, 109 Ill. App. 296; Anderson v. Moore, 108 Ill. App. 106; Beidler v. King, 108 Ill. App. 23, judgment affirmed 70 N. E. 763, 209 Ill. 302, 101 Am. St. Rep. 246; Mobile & O. R. Co. v. Healy, 100 Ill. App. 586; La Salle County Carbon Coal Co. v. Eastman, 99 Ill. App. 495; City of La Salle v. Thorndike, 7 Ill. App. 282.

Ind. Indiana Union Traction Co. v. Reynolds, 95 N. E. 584, 176 Ind. 263.

Iowa. Bauer v. City of Dubuque, 98 N. W. 355, 122 Iowa, 500.

Md. City of Baltimore v. State, 103 A. 426, 132 Md. 113.

Mo. Lafever v. Pryor (App.) 190 S. W. 644; Priebe v. Crandall (App.) 187 S. W. 605; Stanley v. Chicago, M. & St. P. Ry. Co., 87 S. W. 112, 112 Mo. App. 601; Baker v. City of Independence, 81 S. W. 501, 106 Mo. App. 507; Van Natta v. People's St. Ry., Electric Light & Power Co., 133 Mo. 13, 34 S. W. 505.

Or. Delovage v. Old Oregon Creamery Co., 147 P. 392, 76 Or. 430, motion to retax costs denied 149 P. 317, 76 Or. 430; Salmi v. Columbia & N. R. R. Co., 146 P. 819, 75 Or. 200, L. R. A. 1915D, 834.

S. C. Lundy v. Southern Bell Telephone & Telegraph Co., 72 S. E. 558, 90 S. C. 25; Bodie v. Charleston & W. C. Ry. Co., 44 S. E. 943, 66 S. C. 302.

Tex. Magee v. Cavins (Civ. App.) 197 S. W. 1015; Panhandle & S. F. Ry. Co. v. Wright-Herndon Co. (Civ. App.) 195 S. W. 216; Panhandle & S. F. Ry. Co. v. Vaughn (Civ. App.) 191 S. W. 142; Houston & T. C. R. Co. v. Walker (Civ. App.) 167 S. W. 199, judgment reversed 173 S. W. 208, 107 Tex. 241; Chicago, R. I. & G. Ry. Co.

by a carrier to avoid injury to a passenger,[54] to assume facts bearing on question whether a railroad exercised due care to prevent accidents[55] that certain facts show negligence on the part of a master towards a servant,[56] that certain facts constitute contributory negligence,[57] that certain facts show due care and caution or the

v. Oliver (Civ. App.) 159 S. W. 853; Missouri, K. & T. Ry. Co. of Texas v. Williams, 133 S. W. 499, 63 Tex. Civ. App. 368; Texas & P. Ry. Co. v. Felker, 93 S. W. 477, 42 Tex. Civ. App. 256; Houston & T. C. R. Co. v. Burns, 90 S. W. 688, 41 Tex. Civ. App. 83; Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 82 S. W. 787; Missouri, K. & T. Ry. Co. of Texas v. Wood (Civ. App.) 81 S. W. 1187; St Louis Southwestern Ry. Co. of Texas v. Gentry (Civ. App.) 74 S. W. 607.

Wash. Atherton v. Tacoma Ry. & Power Co., 71 P. 39, 30 Wash. 395.

W. Va. Culp v. Virginia Ry. Co., 87 S. E. 187, 77 W. Va. 125.

[54] Larson v. Chicago, M. & P. S. Ry. Co., 141 N. W. 353, 31 S. D. 512; Missouri, K. & T. Ry. Co. of Texas v. Wolf, 89 S. W. 778, 40 Tex. Civ. App. 381; St. Louis S. W. Ry. Co. v. Ball, 66 S. W. 879, 28 Tex. Civ. App. 287; Rapid Transit Ry. Co. v. Lusk (Tex. Civ. App.) 66 S. W. 799; Dallas & O. C. El. Ry. Co. v. Harvey (Tex. Civ. App.) 27 S. W. 423.

[55] Cleveland, C., C. & St. L. Ry. Co. v. Gossett, 87 N. E. 723, 172 Ind. 525; Maryland, D. & V. Ry. Co. v. Brown, 71 A. 1005, 109 Md. 304; Cleveland, C. C. & St. L. Ry. v. Sivey, 27 Ohio Cir. Ct. R. 248; Missouri, K. & T. Ry. Co. of Texas v. Smith, 133 S. W. 482, 63 Tex. Civ. App. 510; St. Louis & S. W. Ry. Co. of Texas v. Gill (Tex. Civ. App.) 55 S. W. 386.

[56] **Ill.** William Graver Tank Works v. McGee, 58 Ill. App. 250.

Ky. West Kentucky Coal Co. v. Kelley, 159 S. W. 1152, 155 Ky. 552.

Mo. Haire v. Schaff (App.) 190 S. W. 56; Dority v. St. Louis & S. F. R. Co., 174 S. W. 209, 188 Mo. App. 365; Wease v. Fayette R. Plumb Tool Co., 173 S. W. 79, 187 Mo. App. 716; Burrows v. Likes, 166 S. W. 643, 180 Mo. App. 447; Lukamiski v. American Steel Foundries, 142 S. W. 1093, 162 Mo. App. 631; Abbott v. Marion Min. Co., 87 S. W. 110, 112 Mo. App. 550; Sinberg v. Falk Co., 98 Mo. App. 546, 72 S. W. 947; Linn v. Massillon Bridge Co., 78 Mo. App. 111.

N. D. Lang v. Bailes, 125 N. W. 891, 19 N. D. 582.

S. C. Hunter v. D. W. Alderman & Sons Co., 71 S. E. 1082, 89 S. C. 502.

Tex. Houston Belt & Terminal Ry. Co. v. Montello (Civ. App.) 165 S. W. 540; St. Louis Southwestern Ry. Co. of Texas v. Tune (Civ. App.) 147 S. W. 364; Phillips v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.) 136 S. W. 542; Chicago, R. I. & G. Ry. Co. v. De Bord, 132 S. W. 845, 62 Tex. Civ. App. 302; Chicago, R. I. & M. Ry. Co. v. Harton, 81 S. W. 1236, 36 Tex. Civ. App. 475; Harwell v. Southern Furniture Co. (Civ. App.) 75 S. W. 52, motion to dismiss denied, Id. 888.

[57] **Ala.** Montgomery Light & Traction Co. v. Harris, 72 So. 545, 197 Ala. 236; Montgomery St. Ry. Co. v. Shanks, 37 So. 166, 139 Ala. 489.

Ill. Hartrich v. Hawes, 67 N. E. 13, 202 Ill. 334, affirming judgment 103 Ill. App. 433; Vittum v. Drury, 161 Ill. App. 603; Elwood v. Chicago City Ry. Co., 90 Ill. App. 397.

Ind. Virgin v. Lake Erie & W. R. Co., 101 N. E. 500, 55 Ind. App. 216; Teagarden v. McLaughlin, 86 Ind. 476, 44 Am. Rep. 332.

Ky. Louisville, C. & L. R. Co. v. Goetz's Adm'x, 79 Ky. 442, 42 Am. Rep. 227.

Mass. Knight v. Overman Wheel Co., 54 N. E. 890, 174 Mass. 455.

Mo. Lumb v. Forney (App.) 190 S. W. 988; Tanchof v. Metropolitan St. Ry. Co. (App.) 177 S. W. 813.

Tex. Williams v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 196 S. W. 309; Abilene Gas & Electric Co. v. Thomas (Civ. App.) 194 S. W. 1016; Missouri, K. & T. Ry. Co. of Texas v. Cardwell (Civ. App.) 187 S. W. 1073; San Antonio, U. & G. R. Co. v. Gal-

want of negligence,[58] that a servant appreciated and assumed certain risks,[59] that defects in a sidewalk were obvious,[60] that one walking on a railroad track was a trespasser,[61] that an engine was properly equipped to prevent the escape of sparks,[62] that certain acts or places or positions or agencies are dangerous,[63] that a structure was a scaffold,[64] that certain objects are not such as to fright-

breath (Civ. App.) 185 S. W. 901; Texas Midland R. R. v. Nelson (Civ. App.) 161 S. W. 1088; St. Louis Southwestern Ry. Co. of Texas v. Tarver (Civ. App.) 150 S. W. 958; Ft. Worth & D. C. Ry. Co. v. Broomhead (Civ. App.) 140 S. W. 820; Chicago, R. I. & G. Ry. Co. v. Knox (Civ. App.) 138 S. W. 224; Gulf, C. & S. F. Ry. Co. v. Brooks, 132 S. W. 95, 63 Tex. Civ. App. 231; International & G. N. R. Co. v. Brice (Civ. App.) 95 S. W. 660, judgment reversed 97 S. W. 461, 100 Tex. 203.

Vt. Doyle v. Melendy, 75 A. 881, 83 Vt. 339.

[58] **U. S.** (C. C. A. Mo.) American Car & Foundry Co. v. Barry, 195 F. 919, 115 C. C. A. 607.

Ala. Alabama Great Southern R. Co. v. Demoville, 52 So. 406, 167 Ala. 292.

Ark. St. Louis Southwestern Ry. Co. v. Adams, 135 S. W. 814, 98 Ark. 222.

Cal. Williams v. Pacific Electric Ry. Co., 170 P. 423, 177 Cal. 235.

Ill. Beeson v. Vandalia R. Co., 161 Ill. App. 267; Chicago Union Traction Co. v. Grommes, 110 Ill. App. 113; West Chicago St. R. Co. v. Callow, 102 Ill. App. 323; De Kalb & G. W. Ry. Co. v. Rowell, 74 Ill. App. 191.

Ind. Rump v. Woods, 98 N. E. 369, 50 Ind. App. 347; Indianapolis St. Ry. Co. v. O'Donnell, 73 N. E. 163, 35 Ind. App. 312, rehearing denied 74 N. E. 253, 35 Ind. App. 312.

Md. Wolf v. Shriver, 72 A. 411, 109 Md. 295.

Mo. Lagarce v. Missouri Pac. Ry. Co., 166 S. W. 1063, 183 Mo. App. 70.

N. Y. Schwartz v. Metropolitan St. Ry. Co., 78 N. Y. S. 886, 38 Misc. Rep. 795.

Or. Richardson v. Klamath S. S. Co., 126 P. 24, 62 Or. 490.

Pa. Schmidt v. McGill, 120 Pa. 405, 14 A. 383, 6 Am. St. Rep. 713.

S. C. Kirby v. Southern Ry., 41 S. E. 765, 63 S. C. 494.

Tex. International & G. N. R. Co. v. Garcia, 117 S. W. 206, 54 Tex. Civ. App. 59; Thompson v. Galveston, H. & S. A. Ry. Co., 106 S. W. 910, 48 Tex. Civ. App. 284.

Wash. Hall v. West & Slade Mill Co., 81 P. 915, 39 Wash. 447, 4 Ann. Cas. 587.

[59] Nix v. Brunswick-Balke-Collender Co., 191 Ill. App. 503; Cook v. Urban (Tex. Civ. App.) 167 S. W. 251.

[60] Waters v. Kansas City, 68 S. W. 366, 94 Mo. App. 413.

[61] Houston & T. C. R. Co. v. O'Donnell (Tex. Civ. App.) 90 S. W. 886, judgment reversed 92 S. W. 409, 99 Tex. 636.

[62] Alabama Great Southern R. Co. v. Sanders, 40 So. 402, 145 Ala. 449; Alabama Great Southern R. Co. v. Clark, 39 So. 816, 145 Ala. 459.

[63] **Ala.** Prattville Cotton Mills Co. v. McKinney, 59 So. 498, 178 Ala. 554.

Ill. Sugar Creek Min. Co. v. Peterson, 52 N. E. 475, 177 Ill. 324, reversing judgment 75 Ill. App. 631; Hughes v. Eldorado Coal & Mining Co., 197 Ill. App. 259; Wilson v. Danville Collieries Coal Co., 171 Ill. App. 65; Odett v. Chicago City Ry. Co., 166 Ill. App. 270.

Ind. Indiana Union Traction Co. v. Sullivan, 101 N. E. 401, 53 Ind. App. 239.

Mo. Ganey v. Kansas City, 168 S. W. 619, 259 Mo. 654.

S. C. Lowrimore v. Palmer Mfg. Co., 38 S. E. 430, 60 S. C. 153.

Wash. Walters v. City of Seattle, 167 P. 124, 97 Wash. 657.

Wyo. Acme Cement Plaster Co. v. Westman, 122 P. 89, 20 Wyo. 143.

[64] Conger v. Wiggins, 57 A. 341, 208 Pa. 122.

en a mule of ordinary gentleness,[65] that there was fraud in a certain transaction, or that certain representations were fraudulent,[66] that certain false representations were material,[67] that one possessed knowledge or opportunities for knowledge of certain matters in time to govern his action,[68] that certain persons or things were identical,[69] that a will was signed,[70] that the children of a decedent were the natural objects of his bounty,[71] that certain persons were the heirs of a decedent,[72] that there was unreasonable delay on the part of a bankrupt in endeavoring to obtain his discharge,[73] that a receipt expressly acknowledged payment of a bill,[74] to assume the fact of nonpayment,[75] that testimony given on a former trial has been accurately reproduced,[76] that a copy was a correct copy,[77] that a certain document was an ancient instrument,[78] that a certain conversation took place between the parties,[79] that certain items

[65] Western Ry. of Alabama v. Cleghorn, 39 So. 133, 143 Ala. 392.

[66] Montgomery-Moore Mfg. Co. v. Leeth, 56 So. 770, 2 Ala. App. 324; Gardner v. Boothe, 31 Ala. 186.

Ga. Chambers v. Gardner, 89 Ga. 270, 15 S. E. 312.

Ill. American Ins. Co. v. Crawford, 89 Ill. 62; Clark v. Lee, 205 Ill. App. 1.

Mich. Gordon v. Alexander, 80 N. W. 978, 122 Mich. 107.

Mo. State v. Mason, 96 Mo. 559, 10 S. W. 179.

Tex. St. Louis, S. F. & T. Ry. Co. v. Bowles, 131 S. W. 1176, 63 Tex. Civ. App. 23.

[67] Weil v. Fineran, 93 S. W. 568, 78 Ark. 87.

[68] Aripeka Sawmills v. Georgia Supply Co., 84 S. E. 455, 143 Ga. 210; Howell v. Lawrenceville Mfg. Co., 31 Ga. 663.

Ill. Rosinski v. Burton, 163 Ill. App. 162.

Md. Annapolis Gas & Electric Light Co. v. Fredericks, 72 A. 534, 109 Md. 595.

Mich. Rouse v. Michigan United Rys. Co., 129 N. W. 719, 164 Mich. 475; American Cushman Tel. Co. v. Noble, 98 Mich. 67, 56 N. W. 1100.

Mo. Legg v. Metropolitan St. Ry. Co., 133 S. W. 1190, 154 Mo. App. 290.

Pa. Podona v. Lehigh Valley Coal Co., 91 A. 920, 245 Pa. 501.

R. I. Blake v. Rhode Island Co., 78 A. 834, 32 R. I. 213, Ann. Cas. 1912D, 852.

Tex. Wichita Falls Motor Co. v. Bridge (Civ. App.) 158 S. W. 1161; Goodbar v. City Nat. Bank, 78 Tex. 461, 14 S. W. 851.

Wash. Harkins v. J. A. Veness Lumber Co., 124 P. 492, 69 Wash. 196.

[69] Dunaway & Lambert v. Stickney, 69 So. 232, 13 Ala. App. 645; Witherell v. Maine Ins. Co., 49 Me. 200; Bellis v. Phillips, 28 N. J. Law, 125.

[70] Whitsett v. Belue, 54 So. 677, 172 Ala. 256; O'Day v. Crabb, 109 N. E. 724, 269 Ill. 123.

[71] Jackson v. Folsom, 118 N. E. 955, 187 Ind. 257.

[72] Woolfolk v. Ashby, 2 Metc. (Ky.) 288.

[73] Huntington v. Saunders, 166 Mass. 92, 43 N. E. 1035.

[74] Swift & Co. v. Mutter, 115 Ill. App. 374.

[75] Rouden v. Heisler's Estate (Mo. App.) 219 S. W. 691.

[76] Carter v. Marshall, 72 Ill. 609.

[77] Louisville & N. R. Co. v. Shepherd, 61 So. 14, 7 Ala. App. 496.

[78] Daugharty v. S. L. & C. C. Drawdy, 68 S. E. 472, 134 Ga. 650.

[79] Vroman v. Rogers (City Ct. Brook.) 5 N. Y. S. 426, judgment affirmed 132 N. Y. 167, 30 N. E. 388; Gurney v. Smithson, 20 N. Y. Super. Ct. 396.

constituted elements of recovery,[80] that a personal injury was permanent,[81] that a carrier had notice of special damages which might accrue to a shipper from delay in transportation,[82] that a plaintiff was entitled to substantial damages,[83] that plaintiff could have prevented the damages for which he sued,[84] to assume facts relating to value,[85] that certain facts diminished the value of land or other property,[86] that certain effects were due to certain causes,[87] that

[80] **U. S.** Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257.

Ill. Barrelett v. Bellgard, 71 Ill. 280; Todd v. Chicago City Ry. Co., 197 Ill. App. 544.

Iowa. Sample v. Rand, 84 N. W. 683, 112 Iowa, 616.

Ky. McGrew's Ex'r v. O'Donnell, 92 S. W. 301, 28 Ky. Law Rep. 1366.

Md. City of Baltimore v. M. A. Talbott & Co., 87 A. 941, 120 Md. 354.

Minn. Conehan v. Crosby, 15 Minn. 13 (Gil. 1).

Miss. Lopez v. Jackson, 32 So. 117, 80 Miss. 684.

Mo. Van Zandt v. St. Louis Wholesale Grocer Co., 190 S. W. 1050, 196 Mo. App. 640; Evans v. City of Joplin, 76 Mo. App. 20; Walters v. Cox, 67 Mo. App. 299; Patton v. Penquite, 32 Mo. App. 595.

N. Y. McCormick v. McCaffray, 55 N. Y. S. 574, 25 Misc. Rep. 786; Catlin v. Pond, 101 N. Y. 649, 5 N. E. 41.

Ohio. Weybright v. Fleming, 40 Ohio St. 52.

Tex. San Antonio & A. P. Ry. Co. v. Shankle & Lane (Civ. App.) 183 S. W. 115; Waterman Lumber & Supply Co. v. Holmes (Civ. App.) 161 S. W. 70; Ullman v. Devereux (Civ. App.) 93 S. W. 472; St. Louis S. W. Ry. Co. v. McCullough (Civ. App.) 33 S. W. 285; Houston City St. Ry. Co. v. Artusey (Civ. App.) 31 S. W. 319; Wilkinson v. Johnson, 83 Tex. 392, 18 S. W. 746.

[81] Pekin Stave & Mfg. Co. v. Ramey, 158 S. W. 156, 108 Ark. 483.

[82] Atchison, T. & S. F. Ry. Co. v. Keel Grain Co. (Tex. Civ. App.) 132 S. W. 837.

[83] Dady v. Condit, 58 N. E. 900, 188 Ill. 234, reversing judgment 87 Ill. App. 250; Judd v. Isenhart, 93 Ill. App. 520; Blow v. Joyner, 72 S. E. 319, 156 N. C. 140.

[84] King Land & Improvement Co. v. Bowen, 61 So. 22, 7 Ala. App. 462.

[85] **Idaho.** Drumheller v. Dayton, 160 P. 944, 29 Idaho, 552.

Ill. Staver Carriage Co. v. American & British Mfg. Co., 188 Ill. App. 634.

N. Y. Schoolman v. Ratkowsky (Sup.) 141 N. Y. S. 527; McNulty v. Pickelmann (Sup.) 141 N. Y. S. 521; Spencer v. Hardin, 134 N. Y. S. 373, 149 App. Div. 667.

Tex. Houston & T. C. R. Co. v. Crowder (Civ. App.) 152 S. W. 183; Gulf, C. & S. F. Ry. Co. v. Coulter (Civ. App.) 139 S. W. 16.

[86] New York, C. & St. L. R. Co. v. Rhodes, 86 N. E. 840, 171 Ind. 521, 24 L. R. A. (N. S.) 1225; Norris v. Laws, 64 S. E. 499, 150 N. C. 599; Missouri, K. & T. R. Co. of Texas v. Light, 117 S. W. 1058, 54 Tex. Civ. App. 481.

[87] **Ala.** Sloss-Sheffield Steel & Iron Co. v. Smith (Sup.) 40 So. 91.

Ill. Illinois, I. & M. Ry. Co. v. Easterbrook, 71 N. E. 1116, 211 Ill. 624; Dawson v. Allen, 191 Ill. App. 399; Security Ins. Co. v. Slack, 183 Ill. App. 579; Browning v. Jones, 52 Ill. App. 597.

Ind. Baltimore & O. S. W. Ry. Co. v. Young, 54 N. E. 791, 153 Ind. 163.

Minn. McGrath v. Great Northern Ry. Co., 78 N. W. 972, 76 Minn. 146.

Mo. Fife v. Chicago & A. R. Co., 161 S. W. 300, 174 Mo. App. 655.

N. Y. Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696, affirming 64 Hun, 632, 18 N. Y. S. 815.

N. C. Brewster v. Corporation of Elizabeth City, 54 S. E. 784, 142 N. C. 9; Peoples v. North Carolina R. Co., 49 S. E. 87, 137 N. C. 96.

Tex. Trinity & B. V. Ry. Co. v.

certain dangerous conditions were due to a latent defect,[88] to assume facts in relation to ownership,[89] that the location of a boundary line was correct,[90] that a survey was made,[91] that possession of land was of a certain character,[92] that the possession of property was in a certain person,[93] that an absence from land occupied as a homestead was temporary,[94] and to assume facts bearing on the credibility of witnesses.[95]

§ 77. Specific applications of rule in criminal cases

In criminal cases the above rule has been applied to instructions assuming that a crime was proved,[96] that defendant committed the

Gregory (Civ. App.) 142 S. W. 656; Same v. Burke, Id. 658; Hunt v. Johnson (Civ. App.) 129 S. W. 879.

[88] Pierce v. Decatur Coal Co., 151 Ill. App. 47.

[89] **Ala.** Louisville & N. R. Co. v. Christian Moerlein Brewing Co., 43 So. 723, 150 Ala. 390; Dorlan v. Westervitch, 37 So. 382, 140 Ala. 283, 103 Am. St. Rep. 35.

Cal. Jolly v. McCoy, 172 P. 618, 36 Cal. App. 479; Dean v. Ross, 105 Cal. 227, 38 P. 912.

Ill. Allmendinger v. McHie, 59 N. E. 517, 189 Ill. 308.

Ky. Bailey v. Tygart Valley Iron Co., 10 S. W. 234.

Me. Whipple v. Wing, 39 Me. 424.

Miss. American Express Co. v. Jennings, 38 So. 374, 86 Miss. 329, 109 Am. St. Rep. 708.

Mo. Nichols v. Tallman, 189 S. W. 1184; Warrington v. Bird, 151 S. W. 754, 168 Mo. App. 385; Benne v. Miller, 50 S. W. 824, 149 Mo. 228; Wilkerson v. Eilers, 114 Mo. 245, 21 S. W. 514.

S. C. Hodge v. Hodge, 34 S. E. 517, 56 S. C. 263.

Tex. First Nat. Bank v. Thomas (Civ. App.) 118 S. W. 221; Lake v. Copeland, 72 S. W. 99, 31 Tex. Civ. App. 358.

W. Va. Union Trust & Deposit Co. v. Paulhamus, 81 S. E. 547, 74 W. Va. 1.

[90] Smith v. Bachus, 78 So. 888, 201 Ala. 534; Paschall v. Brown, 147 S. W. 561, 105 Tex. 247, reversing judgment (Civ. App.) 133 S. W. 509; Luckie v. Schneider (Tex. Civ. App.) 57 S. W. 690.

[91] Goff v. Cougle, 76 N. W. 489, 118 Mich. 307, 42 L. R. A. 161.

[92] Anthony v. Seed, 40 So. 577, 146 Ala. 193; Rabbermann v. Carroll, 69 N. E. 759, 207 Ill. 253; Neppach v. Jordan, 15 Or. 308, 14 P. 353.

[93] Casper v. Geck, 185 Ill. App. 155.

[94] White v. Epperson, 73 S. W. 851, 32 Tex. Civ. App. 162.

[95] **U. S.** (C. C. A. Mass.) American Agricultural Chemical Co. v. Hogan, 213 F. 416, 130 C. C. A. 52.

Ala. Worthy v. State, 44 So. 535, 152 Ala. 49; Crittenden v. State, 32 So. 273, 134 Ala. 145.

Ark. Spencer v. State, 194 S. W. 863, 128 Ark. 452.

Ky. McKinney v. Commonwealth, 82 S. W. 263, 26 Ky. Law Rep. 565.

Mich. People v. Fox, 105 N. W. 1111, 142 Mich. 528.

Mo. Freeman v. Metropolitan St. Ry. Co., 68 S. W. 1057, 95 Mo. App. 94.

Pa. Commonwealth v. Bober, 59 Pa. Super. Ct. 573.

Tex. Ballard v. State, 160 S. W. 716, 71 Tex. Cr. R. 587; Green v. State, 98 S. W. 1059, 49 Tex. Cr. R. 645.

[96] Merino v. State, 141 P. 710, 16 Ariz. 132; People v. Roberts, 55 P. 137, 122 Cal. 377; State v. Lee, 182 S. W. 972, 272 Mo. 121.

Instructions not improper as assuming the commission of a crime. Since "homicide" means the killing of any human being an instruction speaking of the killing as a homicide is not error. Griggs v. State, 86 S. E. 726, 17 Ga. App. 301. Where, in a murder case, the court charged that it was contended by accused that he was elsewhere at the time of the commission of the homicide, and consequently that it was im-

act charged as a crime,[97] that the intent of defendant was criminal, or the reverse,[98] that the offense charged was committed in a certain place,[99] that the offense was committed in a certain manner, or that certain articles were used in its commission,[1] that defendant had a good character,[2] that evidence incriminating defendant existed,[3] that defendant fled,[4] that a witness was an accomplice,[5] that defendant had committed other related offenses,[6] that defendant had confessed or made admissions,[7] and to instructions assuming facts bearing on issue of self-defense.[8]

possible for him to have committed it, that the contention constituted an alibi, which if established was a perfect refutation of any crime charged, and, being interposed by accused as proof that he was not guilty, it became the duty of the jury to pass upon the question whether accused was present at the scene of the homicide at the time of the commission thereof, it was held that the charge was not objectionable as assuming the proof of the crime charged against accused, on the hypothesis that "homicide" is synonymous with "crime," since the killing of a human being under any circumstances constitutes homicide, but whether a homicide is a crime depends on the circumstances under which it is committed. People v. Mar Gin Suie, 103 P. 951, 11 Cal. App. 42.

[97] Lujan v. State, 141 P. 706, 16 Ariz. 123.

[98] Morris v. State, 41 So. 274, 146 Ala. 66; Willis v. State, 33 So. 226, 134 Ala. 429; Wimberly v. State, 77 S. E. 879, 12 Ga. App. 540; Kennison v. State, 115 N. W. 289, 80 Neb. 688; Young v. State, 151 S. W. 1046, 68 Tex. Cr. R. 580.

[99] Cox v. State, 60 S. W. 27, 68 Ark. 462; Commonwealth v. Cooper, 27 Pa. Super. Ct. 8.

[1] Hall v. State, 65 So. 427, 11 Ala. App. 95; Sloan v. State, 70 So. 23, 70 Fla. 216; Smothers v. State, 59 So. 900, 64 Fla. 459; People v. Bissett, 92 N. E. 949, 246 Ill. 516; State v. Harris, 108 S. W. 28, 209 Mo. 423.

[2] Axelrod v. State, 60 So. 959, 7 Ala. App. 61; Sadler v. State, 51 So. 564, 165 Ala. 109; People v. Lathrop (Cal. App.) 192 P. 722.

[3] Thomas v. State, 32 So. 250, 133 Ala. 139; Rupe v. State, 124 S. W. 655, 57 Tex. Cr. 588.

[4] Lantern v. State, 55 So. 1032, 1 Ala. App. 31.

[5] **U. S.** Holmgren v. United States, 30 S. Ct. 588, 217 U. S. 509, 54 L. Ed. 861, 19 Ann. Cas. 778, affirming judgment (C. C. A. Cal.) 156 F. 439, 84 C. C. A. 301; (C. C. A. Pa.) Richardson v. United States, 181 F. 1, 104 C. C. A. 69.

Ark. Simms v. State, 150 S. W. 113, 105 Ark. 16.

Mo. State v. Potts, 144 S. W. 495, 239 Mo. 403.

Mont. State v. Sloan, 89 P. 829, 35 Mont. 367; State v. Allen, 87 P. 177, 34 Mont. 403.

Tenn. Hicks v. State, 149 S. W. 1055, 126 Tenn. 359.

Tex. Foster v. State, 150 S. W. 936, 68 Tex. Cr. R. 38.

[6] Glover v. State (Tex. Cr. App.) 76 S. W. 465; Homer v. State (Tex. Cr. App.) 65 S. W. 371.

[7] Young v. State, 54 S. E. 82, 125 Ga. 584; Dixon v. State, 39 S. E. 846, 113 Ga. 1039; Hellyer v. People, 58 N. E. 245, 186 Ill. 550; State v. Drew, 179 Mo. 315, 78 S. W. 594, 101 Am. St. Rep. 474.

[8] **Ala.** Cain v. State, 77 So. 453, 16 Ala. App. 303; Smith v. State, 74 So., 755, 15 Ala. App. 662; Pippin v. State, 73 So. 340, 197 Ala. 613; Allsup v. State, 72 So. 599, 15 Ala. 121; Hutchinson v. State, 72 So. 572, 15 Ala. App. 96; White v. State, 71 So. 452, 195 Ala. 681; Murray v. State, 69 So. 354, 13 Ala. App. 175; Thomas v. State, 69 So. 315, 13 Ala. App. 50; Bailey v. State, 65 So. 422, 11 Ala. App. 8; McGhee v. State, 59 So. 573, 178 Ala. 4; Cheney v. State, 55 So. 801, 172 Ala. 368; Phillips v. State, 54 So. 111, 170 Ala. 5; Stockdale v. State, 51 So. 563, 165 Ala. 12; Williams v. State, 50 So. 59, 161 Ala. 52;

B. Facts Admitted, Not Controverted, or Conclusively Established

§ 78. General rule

The court may assume the existence of facts which are admitted,[9] or are not disputed;[10] this rule also applying in criminal cases.[11]

Wright v. State, 42 So. 745, 148 Ala. 596; Cawley v. State, 32 So. 227, 133 Ala. 128; Mitchell v. State, 32 So. 132, 133 Ala. 65; Pugh v. State, 31 So. 727, 132 Ala. 1; Gilmore v. State, 28 So. 595, 126 Ala. 20.

Fla. Stokes v. State, 44 So. 759, 54 Fla. 109.

Miss. Cunningham v. State, 39 So. 531, 87 Miss. 417.

Tex. Parish v. State, 153 S. W. 327, 69 Tex. Cr. R. 254; Christian v. State, 97 S. W. 694, 50 Tex. Cr. R. 410.

[9] **Ala.** Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357; Ham v. State, 47 So. 126, 156 Ala. 645.

Alaska. Williams v. Alaska Commercial Co., 2 Alaska, 43.

Ark. Driver v. Board of Directors of St. Francis Levee Dist., 68 S. W. 26, 70 Ark. 358.

Ga. Morrison v. Cureton, 77 S. E. 160, 139 Ga. 299; Western Union Telegraph Co. v. Harris, 64 S. E. 1123, 6 Ga. App. 260; Eagle & Phenix Mills v. Herron, 46 S. E. 405, 119 Ga. 389; Central of Georgia Ry. Co. v. Johnston, 32 S. E. 78, 106 Ga. 130.

Ill. Compher v. Browning, 76 N. E. 678, 219 Ill. 429, 109 Am. St. Rep. 346; Chicago Anderson Pressed Brick Co. v. Reinneiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249; Monk v. Caseyville Ry. Co., 202 Ill. App. 641.

Ind. Horka v. Wieczorek, 115 N. E. 949, 64 Ind. App. 387; Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143.

Iowa. Ryan v. Incorporated Town of Lone Tree, 98 N. W. 287, 122 Iowa, 420.

Kan. Wade v. Empire Dist. Electric Co., 158 P. 28, 98 Kan. 366, rehearing denied 158 P. 1110.

Ky. Jones v. Mobile & O. R. Co. 127 S. W. 144.

Md. Koch v. Maryland Coal Co., 68 Md. 125, 11 A. 700; Waters' Lessee v. Riggin, 19 Md. 536.

Mich. Johnston v. Cornelius, 166 N. W. 983, 200 Mich. 209, L. R. A. 1918D, 880; Dalm v. Bryant Paper Co., 122 N. W. 257, 157 Mich. 550.

Mo. Montgomery v. Hammond Packing Co. (App.) 217 S. W. 867; Palmer v. Shaw Transfer Co. (Sup.) 209 S. W. 882; Irwin v. Wilhoit (App.) 199 S. W. 588; Chapman v. Brown, 179 S. W. 774, 192 Mo. App. 78; Bouillon v. Laclede Gaslight Co., 147 S. W. 1107, 165 Mo. App. 320; Wise v. Wabash R. Co., 115 S. W. 452, 135 Mo. App. 230; Markey v. Louisiana & M. R. R. Co., 84 S. W. 61, 185 Mo. 348; Spencer v. Farmers' Mut. Ins. Co., 79 Mo. App. 213; Price v. Patrons' & Farmers' Home Protection Co., 77 Mo. App. 236.

Neb. Fitzgerald v. Union Stockyards Co., 136 N. W. 838, 91 Neb. 493.

Nev. Cutler v. Pittsburg Silver Peak Gold Mining Co., 116 P. 418, 34 Nev. 45.

N. Y. Smith v. New York Anti-Saloon League, 106 N. Y. S. 251, 121 App. Div. 600; McManus v. Woolverton (Com. Pl.) 19 N. Y. S. 545, judgment affirmed 138 N. Y. 648, 34 N. E. 513.

N. C. Crampton v. Ivie, 32 S. E. 968, 124 N. C. 591.

Okl. Choctaw, O. & G. R. Co. v. Burgess, 97 P. 271, 21 Okl. 653.

S. C. Hiller v. Bank of Columbia, 79 S. E. 899, 96 S. C. 74; Reardon v. Averbuck, 75 S. E. 959, 92 S. C. 569; Moore v. Columbia & G. R. Co., 38 S. C. 1, 16 S. E. 781.

S. D. Duprel v. Collins, 146 N. W. 593, 33 S. D. 365; Bolte & Jansen v. Equitable Fire Ass'n, 121 N. W. 773, 23 S. D. 240.

Tex. Richard Cocke & Co. v. New

[10, 11] See Notes 10 and 11 on pages 154 to 156.

In civil cases, if the evidence is all one way and conclusively

Era Gravel & Development Co. (Civ. App.) 168 S. W. 988; Spires v. McElroy (Civ. App.) 166 S. W. 457; Missouri, K. & T. Ry. Co. of Texas v. Allen, 115 S. W. 1179, 53 Tex. Civ. App. 433; Thompson v. Johnson, 58 S. W. 1030, 24 Tex. Civ. App. 246.

Wash. Blair v. Calhoun, 151 P. 259, 87 Wash. 154.

[10] **U. S.** Tuttle v. Detroit, G. H. & M. Ry. Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; (C. C. A. Mo.) Missouri Dist. Telegraph Co. v. Morris & Co., 243 F. 481, 156 C. C. A. 179, appeal dismissed 38 S. Ct. 11, 245 U. S. 651, 62 L. Ed. 531.

Ala. Southern Ry. Co. v. Hayes, 73 So. 945, 198 Ala. 601; Willoughby v. Birmingham Ry., Light & Power Co., 66 So. 887, 11 Ala. App. 611; Alexander v. Smith, 61 So. 68, 180 Ala. 541; Louisville & N. R. Co. v. Holland, 55 So. 1001, 173 Ala. 675; Birmingham Ry., Light & Power Co. v. McCurdy, 55 So. 616, 172 Ala. 488; Marx v. Leinkauff, 93 Ala. 453, 9 So. 818.

Ark. Pacific Mut. Life Ins. Co. v. Walker, 53 S. W. 675, 67 Ark. 147.

Cal. Mathes v. Aggeler & Musser Seed Co., 178 P. 713, 179 Cal. 697; Burrell v. Southern California Canning Co., 169 P. 405, 35 Cal. App. 162; Vann v. McCreary, 77 Cal. 434, 19 P. 826.

Colo. Craig v. A. Leschen & Sons Rope Co., 87 P. 1143, 38 Colo. 115.

Conn. Brown Bag Filling Mach. Co. v. United Smelting & Aluminum Co., 107 A. 619, 93 Conn. 670; Ferrigino v. Keasbey, 106 A. 445, 93 Conn. 445; Temple v. Gilbert, 85 A. 380, 86 Conn. 335; McCaffrey v. Groton & S. St. Ry. Co., 84 A. 284, 85 Conn. 584.

Del. Truxton v. Fait & Slagle Co., 42 A. 431, 1 Pennewill, 483, 73 Am. St. Rep. 81.

Fla. Atlantic Coast Line R. Co. v. McCormick, 52 So. 712, 59 Fla. 121.

Ga. Strickland v. Bank of Cartersville, 81 S. E. 886, 141 Ga. 565; Oxford v. Oxford, 71 S. E. 883, 136 Ga. 589; Reeves v. H. C. Allgood & Co., 67 S. E. 82, 133 Ga. 835; Atlantic Coast Line R. Co. v. Smith, 65 S. E. 44, 6 Ga. App. 378.

Ill. Grannon v. Donk Bros. Coal & Coke Co., 102 N. E. 769, 259 Ill. 350, affirming judgment, 173 Ill. App. 395; Turner v. Osgood Art Colortype Co., 79 N. E. 306, 223 Ill. 629, affirming judgment 125 Ill. App. 602; Town of Normal v. Bright, 79 N. E. 90, 223 Ill. 99, affirming judgment 125 Ill. App. 478; Gerke v. Fancher, 158 Ill. 375, 41 N. E. 982; City of Chicago v. Moore, 139 Ill. 201, 28 N. E. 1071; Vogler v. Chicago & Carterville Coal Co., 196 Ill. App. 574; Jarnecke v. Chicago Consol. Traction Co., 190 Ill. App. 179; Mackie v. Webster Mfg. Co., 175 Ill. App. 385; Cahill v. Dellenback, 139 Ill. App. 320; Chicago & A. Ry. Co. v. Tracey, 109 Ill. App. 563.

Ind. Union Traction Co. of Indiana v. Elmore, 116 N. E. 837, 66 Ind. App. 95; Archer v. Ostemeier, 105 N. E. 522, 56 Ind. App. 385; Cleveland, C., C. & St. L. Ry. Co. v. Jones, 99 N. E. 503, 51 Ind. App 245; Halstead v. Woods, 95 N. E. 429, 48 Ind. App. 127; Baltimore & O. R. Co. v. Keiser, 94 N. E. 330, 51 Ind. App. 58; Howard County Com'rs v. Legg, 110 Ind. 479, 11 N. E. 612.

Iowa. Dunning v. Burt, 162 N. W. 23, 180 Iowa, 754; Colsch v. Chicago, M. & St. P. Ry. Co., 153 N. W. 327, 171 Iowa, 78; Sewing v. Harrison County, 136 N. W. 200, 156 Iowa, 229; State v. Wrangler, 132 N. W. 22, 151 Iowa, 555; Murphy v. Hiltibridle, 109 N. W. 471, 132 Iowa, 114; Pratt v. Chicago, R. I. & P. Ry. Co., 77 N. W. 1064, 107 Iowa, 287; Russell v. Huiskamp, 77 Iowa, 727, 42 N. W. 525.

Kan. Douglass v. Geller, 32 Kan. 499, 4 P. 1039.

Ky. Western Union Telegraph Co. v. City of Louisville, 169 S. W. 994, 160 Ky. 499; Wasioto & B. M. R. Co. v. Blanton, 169 S. W. 589, 160 Ky. 134; Otis Elevator Co. v. Wilson, 145 S. W. 391, 147 Ky. 676; Lax-Fos Co. v. Rowlett, 139 S. W. 836, 144 Ky. 690; Montgomery v. Morton, 137 S. W. 540, 143 Ky. 793.

Me. Toole v. Bearce, 39 A. 558, 91 Me. 209.

Mass. McGuire v. Lawrence Mfg. Co., 156 Mass. 324, 31 N. E. 3.

Mich. Holcomb & Hoke Mfg. Co.

establishes a certain fact, the court may assume its existence, al-

v. Cataldo, 165 N. W. 941, 199 Mich. 265; Hummer v. Midland Casualty Co., 148 N. W. 413, 181 Mich. 386; Colborne v. Detroit United Ry., 143 N. W. 32, 177 Mich. 139; Opsomere v. Opsomere, 133 N. W. 518, 167 Mich. 636; Tunnicliffe v. Bay Cities Consol. Ry. Co., 107 Mich. 261, 65 N. W. 226.

Minn. Marchio v. City of Duluth, 158 N. W. 612, 133 Minn. 470; Johnson v. Carlin, 141 N. W. 4, 121 Minn. 176, 4 Ann. Cas. 1914C, 705.

Miss. Alabama & V. Ry. Co. v. Phillips, 70 Miss. 14, 11 So. 602; Lamar v. Williams, 39 Miss. 342; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

Mo. Frank Hart Realty Co. v. Ryan (App.) 218 S. W. 412; Argeropoulos v. Kansas City Rys. Co., 212 S. W. 369, 201 Mo. App. 287; Denny v. Randall (App.) 202 S. W. 602; Neeley v. Snyder (App.) 193 S. W. 610; Phillips v. Pryor (App.) 190 S. W. 1027; Young v. Tilley (App.) 190 S. W. 95; Burns v. Polar Wave Ice & Fuel Co. (App.) 187 S. W. 145; Cool v. Petersen, 175 S. W. 244, 189 Mo. App. 717; Hall v. Manufacturers' Coal & Coke Co., 168 S. W. 927, 260 Mo. 351, Ann. Cas. 1916C, 375; Schaaf v. St. Louis Basket & Box Co., 131 S. W. 936, 151 Mo. App. 35; Knight v. Kansas City, 87 S. W. 1192, 113 Mo. App. 561; Schmidt v. St. Louis R. Co., 63 S. W. 834, 163 Mo. 645; First Nat. Bank v. Hatch, 98 Mo. 376, 11 S. W. 739.

Mont. De Sandro v. Missoula Light & Water Co., 136 P. 711, 48 Mont. 226; Frederick v. Hale, 112 P. 70, 42 Mont. 153.

Neb. Thomas v. Otis Elevator Co., 172 N. W. 53, 103 Neb. 401; First Nat. Bank v. Bower, 98 N. W. 834, 5 Neb. (Unof.) 375; Oelke v. Theis, 97 N. W. 588, 70 Neb. 465; Thayer County Bank v. Huddleson, 95 N. W. 471, 1 Neb. (Unof.) 261; First Nat. Bank v. Sargent, 91 N. W. 595, 65 Neb. 594, 59 L. R. A. 296.

N. M. Milliken v. Martinez, 159 P. 952, 22 N. M. 61.

Okl. Byers v. Ingraham, 151 P. 1061, 51 Okl. 440; Bleecker v. Miller, 138 P. 809, 40 Okl. 374.

S. C. McLain v. Allen, 79 S. E. 1, 95 S. C. 152; Black v. Atlantic Coast Line R. Co., 64 S. E. 418, 82 S. C. 478; McCarty v. Piedmont Mut. Ins. Co., 62 S. E. 1, 81 S. C. 152, 18 L. R. A. (N. S.) 729; Bussey v. Charleston & W. C. Ry. Co., 30 S. E. 477, 52 S. C. 438.

S. D. Bolte & Jansen v. Equitable Fire Ass'n, 121 N. W. 773, 23 S. D. 240.

Tenn. Farquhar v. Toney, 24 Tenn. (5 Humph.) 502.

Tex. Mueller v. State, 215 S. W. 93, 85 Tex. Cr. R. 346; Townsend v. Pilgrim (Civ. App.) 187 S. W. 1021; Houston Oil Co. of Texas v. McGrew, 176 S. W. 45, 107 Tex. 220, affirming judgment (Civ. App.) 143 S. W. 191; Missouri, K. & T. Ry. Co. of Texas v. Cauble (Civ. App.) 174 S. W. 880; Irvin v. Johnson (Civ. App.) 170 S. W. 1059; Watson v. Rice (Civ. App.) 166 S. W. 106; Missouri, K. & T. Ry. Co. of Texas v. Hampton (Civ. App.) 142 S. W. 89; St. Louis Southwestern Ry. Co. of Texas v. Shipley, 126 S. W. 952, 60 Tex. Civ. App. 1; Missouri, K. & T. Ry. Co. of Texas v. Hawley, 123 S. W. 726, 58 Tex. Civ. App. 143; Suderman-Dolson Co. v. Hone (Civ. App.) 118 S. W. 216; Trinity & S. Ry. Co. v. Lane, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18.

Utah. Black v. Rocky Mountain Bell Telephone Co., 73 P. 514, 26 Utah, 451.

Va. Rangeley's Adm'r v. Southern Ry. Co., 30 S. E. 386, 95 Va. 715.

Wash. White v. Jansen, 142 P. 1140, 81 Wash. 435; Anderson v. Kinnear, 141 P. 1151, 80 Wash. 638; A. H. Gehri & Co. v. Dawson, 116 P. 673, 64 Wash. 240.

W. Va. Jones v. Riverside Bridge Co., 73 S. E. 942, 70 W. Va. 374.

Wis. Illinois Steel Co. v. Muza, 159 N. W. 908, 164 Wis. 247; Schaefer v. City of Ashland, 94 N. W. 303, 117 Wis. 553.

Illustrations of proper instructions within rule. Where, in an action on an insurance agent's bond, there was only one witness who testified concerning the amount of the agent's defalcation, and his testimo-

though it is not expressly admitted by the party interested in con-

ny showed a liability in excess of the penalty of the bond, and there was no controverting evidence or anything to cause suspicion as to his testimony, it was not error to charge that, if the jury found for plaintiff on the only issue submitted, they should find in plaintiff's favor for the full amount sued for. Foster v. Franklin Life Ins. Co. (Tex. Civ. App.) 72 S. W. 91. In an action by an employé against his employer to recover for injuries resulting from the negligent loading of a car of lumber, where the undisputed evidence shows that the car was loaded under the direction and supervision of defendant's foreman, whose duty as vice principal was to see that it was properly loaded before it was placed in the train, a charge on contributory negligence, assuming the fact as proved, is not objectionable as a charge on the weight of the evidence. El Paso & N. W. Ry. Co. v. McComas, 81 S. W. 760, 36 Tex. Civ. App. 170. Where the evidence showed that there was a hole in the middle of the street, leaving room on either side for travel, and that the city had not closed the street, nor placed signals to mark the hole, and plaintiff testified that he had no knowledge of the existence of the hole, but thought that it had been filled, the court was justified in assuming in a charge that any one had the right to travel on the street. City of Dallas v. Muncton, 83 S. W. 431, 37 Tex. Civ. App. 112. In trespass to try title to land claimed by 10 years' adverse possession, where there was no question as to the character of plaintiff's possession, the only issue being as to the length thereof and the amount of the land possessed, and all the facts tended to show that, if plaintiff was in possession at all, the possession was peaceable and adverse, the court could assume that it was adverse to defendant, and it was not error to fail to state that to recover under 10 years' limitations there should be proof of adverse possession. Washam v. Harrison (Tex. Civ. App.) 122 S. W. 52. Where, in an action for damages resulting from the pollution of a stream, there is no dispute as to the facts of the death of plaintiff's cattle and the destruction of his crops, it is not error for the court to assume such facts in submitting the cause of such damages to the jury. Texas & N. O. Ry. Co. v. Moers (Tex. Civ. App.) 97 S. W. 1064.

[11] Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 41 L. Ed. 289; (C. C. A. Wash.) May v. United States, 157 F. 1, 86 C. C. A. 575, certiorari denied 28 S. Ct. 570, 209 U. S. 542, 52 L. Ed. 918.

Ala. Murphy v. State, 71 So. 967, 14 Ala. App. 78; Eubanks v. State, 56 So. 88, 2 Ala. App. 61; Brown v. State, 38 So. 268, 142 Ala. 287; Sherrill v. State, 35 So. 129, 138 Ala. 3.

Ark. McConnell v. City of Booneville, 186 S. W. 82, 123 Ark. 561; Jeffries v. State, 61 Ark. 308, 32 S. W. 1080.

Cal. People v. Mueller, 143 P. 750, 168 Cal. 526; People v. Panagoit, 143 P. 70, 25 Cal. App. 158; People v. Puttman, 61 P. 961, 129 Cal. 258; People v. Phillips, 70 Cal. 61, 11 P. 493.

Colo. Imboden v. People, 90 P. 608, 40 Colo. 142.

Fla. Edwards v. State, 56 So. 401, 62 Fla. 40.

Ga. Allen v. State, 88 S. E. 100, 18 Ga. App. 1; Knight v. State, 85 S. E. 915, 143 Ga. 678; Wilson v. State, 84 S. E. 81, 15 Ga. App. 632; Taylor v. State, 70 S. E. 237, 135 Ga. 622; Robinson v. State, 58 S. E. 842, 129 Ga. 336.

Ill. People v. Weir, 129 N. E. 116, 295 Ill. 268; People v. Depew, 86 N. E. 1090, 237 Ill. 574; Smith v. People, 103 Ill. 82; Hanrahan v. People, 91 Ill. 142.

Ind. Dorsey v. State, 100 N. E. 369, 179 Ind. 531; Whitney v. State, 57 N. E. 398, 154 Ind. 573; Hawkins v. State, 136 Ind. 630, 36 N. E. 419; Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

Iowa. State v. Wilson, 144 N. W. 47, 166 Iowa, 309, rehearing denied 147 N. W. 739, 166 Iowa, 309; State

testing it, or is formally in dispute.[12] In criminal cases this is the

v. Bell, 125 N. W. 652, 146 Iowa, 617; State v. McKnight, 93 N. W. 63, 119 Iowa, 79.

Me. State v. Day, 79 Me. 120, 8 A. 544.

Mich. People v. Bryan, 136 N. W. 1120, 170 Mich. 683.

Minn. State v. Damuth, 160 N. W. 196, 135 Minn. 76.

Mo. State v. Bobbst (Sup.) 190 S. W. 257; State v. Bickel (Sup.) 177 S. W. 310; State v. McConnell, 144 S. W. 836, 240 Mo. 269; State v. Priest, 114 S. W. 949, 215 Mo. 1; State v. Miller, 89 S. W. 377, 190 Mo. 449.

Neb. Pisar v. State, 76 N. W. 869, 56 Neb. 455; Morgan v. State, 71 N. W. 788, 51 Neb. 672.

N. J. State v. Bectsa, 58 A. 933, 71 N. J. Law, 322.

N. C. State v. Williams, 47 N. C. (2 Jones, Law) 194; State v. Rash, 34 N. C. (12 Ired.) 382, 55 Am. Dec. 420.

Okl. Bartell v. State, 111 P. 669, 4 Okl. Cr. 135; Stewart v. Territory, 100 P. 47, 2 Okl. Cr. 63, rehearing denied 102 P. 649, 2 Okl. Cr. 63.

Or. State v. Reed, 97 P. 627, 52 Or. 377.

S. C. State v. Bazen, 71 S. E. 779, 89 S. C. 260; State v. Ayers, 68 S. E. 625, 86 S. C. 426; State v. Nickels, 43 S. E. 521, 65 S. C. 169.

S. D. State v. Sonnenschein, 159 N. W. 101, 37 S. D. 585; State v. Shepard, 138 N. W. 294, 30 S. D. 219.

Tenn. Powers v. State, 97 S. W. 815, 117 Tenn. 363.

Tex. Kelly v. State, 151 S. W. 304, 68 Tex. Cr. R. 317; Russell v. State, 111 S. W. 658, 53 Tex. Cr. R. 500; Tanner v. State (Cr. App.) 44 S. W. 489; Strang v. State, 32 Tex. Cr. R. 219, 22 S. W. 680; Fahey v. State, 27 Tex. App. 146, 11 S. W. 108, 11 Am. St. Rep. 182.

Wis. Bates v. State, 103 N. W. 251, 124 Wis. 612, 4 Ann. Cas. 365; Bliss v. State, 94 N. W. 325, 117 Wis. 596.

[12] **U. S.** (C. C. A. Minn.) Cloquet Lumber Co. v. Burns, 222 F. 857, 138 C. C. A. 283; Toledo, St. L. & W. R. Co. v. Kountz, 168 F. 832, 94 C. C. A. 244.

Ala. Ferguson v. Shipp, 73 So. 414, 198 Ala. 87; Webb v. Gray, 62 So. 194, 181 Ala. 408; City of Montgomery v. Wyche, 53 So. 786, 169 Ala. 181.

Ark. Western Union Telegraph Co. v. Wilson, 133 S. W. 845, 97 Ark. 198; Prescott & N. W. Ry. Co. v. Morris, 123 S. W. 392, 92 Ark. 365.

Ga. Watkins v. Stulb & Vorhauer, 98 S. E. 94, 23 Ga. App. 181; Williams v. Raper, 78 S. E. 253, 139 Ga. 811.

Ill. Brennan v. City of Streator, 100 N. E. 266, 256 Ill. 468, affirming judgment 168 Ill. App. 134; O'Rourke v. Sproul, 89 N. E. 663, 241 Ill. 576.

Ind. Pittsburgh, C., C. & St. L. Ry. Co. v. Rogers, 87 N. E. 28, 45 Ind. App. 230; Swygart v. Willard, 76 N. E. 755, 166 Ind. 25.

Iowa. Mackland v. Board of Sup'rs of Pottawattamie County, 144 N. W. 317, 162 Iowa, 604; Frank v. Davenport, 75 N. W. 480, 105 Iowa, 588; West v. Chicago & N. W. Ry. Co., 77 Iowa, 654, 35 N. W. 479, 42 N. W. 512.

Ky. Louisville & N. R. Co. v. E. J. O'Brien & Co., 182 S. W. 227, 168 Ky. 403, Ann. Cas. 1917D, 922; Black v. Terry, 163 S. W. 737, 157 Ky. 600; Cowles v. Carrier, 101 S. W. 916, 31 Ky. Law Rep. 229.

Md. Weant v. Southern Trust & Deposit Co., 77 A. 289, 112 Md. 463.

Mich. Garrisi v. Kass, 167 N. W. 833, 201 Mich. 643.

Mo. Kearse v. Seyb, 209 S. W. 635, 200 Mo. App. 645; State ex rel. National Newspapers' Ass'n v. Ellison (Sup.) 200 S. W. 433, quashing certiorari Rail v. National Newspaper Ass'n, 192 S. W. 129, 198 Mo. App. 463; Spicer v. Spicer, 155 S. W. 832, 249 Mo. 582, Ann. Cas. 1914D, 238; Irving v. Chicago, R. I. & P. Ry. Co., 137 S. W. 1009, 156 Mo. App. 667; Westervelt v. St. Louis Transit Co., 121 S. W. 114, 222 Mo. 325; Holton v. Cochran, 106 S. W. 1035, 208 Mo. 314; Flaherty v. St. Louis Transit Co., 106 S. W. 15, 207 Mo. 318;

rule with respect to any collateral fact which tends to prove one of the constituent elements of the crime charged, or which bears on the defense set up by the accused.[13] But with respect to any fact constituting an essential element of the crime alleged the rule, supported by the weight of authority, is that if it is not admitted by the defendant, and so is in dispute by reason of his plea of not guilty, the court cannot assume its existence, although the testimony to establish it is without contradiction; the theory of such rule being that the jury have an absolute right to disbelieve the evidence adduced to establish such fact.[14] In New York, though a

Deschner v. St. Louis & M. R. R. Co., 98 S. W. 737, 200 Mo. 310; Mitchell v. St. Louis, I. M. & S. Ry. Co., 92 S. W. 111, 116 Mo. App. 81; Cameron v. B. Roth Tool Co., 83 S. W. 279, 108 Mo. App. 265; Dunn v. Northeast Electric Ry. Co., 81 Mo. App. 42.

Neb. Jones v. Chicago Great Western R. Co., 149 N. W. 813, 97 Neb. 306.

N. Y. Kaufman v. Schoeffel, 46 Hun, 571.

N. C. Starr v. Southern Bell Telephone & Telegraph Co., 72 S. E. 484, 156 N. C. 435.

Okl. St. Louis & S. F. R. Co. v. Kerns, 136 P. 169, 41 Okl. 167.

Pa. Thomas - Roberts - Stevenson Co. v. Philadelphia & R. Ry. Co., 100 A. 998, 256 Pa. 549; Miller v. Cure, 54 A. 721, 205 Pa. 168.

S. C. Martin v. Seaboard Air Line Ry. Co., 93 S. E. 336, 108 S. C. 130.

Tex. Missouri, K. & T. Ry. Co. of Texas v. Kinslow (Civ. App.) 172 S. W. 1124; McKenzie v. Imperial Irr. Co. (Civ. App.) 166 S. W. 495; Missouri, K. & T. Ry. Co. v. Burton (Civ. App.) 162 S. W. 479; Kennedy v. Walker (Civ. App.) 138 S. W. 1115; Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Civ. App.) 134 S. W. 280; Freeman v. Kane (Civ. App.) 133 S. W. 723; Ludtke v. Texas & N. O. R. Co. (Civ. App.) 132 S. W. 377; Missouri, K. & T. Ry. Co. of Texas v. Rothenberg (Civ. App.) 131 S. W. 1157; Crain v. National Life Ins. Co. of United States, 120 S. W. 1098, 56 Tex. Civ. App. 406; El Paso & S. W. Ry. Co. v. Smith, 108 S. W. 988, 50 Tex. Civ. App. 10; Louisiana & Texas Lumber Co. v. Meyers (Civ. App.) 94 S. W. 140; St. Louis Southwestern Ry. Co. of Texas v. Highnote (Civ. App.) 84 S. W. 365, judgment reversed 86 S. W. 923, 99 Tex. 23.

Va. Seaboard Air Line Ry. v. Abernathy, 92 S. E. 913, 121 Va. 173.

Wash. Halverson v. Seattle Electric Co., 77 P. 1058, 35 Wash. 600.

[13] **Ariz.** Wagoner v. Territory, 51 P. 145, 5 Ariz. 175.

Ga. Roark v. State, 32 S. E. 125, 105 Ga. 736.

Ill. Zuckerman v. People, 72 N. E. 741, 213 Ill. 114.

Miss. Dean v. State, 37 So. 501, 85 Miss. 40.

Mo. State v. Harris, 51 S. W. 481, 150 Mo. 56.

Neb. McCormick v. State, 92 N. W. 606, 66 Neb. 337; Welsh v. State, 82 N. W. 368, 60 Neb. 101.

S. C. State v. Thompson, 56 S. E. 789, 76 S. C. 116.

S. D. State v. James, 164 N. W. 91, 39 S. D. 263.

Tex. Williams v. State (Cr. App.) 105 S. W. 1024; Roberson v. State (Civ. App.) 91 S. W. 578; Cantwell v. State, 85 S. W. 18, 47 Tex. Cr. R. 521; Morgan v. State, 67 S. W. 420, 43 Tex. Cr. R. 543; Messer v. State, 63 S. W. 643, 43 Tex. Cr. R. 97; Williams v. State, 39 S. W. 664, 37 Tex. Cr. R. 238; Holliday v. State, 35 Tex. Cr. R. 133, 32 S. W. 538.

Wash. Edwards v. Territory, 1 Wash. T. 195.

Wis. Cupps v. State, 97 N. W. 210, 120 Wis. 504, 102 Am. St. Rep. 996, rehearing denied 98 N. W. 546, 120 Wis. 504, 102 Am. St. Rep. 996.

[14] People v. Craig, 91 P. 997, 152 Cal. 42; State v. Bige, 84 N. W.

fact essential to the crime charged is undisputed and is treated by all concerned as established, the court must submit it to the jury if the defendant so requests.[15] In some jurisdictions, however, it is not improper in a criminal case to give an instruction assuming an essential fact which is proved, although not admitted.[16] In Wisconsin the courts uphold an instruction containing such an assumption,[17] or at least consider it to be, if error at all, not a reversible one;[18] and in Minnesota, in a prosecution for larceny, where the question was as to the value of the property stolen, and the evidence of the state as to such value was not disputed, it was held that the court might assume the value so proved, although the defendant did not formally admit such value, and introduced evidence that he had purchased the goods at a certain discount.[19]

In some jurisdictions the court should assume as true facts which are not disputed.[20]

§ 79. Limitations of rule

Under this rule the court should never assume a fact to be proved, unless the evidence is so conclusive one way that the minds of reasonable men can reach but one conclusion as to the result.[21] That testimony tending to show the existence of certain facts is not contradicted will not necessarily permit the court to assume such facts.[22] Facts can be treated as undisputed within the above

518, 112 Iowa, 433; State v. Barry, 92 N. W. 809, 11 N. D. 428.

[15] People v. Marendi, 107 N. E. 1058, 213 N. Y. 600; People v. Walker, 91 N. E. 806, 198 N. Y. 329.

[16] Davis v. State, 100 S. E. 50, 24 Ga. App. 35; Carter v. Commonwealth, 96 S. E. 766, 123 Va. 810.

Assumptions held proper. Where the evidence showed that deceased, while sitting at a table in social conversation with companions, was, without warning and without provocation on his part, shot to death by some person, a charge assuming as a fact that deceased was shot down in cold blood, and that the person who fired the shot was apparently trying to commit murder, or doing an act which might cause bloodshed, was not open to objection. State v. Moynihan, 106 A. 817, 93 N. J. Law, 253.

[17] Perugi v. State, 80 N. W. 593, 104 Wis. 230, 76 Am. St. Rep. 865.

[18] Burns v. State, 128 N. W. 987, 145 Wis. 373, 140 Am. St. Rep. 1081.

[19] State v. Fleetwood, 126 N. W. 485, 111 Minn. 70, rehearing denied 126 N. W. 827, 111 Minn. 70.

[20] Peterson v. Chicago & O. P. Elevated R. Co., 108 N. E. 252, 260 Ill. 280, reversing judgment 176 Ill. App. 218; Geo. D. Barnard & Co. v. Robertson (Tex. Civ. App.) 29 S. W. 697; Texas & P. Ry. Co. v. Moore, 8 Tex. Civ. App. 289, 27 S. W. 962.

In Alabama the trial court cannot be put in error for refusing an instruction assuming the existence of a fact, even though the evidence is not in dispute. Huguley v. State, 72 So. 764, 15 Ala. App. 189; Campbell v. State, 69 So. 322, 13 Ala. App. 70; Warsham v. State, 84 So. 885, 17 Ala. App. 181.

[21] McCoy v. Millville Traction Co., 85 A. 358, 83 N. J. Law, 508; Security Mut. Life Ins. Co. v. Calvert (Tex. Civ. App.) 100 S. W. 1033, judgment reversed 105 S. W. 320, 101 Tex. 128.

[22] State v. Anderson, 135 N. W. 405, 154 Iowa, 701; Martin Fertili-

rule only when they are not merely unopposed by the direct evidence, but when they are not in conflict with the just and proper inferences to be drawn from other facts proved in the case.[23] Within such rule a fact is not placed beyond the realm of controversy by the uncorroborated testimony of a party to the action,[24] nor, as a general rule, by the testimony of experts,[25] and a fact will be regarded as in dispute if a witness has made contradictory statements with reference thereto.[26]

In some jurisdictions facts put in issue by the pleadings cannot be assumed, because the evidence in their support is uncontradicted, when such evidence is in large part oral.[27] In other jurisdictions it is held, in conformity with the statement of the general rule set out supra, that if the existence of a fact so put in issue is practically conceded by clear and undisputed evidence the assumption of such fact will not be prejudicial to the substantial rights of the parties, and will not, therefore, be cause for reversal.[28]

§ 80. Specific applications of rule

The above rule has been applied in civil cases to instructions assuming the existence of the relation of carrier and passenger,[29] of the relation of employer and employee,[30] of the relation of

zer Co. v. Thomas & Co., 109 A. 458, 135 Md. 633; Harrison v. Western Union Tel. Co., 48 S. E. 772, 136 N. C. 381; State v. Johnson, 67 S. E. 453, 85 S. C. 265; Byers v. Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760.

[23] Schultz v. Schultz, 71 N. W. 854, 113 Mich. 502.

[24] **Colo.** City of Colorado Springs v. Coray, 139 P. 1031, 25 Colo. App. 460.

Miss. Dunlap v. Hearn, 37 Miss. 471.

Mo. Cooley v. Dunham, 195 S. W. 1058, 196 Mo. App. 399.

N. Y. Merchants' Exch. Nat. Bank v. Wallach (City Ct. N. Y.) 45 N. Y. S. 885, 20 Misc. Rep. 309, affirming judgment 43 N. Y. S. 1159, 19 Misc. Rep. 711; Brush v. Long Island R. Co., 42 N. Y. S. 103, 10 App. Div. 535, judgment affirmed 53 N. E. 1123, 158 N. Y. 742.

Tex. Carothers v. Finley (Civ. App.) 209 S. W. 801; Atchison, T. & S. F. Ry. Co. v. Lucas (Civ. App.) 148 S. W. 1149, following, on rehearing, answers to certified questions 144 S. W. 1126, 105 Tex. 82, 39 L. R. A. (N. S.) 512.

[25] Choctaw, O. & G. R. Co. v. Deperade, 71 P. 629, 12 Okl. 367; Galveston, H. & S. A. Ry. Co. v. Worth (Tex. Civ. App.) 107 S. W. 958.

[26] Citizens' Nat. Life Ins. Co. v. Ragan, 78 S. E. 683, 13 Ga. App. 89.

[27] Dodd v. Guiseffi, 73 S. W. 304, 100 Mo. App. 311.

Posting of certain notices. An instruction was properly refused which assumed that an issuable fact, namely, the posting of certain notices was proven in the case, though the fact that the notices were posted was uncontradicted. Tognini v. Kyle, 17 Nev. 209, 30 P. 829, 45 Am. Rep. 442.

[28] Weil v. Nevitt, 18 Colo. 10, 31 P. 487.

[29] Dallas Rapid Transit Ry. Co. v. Payne (Tex. Civ. App.) 78 S. W. 1085, reversed 82 S. W. 649, 98 Tex. 211.

[30] Moore v. Pacific Coast Steel Co., 153 P. 912, 171 Cal. 489; Louisville, E. & St. L. Consol. R. Co. v. Utz, 133

principal and agent,[31] of the relation of partnership,[32] to the assumption of the fact of authority of an agent,[33] to the assumption of the fact of negligence,[34] to the assumption that slanderous words were uttered,[35] that a libel was published,[36] that the amount of recovery should be a certain amount,[37] that the results of physical injuries were of a certain character,[38] that losses accrued to the family of a decedent through his death,[39] and to assumptions concerning the value of property.[40]

In criminal cases such rule has been applied to the assumption that a crime was committed,[41] that defendant did the act charged

Ind. 265, 32 N. E. 881; Patton-Worsham Drug Co. v. Drennon (Tex. Civ. App.) 123 S. W. 705.

[31] Hartford Life Ins. Co. v. Sherman, 78 N. E. 923, 223 Ill. 329, affirming judgment (1905) 123 Ill. App. 202; People's Nat. Fire Ins. Co. v. Jackson, 159 S. W. 688, 155 Ky. 150; Hufft v. Dougherty, 171 S. W. 17, 184 Mo. App. 652.

[32] Gulf, C. & S. F. Ry. Co. v. Willbanks, 7 Tex. Civ. App. 489, 27 S. W. 302.

[33] Devine v. Federal Life Ins. Co., 95 N. E. 174, 250 Ill. 203; McCauley v. McElroy (Tex. Civ. App.) 199 S. W. 317.

[34] **Ky.** Cincinnati, N. O. & T. P. Ry. Co. v. Mullane's Adm'r, 152 S. W. 555, 151 Ky. 499.

Minn. Campbell v. Canadian Northern Ry. Co., 144 N. W. 772, 124 Minn. 245.

Mo. Keenig v. Missouri Pac. Ry. Co., 19 Mo. App. 327.

Tex. Galveston, H. & S. A. Ry. Co. v. Miller (Civ. App.) 191 S. W. 374; Quanah, A. & P. Ry. Co. v. Johnson (Civ. App.) 159 S. W. 406; San Antonio Traction Co. v. Probandt, 125 S. W. 931, 59 Tex. Civ. App. 265; Dallas Rapid Transit Ry. Co. v. Payne (Civ. App.) 78 S. W. 1085, reversed 82 S. W. 649, 98 Tex. 211.

Wash. Allend v. Spokane Falls & N. Ry. Co., 58 P. 244, 21 Wash. 324.

[35] Culver v. Marx, 144 N. W. 982, 155 Wis. 453.

[36] San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574, 52 Tex. Civ. App. 22.

[37] Chambers v. Farnham (C. C. A. Ill.) 236 F. 886, 150 C. C. A. 148; Jones v. S. H. Kress & Co., 153 P. 655, 54 Okl. 194.

[38] **Ind.** Town of Sellersburg v. Ford, 79 N. E. 220, 39 Ind. App. 94.

Ky. Louisville & N. R. Co. v. Earl's Adm'x, 94 Ky. 368, 22 S. W. 607.

Miss. Mobile & O. R. Co. v. Campbell, 75 So. 554, 114 Miss. 803.

Mo. Torreyson v. United Rys. Co. of St. Louis, 145 S. W. 106, 164 Mo. App. 366; Sotebier v. St. Louis Transit Co., 102 S. W. 651, 203 Mo. 702.

Tex. Yellow Pine Paper Mill Co. v. Lyons (Civ. App.) 159 S. W. 909; Southern Kansas Ry. Co. of Texas v. Sage (Civ. App.) 80 S. W. 1038, reversed 84 S. W. 814, 98 Tex. 438.

[39] Texas & N. O. R. Co. v. Walker, 125 S. W. 99, 58 Tex. Civ. App. 615.

[40] **Ga.** Deen v. Wheeler, 67 S. E. 212, 7 Ga. App. 507.

Idaho. Soule v. First Nat. Bank of Ashton, 140 P. 1098, 26 Idaho, 66.

Mich. Chapin v. Ann Arbor R. Co., 133 N. W. 512, 167 Mich. 648.

Pa. Duffy v. York Haven Water & Power Co., 88 A. 935, 242 Pa. 146.

R. I. Podrat v. Narragansett Pier R. Co., 78 A. 1041, 32 R. I. 255.

Tex. Caruthers v. Link (Civ. App.) 154 S. W. 330; Missouri, K. & T. Ry. Co. of Texas v. Wasson Bros., 126 S. W. 664, 59 Tex. Civ. App. 239; Stewart v. Jacob Sachs & Co., 96 S. W. 1091, 43 Tex. Civ. App. 530.

[41] Komrs v. People, 73 P. 25, 31 Colo. 212; Shinn v. State, 68 Ind. 423; People v. McInerney, 5 N. Y. Cr. R. 47.

to be a criminal offense,[42] that the flight of defendant was shown,[43] and that a witness was an accomplice.[44]

C. Assumption of Nonexistence of Facts

Instructions ignoring evidence, see post, § 144.

§ 81. Where there is some evidence of particular fact

Where there is some evidence of the existence of a fact in issue, an instruction is erroneous which assumes its nonexistence.[45]

§ 82. Where no conflict in evidence

Where there is no conflict in the testimony, and no room to hesitate or doubt that a certain fact exists, an instruction should not assume that such fact is or may be doubtful.[46]

[42] **Ind.** Smith v. State, 115 N. E. 943, 186 Ind. 252; Hoover v. State, 68 N. E. 591, 161 Ind. 348.

Iowa. State v. Evans, 97 N. W. 1008, 122 Iowa, 174; State v. Archer, 73 Iowa, 320, 35 N. W. 241.

Kan. State v. Horne, 9 Kan. 119.

Mo. State v. Holloway, 56 S. W. 734, 156 Mo. 222.

[43] State v. Mangana, 112 P. 693, 33 Nev. 511; State v. Belknap, 87 P. 934, 44 Wash. 605.

[44] Winfield v. State, 72 S. W. 182, 44 Tex. Cr. R. 475.

[45] **Ala.** Georgia Home Ins. Co. v. Allen, 30 So. 537, 128 Ala. 451; De Loach Mills Mfg. Co. v. Middlebrooks, 95 Ala. 459, 10 So. 917.

Ga. Shippey Bros. & White v. Owens, 86 S. E. 407, 17 Ga. App. 127.

Ill. Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; Springfield Consol. Ry. Co. v. Gregory, 122 Ill. App. 607; Chicago, S. & St. L. R. Co. v. Beach, 29 Ill. App. 157.

Mich. Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157.

Minn. Simpson v. Krumdick, 28 Minn. 352, 10 N. W. 18.

Neb. Mutual Hail Ins. Co. of Wisconsin v. Wilde, 8 Neb. 427, 1 N. W. 384.

N. C. Powell v. Wilmington & W. R. Co., 68 N. C. 395.

Or. Isaacson v. Beaver Logging Co., 143 P. 938, 73 Or. 28.

Pa. Cross v. Tyrone Min. & Mfg. Co., 121 Pa. 387, 15 A. 643.

Wis. Fulmer v. Wightman, 87 Wis. 573, 58 N. W. 1106.

Instructions improper within rule. In an action for injuries from the kick of a horse, warranted gentle by the vendor, a requested instruction, that, to make the seller's statement amount to a warranty, it must be intended as such and so accepted by the purchaser, was properly refused, where the manner of presentation of the instruction assumed the absence of such intention without reference to the evidence, since, in the absence of evidence to the contrary, every one is presumed to intend the ordinary meaning of his words. Caruthers v. Balsley, 89 Ill. App. 559. In an action by an employé for injuries caused by a machine, a charge which assumes that plaintiff did not know the machine was dangerous is erroneous when plaintiff had seen the machine in operation for six months. B. F. Avery & Sons v. Meek, 96 Ky. 192, 28 S. W. 337.

[46] Hauk v. Brownell, 120 Ill. 161, 11 N. E. 416; Wintz v. Morrison, 17 Tex. 372, 67 Am. Dec. 658.

CHAPTER V

COMMENT BY COURT ON MERITS OR CONDUCT OF CAUSE OR PARTIES

§ 83. Statement of rule.
84. Applications of rule.
85. Qualifications of rule.

§ 83. Statement of rule

A litigant has a right to a trial by a fair and impartial jury, whose consideration of his cause is not influenced by language of the court which will create resentment or prejudice against him or sympathy for the opposing side,[1] and where one invokes a judicial remedy given to him by the law the court should not make use of language calculated to make the jury think that the plaintiff, in bringing the action, is doing something inequitable, oppressive, or savoring of sharp practice.[2]

§ 84. Applications of rule

In a criminal case it is improper for the court to speak favorably of the conduct or behavior of the prosecuting witness.[3] It is improper so to frame instructions as to be likely to induce the jury not to give to the case in hand a careful and full consideration, or as to be apt to unduly hasten their deliberations,[4] and it will ordinarily be error for the court to speak of the possible effect of the termination of the suit one way or the other upon other similar cases or upon the interests of the general public.[5]

§ 85. Qualifications of rule

The delay of a party in bringing an action may be such as to be proper for the consideration of the jury, in which event it is,

[1] Monier v. Philadelphia Rapid Transit Co., 75 A. 1070, 227 Pa. 273.

[2] Randolph v. McCain, 34 Ark. 696; Westberry v. Clanton, 72 S. E. 238, 136 Ga. 795; Ludden v. Clemmons, 16 Neb. 506, 20 N. W. 856.

[3] People v. MacDonald, 140 P. 256, 167 Cal. 545.

[4] Skinner v. Stifel, 55 Mo. App. 9.

Speaking of matter in controversy as trifling. An instruction in an action to recover damages caused by the trespassing of stock, as follows: "I suppose that it is necessary that courts should try these cases, but it is a sad commentary on the sense of the people that such slight cause as is in this case should be tried by them; * * * that in such trifling matters parties could not arrange them without going into court, where there is such an amount of costs. The only question in this case is as to the costs in the main," etc., is prejudicial to plaintiff. Ludden v. Clemmons, 16 Neb. 506, 20 N. W. 856.

[5] Byles v. Hazlett, 11 Wkly. Notes Cas. (Pa.) 212, 29 Pittsb. Leg. J. 276.

of course, improper to instruct the jury to take no account of such delay.[6]

It is not improper for the court to state that the fact that the plaintiff has brought the suit constitutes no reason for giving him a verdict,[7] nor for the court to refer to the inconsistency between defenses set up by the defendant in his answer,[8] and where the course of the trial is such that considerations not pertaining to the justice or legality of the contention of a party are likely to affect the deliberation of the jury, it is proper for the court to address itself directly to such considerations, for the purpose of preventing such result.[9]

[6] Shadock v. Alpine Plank Road Co., 79 Mich. 7, 44 N. W. 158.

[7] Rose v. West Philadelphia Ry. Co. (Pa.) 12 A. 78.

[8] McCusker v. Mitchell, 36 A. 1123, 20 R. I. 13.

[9] Magee v. City of Troy, 48 Hun, 383, 1 N. Y. Supp. 24, judgment affirmed 119 N. Y. 640, 23 N. E. 1148.

CHAPTER VI

QUESTIONS OF LAW IN CIVIL CASES

§ 86. General rule.
87. Particular questions of law.
88. Construction and effect of written instruments.
89. Matters relating to contracts.
90. Interpretation and effect of deeds.
91. Questions relating to negligence.
92. Construction and effect of pleadings.
93. Burden of proof, admissibility of evidence, and competency of witnesses.
94. Statutes and ordinances.
95. Foreign laws.
96. Effect of error in submitting question of law to jury.

§ 86. General rule

It is the province and duty of the court in civil cases to instruct the jury as to the general rules of law applicable to the issues and the facts.[1] A charge stating the legal conclusions which will result from the establishment of certain facts is not objectionable as a charge upon the facts or the weight of evidence.[2] Ac-

[1] **U. S.** (C. C. Mass.) Nason v. United States, Fed. Cas. No. 10,024, 1 Gall. 53.

Del. State v. Keen, 82 A. 600, 3 Boyce, 224.

Ga. Telfair County v. Webb, 47 S. E. 218, 119 Ga. 916.

Ind. Vivian Collieries Co. v. Cahall, 110 N. E. 672, 184 Ind. 473.

Kan. Atchison, T. & S. F. Ry. Co. v. Woodson, 100 P. 633, 79 Kan. 567.

Ky. Maltus v. Shields, 2 Metc. 553; Cincinnati, N. O. & T. P. R. Co. v. Silvers, 126 S. W. 120.

La. Union Bank v. Thompson, 8 Rob. 227.

Me. Grout v. Nichols, 53 Me. 383.

Mass. Fay v. Dudley, 124 Mass. 266.

Mich. McCain v. Smith, 137 N. W. 616, 172 Mich. 1.

Mo. De Ford v. Johnson (Sup.) 177 S. W. 577; Bamberge v. Supreme Tribe of Ben Hur, 139 S. W. 235, 159 Mo. App. 102; Flournoy v. Andrews, 5 Mo. 513.

Neb. Bartling v. Behrends, 20 Neb. 211, 29 N. W. 472.

Okl. Missouri, O. & G. Ry. Co. v. Davis, 154 P. 503, 54 Okl. 672.

Pa. Lilly v. Paschal's Ex'rs, 2 Serg. & R. 394.

S. C. Wylie v. Commercial & Farmers' Bank, 41 S. E. 504, 63 S. C. 406.

Tex. St. Louis & S. F. Ry. Co. v. Lane (Civ. App.) 118 S. W. 847.

Va. Picket v. Morris, 2 Wash. 255.

[2] **Ga.** Southern Ry. Co. v. Chitwood, 45 S. E. 706, 119 Ga. 28; Pierce v. Atlanta Cotton Mills, 79 Ga. 782, 4 S. E. 381.

Iowa. Pritchett v. Overman, 3 G. Greene, 531.

Kan. Haines v. Goodlander, 84 P. 986, 73 Kan. 183.

Mo. Harris v. Woody, 9 Mo. 113; Stewart v. Sparkman, 75 Mo. App. 106; Dunn v. Henley, 24 Mo. App. 579.

Neb. Schmuck v. Hill, 96 N. W. 158, 2 Neb. (Unof.) 79.

S. C. Kean v. Landrum, 52 S. E. 421, 72 S. C. 556.

Tex. Etter v. Stampp & Eichelberger (Civ. App.) 204 S. W. 143; Kaack v. Stanton, 112 S. W. 702, 51 Tex. Civ. App. 495; Houston & T. C. R. Co. v. White, 56 S. W. 204, 23 Tex. Civ. App. 280; Taylor, B. & H. Ry.

cordingly, not only is it error in a civil case to tell the jury that they are the judges of the law as well as of the facts,[3] but it is the duty of the jury to receive and act upon the law as given to them by the court,[4] and the court may so instruct.[5]

Instructions which permit the jury to pass upon questions of law are erroneous, and, if requested, are properly refused.[6] Thus

Co. v. Taylor, 79 Tex. 104, 14 S. W. 918, 23 Am. St. Rep. 316.

Va. Green v. Crain, 12 Grat. 252.

Instructions proper within rule. A charge that a failure to deliver a telegraph message without satisfactory explanation is some evidence upon which the jury may base a verdict for punitive damages. Bush v. Western Union Telegraph Co., 76 S. E. 197, 93 S. C. 176. A charge that if there is a river bottom filled to considerable depth with sand, gravel, or other porous material, over which a stream runs on the surface, and through and in which the water moves underground, enough of it rising to supply the surface stream, and through a larger space in the porous material, but in the same general direction as the surface stream, and in connection with it, and in a course and within a space reasonably well defined, then such underground portion would be a part of the water course. City of Los Angeles v. Pomeroy, 57 P. 585, 124 Cal. 597. A charge that it was the duty of the carrier to stop the train long enough at its station for plaintiff to alight was not erroneous as an expression of opinion as to what would be negligence. Western & A. R. Co. v. Burnham, 50 S. E. 984, 123 Ga. 28.

[3] Livingston v. Taylor, 63 S. E. 694, 132 Ga. 1; Atlantic & B. Ry. Co. v. Bowen, 54 S. E. 105, 125 Ga. 460; Ferguson v. Moore, 39 S. W. 341, 98 Tenn. 342; Fink v. Evans, 95 Tenn. 413, 32 S. W. 307.

[4] United States v. Ullman (D. C. N. Y.) Fed. Cas. No. 16,593, 4 Ben. 547; Lecklieder v. Chicago City Ry. Co., 172 Ill. App. 557; Eckels v. Hawkinson, 138 Ill. App. 627; Moore v. Hinkle, 50 N. E. 822, 151 Ind. 343; Brady v. Clark, 12 Lea (Tenn.) 323.

[5] Brown v. City of Atlanta, 66 Ga. 71; Thornton v. Lane, 11 Ga. 459; Brun v. Chicago City R. Co., 183 Ill. App. 129; Hart v. Menefee (Tex. Civ. App.) 45 S. W. 854; First Congregational Meeting House Soc. v. Town of Rochester, 66 Vt. 501, 29 A. 810.

[6] **U. S.** (C. C. A. Iowa) What Cheer Coal Co. v. Johnson, 56 F. 810, 6 C. C. A. 148; (C. C. Or.) Brown v. Oregon King Min. Co., 110 F. 728.

Ala. Jeffries v. Pitts, 75 So. 959, 200 Ala. 201; Greenwood Café v. Walsh, 74 So. 82, 15 Ala. App. 519; Avondale Mills v. Bryant, 63 So. 932, 10 Ala. App. 507; C. H. Gilliland & Son v. Martin, 42 So. 7, 149 Ala. 672.

Ariz. Jordan v. Duke, 36 P. 896, 4 Ariz. 278.

Cal. Tompkins v. Montgomery, 55 P. 997, 123 Cal. 219; Dean v. Grimes, 72 Cal. 442, 14 P. 178.

Conn. Beardsley v. Irving, 71 A. 580, 81 Conn. 489.

D. C. Reid v. Anderson, 13 App. D. C. 30.

Ill. F. W. Cook Brewing Co. v. Goldblatt, 184 Ill. App. 266; Peoria, Bloomington & Champaign Traction Co. v. O'Connor, 149 Ill. App. 598; People v. Welch, 143 Ill. App. 191; Ware v. Souders, 120 Ill. App. 209; Sexton v. Barrie, 102 Ill. App. 586.

Ind. Prudential Ins. Co. of America v. Union Trust Co., 105 N. E. 505, 56 Ind. App. 418.

Kan. Shrader v. McDaniel, 189 P. 954, 106 Kan. 755; Aaron v. Missouri & Kansas Telephone Co., 114 P. 211, 84 Kan. 117.

Ky. Black v. Davenport, 224 S. W. 500, 189 Ky. 40; Illinois Cent. R. Co. v. Dallas' Adm'x, 150 S. W. 536, 150 Ky. 442; Smith v. Cornett, 38 S. W. 689, 18 Ky. Law Rep. 818.

Md. Dronenburg v. Harris, 71 A. 81, 108 Md. 597; New York, P. & N. R. Co. v. Jones, 50 A. 423, 94 Md. 24.

Mich. Stearns v. Vincent, 15 N. W. 86, 50 Mich. 209, 45 Am. Rep. 37; Battershall v. Stephens, 34 Mich. 68.

Mo. Niehaus v. Gillanders (App.)

an instruction that the court will sanction any verdict the jury

184 S. W. 949; Burns v. Limerick, 165 S. W. 1166, 178 Mo. App. 145; Barton v. City of Odessa, 82 S. W. 1119, 109 Mo. App. 76; Carroll v. Campbell, 110 Mo. 557, 19 S. W. 809.

Mont. Gallick v. Bordeaux, 78 P. 583, 31 Mont. 328.

Or. Hoag v. Washington-Oregon Corporation, 144 P. 574, 75 Or. 588, judgment modified on rehearing 147 P. 756, 75 Or. 588; Oberlin v. Oregon-Washington R. & Navigation Co., 142 P. 554, 71 Or. 177.

Pa. Poundstone v. Jones, 38 A. 714, 182 Pa. 574; Work v. Maclay's Lessee, 2 Serg. & R. 415.

S. C. Duren v. Kee, 41 S. C. 171, 19 S. E. 492.

Tex. Wall v. Lubbock, 118 S. W. 886, 52 Tex. Civ. App. 405.

Vt. Coolidge v. Taylor, 80 A. 1038, 85 Vt. 39.

Va. Keen's Ex'r v. Monroe, 75 Va. 424.

Wash. J. L. Mott Iron Works v. Metropolitan Bank, 139 P. 36, 78 Wash. 294; Patterson v. Wenatchee Canning Co., 101 P. 721, 53 Wash. 155.

W. Va. Lawrence's Adm'r v. Hyde, 88 S. E. 45, 77 W. Va. 639; Britton v. South Penn Oil Co., 81 S. E. 525, 73 W. Va. 792; Tracewell v. Wood County Court, 52 S. E. 185, 58 W. Va. 283.

Wis. Guinard v. Knapp-Stout & Company, 90 Wis. 123, 62 N. W. 625, 48 Am. St. Rep. 901.

Illustrations of instructions improper within rule. An instruction, in ejectment against one claiming through P., that if the jury believe that P., now deceased, had possession of the land under claim of ownership, and adversely to all the world, from a period from about 1875 to 1885, and if they find that at and just before her death in 1901 she had such adverse possession, then the presumption is that during the intervening time between say 1885 and the death of P., the adverse possession of P. continued, and would operate a bar to this suit under the defense of adverse possession. Hays v. Lemoine, 47 So. 97, 156 Ala. 465. An instruction, in an action for the killing of a dog, where defendant answered, alleging that the dog had recently killed sheep and was approaching defendant's sheep when killed, and plaintiff replied, alleging that he had an agreement with defendant whereby his dogs were to be allowed to run at large on defendant's premises, and he was to be liable for double damages for injury they might cause, telling the jury that if they believed from the evidence that the killing of the dog was wrongful, and done without good cause, they should find for plaintiff, was error, because submitting to the jury the principal issue of law in the case. Brisco v. Laughlin, 143 S. W. 65, 161 Mo. App. 76. An instruction that plaintiff, in suing out an attachment, must have acted so as not to "unjustly or wrongfully" injure the rights of other creditors. Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S. W. 975. An instruction, in an action on a check by an indorsee against the maker, who had stopped payment, that if the indorsee accepted the notes of the payee and his wife for the amount of the check, and released the maker from liability, the verdict should be for the maker, was erroneous in failing to require the jury to find the facts necessary to constitute a legal release, thus leaving to the jury a question of law. Weant v. Southern Trust & Deposit Co., 77 A. 289, 112 Md. 463. Instructions which permit the jury to construe a contract. Empire State Surety Co. v. Schillinger Bros., 167 Ill. App. 632. A charge, in an action for breach of contract, that if the jury believed from the evidence that plaintiffs broke the contract, if they did, by demanding to be released from a bond of one of the defendants to the state, and by refusing to stay on such bond, if they did, then they could not recover. Ben. C. Jones & Co. v. Gammel-Statesman Pub. Co. (Tex. Civ. App.) 94 S. W. 191, reversed 99 S. W. 701, 100 Tex. 320, 8 L. R. A. (N. S.) 1197. An instruction, in an action on contracts for acquiring a railroad right of way, which left it to the jury to determine how much of the work was done by "defendant," inadvertently naming defendant instead of plaintiff, and if they found

may return is erroneous,[7] as is an instruction which leaves it to

that the work was not completed then to find why it was not completed, and left it to the jury to find the legal consequences of the failure to complete the work. Harrison v. Franklin, 103 S. W. 585, 126 Mo. App. 366. Instructions which left to the jury to decide what acts the law required plaintiff to perform before he could rescind a contract. Gehr v. Hagerman, 26 Ill. 438. An instruction which leaves to the determination of the jury the question whether there has been at a particular time a legal transfer of the title to real estate. Lence v. Insurance Co. of North America, 147 Ill. App. 259. A charge in an action for false imprisonment, requiring the jury to find that "plaintiff was illegally imprisoned." Roth v. Shupp, 50 A. 430, 94 Md. 55. An instruction, in an action for the balance of the price of goods, leaving the question of interest, except the rate thereof, wholly to the jury, indicating no time or event from which it should be calculated. Buchanan v. Caine, 106 N. E. 885, 57 Ind. App. 274. A charge, in an action for the cost of repairing certain dams under a logging contract: "You know more or less about this class of litigation, about lumber business and logging contracts, and the way this business is carried on. Use your common sense, and do what is right between these parties." George W. Roby Lumber Co. v. Gray, 73 Mich. 356, 41 N. W. 420. A charge permitting the jury to determine what constitutes a reasonable precaution to prevent injuries from an excavation in a street is erroneous. City of Montgomery v. Bradley & Edwards, 48 So. 809, 159 Ala. 230. A charge, in an action against a city for an assault committed by defendant's street commissioner who was resurfacing a street, the defense being that plaintiff, a street car driver, was unlawfully removing gravel from the tracks, to find for defendant if the jury should find that plaintiff was himself engaged in an unlawful act, and that his injury was the direct result thereof, was properly refused, as submitting to the jury the legal status of plaintiff's act in removing the gravel. Barree v. City of Cape Girardeau, 112 S. W. 724, 132 Mo. App. 182. An instruction, submitting a question whether an agent's authority to sell gave implied authority to employ a broker, was erroneous as submitting a question of law, in the absence of evidence that the employment of the broker was one of the necessary things to be done for the proper exercise of the authority to sell. Doggett v. Greene, 98 N. E. 219, 254 Ill. 134, reversing judgment 163 Ill. App. 369. An instruction, in an action against a railway company for the killing of a horse which escaped from plaintiff's field to an adjacent field and thence to adjacent railroad tracks, which submitted to the jury the question whether the horse was lawfully in the latter field. Carpenter v. Chicago & A. Ry. Co., 95 S. W. 985, 119 Mo. App. 204. An instruction, in an action of claim and delivery against a sheriff for horses taken on attachment, that, if the jury believed plaintiff bought them in good faith from the attachment debtor, and was prevented from getting possession by the wrongful act of the attaching creditor, they should find for plaintiff, was erroneous, in leaving to the jury a question of law, whether any act of the attaching creditor was wrongful. Pearce v. Boggs, 99 Cal. 340, 33 P. 906. An instruction, in an action for breach of a contract of sale, the seller not having filed a bond required by the contract within a reasonable time, that, if the bond was filed within such time as to afford the buyer all the protection he was entitled to under the contract, plaintiff was entitled to recover. Equitable Mfg. Co. v. Howard, 41 So. 628, 148 Ala. 664. A charge, in an action for a seller's breach of contract, to find for plaintiff unless jury believed that they breached that part of agreement concerning the advancement of money by them to defendant was erroneous as leaving it to the jury to determine

[7] Bockoven v. Board of Sup'rs of Lincoln Tp., Clark County, 83 N. W. 335, 13 S. D. 317.

the jury to determine what are the facts necessary to be proved to enable a plaintiff to recover,[8] or an instruction leaving it to the jury to discover and determine from all the facts in the case whether the defendant is liable.[9] The duty of the trial court to instruct as to the law exists, even under constitutional provisions which declare that, as to the particular action, the jury shall be the judges of the law and the facts.[10]

§ 87. Particular questions of law

The question of ownership is frequently one of law.[11] What is a reasonable time within which to perform an act, when depending on undisputed facts, may be a question of law.[12] Where the evidence relative to the manner of conducting a business is undisputed, it is the province of the court as a matter of law to tell the jury whether such business constitutes interstate commerce.[13] The facts may be such as to show that there has been

what would constitute breach of the contract to advance money. E. F. Spears & Sons v. Winkle, 186 Ky. 585, 217 S. W. 691. An instruction, where there is a sharp conflict in the testimony, which tells the jury that any one who commits a wrongful act is liable for any natural injury resulting therefrom, although such result could not have been contemplated or foreseen as the probable result of such act. Brownback v. Frailey, 78 Ill. App. 262. A charge, in an action for damages for cutting timber on certain land, the title to which both plaintiff and defendant claimed, the court charged that, if the jury believed from the preponderance of the evidence that the defendant cut any timber upon the lands set out in the petition which the jury believed were the lands of the plaintiff, it should find for them, otherwise it should find for defendant. Burt & Brabb Lumber Co. v. Hurst, 110 S. W. 242, 33 Ky. Law Rep. 270. An instruction, in trespass quare clausum fregit, that the defendant was not liable for punitive damages unless his agents, when in the plaintiff's house, acted recklessly and in disregard of her rights, without in any manner defining her rights. Gusdorff v. Duncan, 50 A. 574, 94 Md. 160. An instruction that, unless it was defendant's duty to keep its pipe line in such condition that it was not an obstruction to the creek in question to float railroad ties out of it, they should find for defendant. Cumberland Pipe Line Co. v. Stambaugh, 126 S. W. 106, 137 Ky. 528. 31 L. R. A. (N. S.) 1131. An instruction, in an action for damages for diverting water from an irrigating ditch, that, where the court in a former action had found certainly upon any point that had arisen in this action, its finding must control, and was conclusive upon the parties thereto, is erroneous, as leaving to the jury the construction of the findings of the court, which the court should have itself construed and explained to the jury. Dalton v. Kelsey, 114 P. 464, 58 Or. 244.

[8] Dalton v. Redemeyer, 133 S. W. 133, 154 Mo. App. 190.

[9] Cook v. Mackrell, 70 Pa. 12.

[10] Jones v. Murray, 66 S. W. 981. 167 Mo. 25.

[11] Matson v. Ripley, 70 Ill. App. 86.

[12] Long-Bell Lumber Co. v. Stump (C. C. A. Ark.) 86 F. 574, 30 C. C. A. 260; American Window Glass Co. v. Indiana Natural Gas & Oil Co., 76 N. E. 1006, 37 Ind. App. 439; Louisville & N. R. Co. v. Crain, 224 S. W. 1063, 189 Ky. 431; Williams v. Powell, 101 Mass. 467, 3 Am. Rep. 396; Zineman & Bro. v. William Harris, 6 Pa. Super. Ct. 303.

[13] W. T. Rawleigh Co. v. Van Duyn, 188 P. 945, 32 Idaho, 767.

a wrongful conversion of goods as a matter of law, in which case the court should so instruct.[14] An instruction that cohabitation and declarations of the parties that they are husband and wife do not constitute a marriage, in the absence of an agreement, express or implied, is not objectionable as a comment on the evidence;[15] nor is it a charge on the facts to instruct as to the effect of a pardon,[16] or as to elements of damage having universal judicial recognition.[17]

Whether a party injured by the tort of another has fulfilled his duty to exercise the diligence of an ordinarily prudent man to minimize his damages is one of law for the court, if, under the evidence, only one inference can be drawn as to the plaintiff's duty,[18] and where certain facts, as a matter of law, constitute a waiver of rights conferred by contract or otherwise, it will be proper for the court to so charge.[19] It is not only the proper function, but the duty, of the court to instruct as to the use of words having a legal technical meaning.[20] So the court should declare the legal force of a former judgment set up in bar of the pending action.[21]

§ 88. Construction and effect of written instrument

It is the province and duty of the court, as a general rule, to construe written documents which have been introduced in evidence and to declare their legal effect,[22] and an instruction so de-

[14] Sever Wild v. McLaughlin, 79 N. C. 153.

[15] Schwingle v. Keifer (Tex. Civ. App.) 135 S. W. 194.

[16] Costley v. Galveston City Ry. Co., 70 Tex. 112, 8 S. W. 114.

[17] Jennings v. Edgefield Mfg. Co., 52 S. E. 113, 72 S. C. 411.

[18] Boyd v. Grove, 173 P. 310, 89 Or. 80.

[19] Grout v. Nichols, 53 Me. 383; Hollings v. Bankers' Union of the World, 41 S. E. 90, 63 S. C. 192.

[20] Burrell v. Southern California Canning Co., 169 P. 405, 35 Cal. App. 162.

[21] Richardson v. City of Boston, 24 How. 188, 16 L. Ed. 625; Young v. Byrd, 124 Mo. 590, 28 S. W. 83, 46 Am. St. Rep. 461; Holbrook v. J. J. Quinlan & Co., 80 A. 339, 84 Vt. 411.

[22] **U. S.** (Sup.) Bliven v. New England Screw Co., 23 How. 420, 433, 16 L. Ed. 510, 514; Turner v. Yates, 16 How. 14, 14 L. Ed. 824; (C. C. Mo.) Andrews v. Graves, Fed. Cas. No. 376, 1 Dill. 108.

Cal. Dean v. Grimes, 72 Cal. 442, 14 P. 178; McGarvey v. Little, 15 Cal. 27.

Del. Schilansky v. Merchants' & Manufacturers' Fire Ins. Co., 55 A. 1014, 4 Pennewill, 293.

Fla. Upchurch v. Mizell, 40 So. 29, 50 Fla. 456.

Ga. McCullough Bros. v. Armstrong, 45 S. E. 379, 118 Ga. 424; Home Friendly Soc. v. Berry, 94 Ga. 606, 21 S. E. 583.

Ill. Bradish v. Grant, 119 Ill. 606, 11 N. E. 258.

Ind. Zeuor v. Johnson, 107 Ind. 69, 7 N. E. 751; Louthain v. Miller, 85 Ind. 161.

Iowa. Warren v. Chandler, 98 Iowa, 237, 67 N. W. 242; Potter v. Wooster, 10 Iowa, 334; Thorp v. Craig, Id. 461.

Kan. Dobbs v. Campbell, 72 P.

claring does not fall within the rule against charging on the facts or the weight of the evidence.[23] An instruction that certain documents are to be construed together is not improper, as permitting the jury to construe them.[24] But while, as a general rule, the interpretation of a written instrument is a question of law for the court, this rule presupposes the absence of a dispute as to the facts and the absence of ambiguities,[25] and where the language employed in such instrument is not free from ambiguity, or is equivocal, and its interpretation depends upon the sense in which the words were used, in view of the subject-matter to which they relate, the relation of the parties, and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact.[26] The rule that the court must determine the legal meaning of documentary evidence is inapplicable, where the dispute is not as to the legal meaning of a document, but as to its tendency to prove one side or the

273, 66 Kan. 805; Akin v. Davis, 11 Kan. 580.

Mich. Battershall v. Stephens, 34 Mich. 68.

Mo. Milstead v. Equitable Mortg. Co., 49 Mo. App. 191; Wright v. Fonda, 44 Mo. App. 634.

Or. H. R. Wyllie China Co. v. Vinton, 192 P. 400; 97 Or. 350.

Pa. Halfman v. Pennsylvania Boiler Ins. Co., 160 Pa. 202, 28 A. 837; Shaffer v. Corson, 141 Pa. 256, 21 A. 647, 28 Wkly. Notes Cas. 121.

S. C. Bedenbaugh v. Southern Ry. Co., 48 S. E. 53, 69 S. C. 1; Thompson v. Family Protective Union, 45 S. E. 19, 66 S. C. 459; Jones v. Swearingen, 42 S. C. 58, 19 S. E. 947.

Tex. Sherman Slaughtering & Rendering Co. v. Texas Nursery Co. (Civ. App.) 224 S. W. 478; J. M. Radford Grocery Co. v. Jamison (Civ. App.) 221 S. W. 998; St. Louis, S. F. & T. Ry. Co. v. Birge-Forbes Co. (Civ. App.) 139 S. W. 3; Bennett v. Hollis, 9 Tex. 437; City of San Antonio v. Lewis, 9 Tex. 69.

Va. Houff & Holler v. German American Ins. Co., 66 S. E. 831, 110 Va. 585; Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. 877.

Meaning of plain language. An instruction which submits to the jury the meaning of language which is plain and can have but one meaning is erroneous, as intimating that the court is of opinion that the jury may rightfully place upon the language some other construction. Dime Savings & Trust Co. v. Jacobson, 191 Ill. App. 275.

[23] **Iowa.** Lucas v. Snyder, 2 G. Greene, 499; Durham v. Daniels, Id., 518.

S. C. Metz v. Metz, 91 S. E. 864, 106 S. C. 514; Brown v. Moore, 26 S. C. 160, 2 S. E. 9.

Tex. Temple v. Duran (Civ. App.) 121 S. W. 253; Tinsley v. McIlhenny, 70 S. W. 793, 30 Tex. Civ. App. 352; Howell v. Hanrick (Civ. App.) 24 S. W. 823; Wright v. Thompson, 14 Tex. 558.

[24] Anglo-American Provision Co. v. Prentiss, 157 Ill. 506, 42 N. E. 157; Chicago & A. R. Co. v. Matthews, 48 Ill. App. 361.

[25] Cutler v. Spens, 158 N. W. 224, 191 Mich. 603.

[26] School Dist. No. 8 of Thompson v. Lynch, 33 Conn. 330; Warner v. Miltenberger's Lessee, 21 Md. 264, 83 Am. Dec. 573; Young v. Stephens, 66 Mo. App. 222; Kenyon v. Knights Templars & Masonic Mut. Aid Ass'n, 25 N. E. 299, 122 N. Y. 247; Douglass & Varnum v. Village of Morrisville, 95 A. 810, 89 Vt. 393.

other of an issue of fact, and different inferences may fairly be drawn from it as to the truth.[27] Thus a case which turns upon the proper conclusions to be drawn from a commercial correspondence in connection with other facts and circumstances is properly referred to a jury,[28] and where the controlling question is whether an ambiguous written instrument relates to certain property it is proper for the court to submit the question to the jury for their decision.[29]

§ 89. Matters relating to contracts

The essentials of a contract are to be determined by the court,[30] and instructions are erroneous which leave it to the jury to say whether the undisputed facts in evidence, or the facts found by the jury from the evidence, constitute a contract, either oral or written,[31] or whether certain conversations preliminary to a contract were a part thereof,[32] or whether an alleged contract is supported by a valuable consideration.[33] Ordinarily the construction of a written contract is for the court,[34] which should embody such construction in its charge,[35] and instructions which permit or require the jury to interpret such a writing are erroneous and properly refused.[36] An instruction so construing a contract put

[27] Carp v. Queen Ins. Co., 79 S. W. 757, 104 Mo. App. 502.

[28] Rankin v. Fidelity Insurance, Trust & Safe Deposit Co., 23 S. Ct. 553, 189 U. S. 242, 47 L. Ed. 792.

[29] Hanlon v. Hanlon, 29 S. E. 712, 103 Ga. 562.

[30] Gowen v. Kehoe, 71 Ill. 66; Witt v. Gallemore, 163 Ill. App. 649; W. W. Kendall Boot & Shoe Co. v. Bain, 46 Mo. App. 581.

[31] Turner v. Owen, 122 Ill. App. 501; Moody v. Standard Wheel Co., 20 Ind. App. 422, 50 N. E. 890; Erskine v. Wilson, 27 Tex. 117. See W. C. Sterling & Son Co. v. Watson & Bennett Co., 193 Mich. 11, 159 N. W. 381.

Implied contracts. Where the question is whether the parties, by oral communications and by their acts have entered into a contract, the conclusion to be deduced is not one of law, but of fact, and must be determined as such. Sines v. Superintendents of Poor, 55 Mich. 383, 21 N. W. 428.

[32] J. W. Bishop Co. v. Curran & Burton, 76 A. 275, 30 R. I. 504.

[33] Lumpkin v. Strange (Mo. App.) 179 S. W. 742.

[34] Paepcke-Leicht Lumber Co. v. Talley, 153 S. W. 833, 106 Ark. 400; Brown Bag Filling Mach. Co. v. United Smelting & Aluminum Co., 107 A. 619, 93 Conn. 670; Leas v. Grubbs, 1 Wils. (Ind.) 301; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210.

[35] Timmons v. McKinzie, 189 P. 627, 21 Ariz. 433; Aaron v. Missouri & Kansas Telephone Co., 114 P. 211, 84 Kan. 117; Blair v. Baird, 94 S. W. 116, 43 Tex. Civ. App. 134; Peyser v. Western Dry Goods Co., 92 P. 886, 48 Wash. 55.

[36] **Ala.** Cobb & Marston v. McKenzie, 60 So. 943, 7 Ala. App. 203; McEntyre v. Hairston, 44 So. 417, 152 Ala. 251; Phœnix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31.

Conn. In re Hotchkiss' Will, 92 A. 419, 88 Conn. 655.

Ga. John Mallock & Co. v. Kicklighter, 73 S. E. 1073, 10 Ga. App. 605.

Ill. Standard Mfg. Co. v. Slaughter, 122 Ill. App. 479; Beidler v. King, 108 Ill. App. 23, judgment affirmed

in evidence does not violate a statute prohibiting a judge from summing up or commenting on the evidence.[37]

The general rule that the construction of a contract is a matter to be determined by the court is subject to the qualification that the entire contract is in writing, needing nothing but an interpretation of its language by its own intrinsic light, or that, being by parol, there is no antagonism in the evidence by which it is sought to be established.[38] Where extrinsic facts are to be considered in connection with the written language of a contract in determining its meaning, very much must be left to the jury.[39] After the jury have found the facts showing the existence of an oral contract and its terms, it is ordinarily for the court to construe it and determine its effect.[40] The question of what is a good and legal cause for failure to carry out a contract should not be submitted to the jury.[41]

§ 90. Interpretation and effect of deed

An instruction as to the interpretation and legal effect of a deed admitted in evidence does not constitute a forbidden expression of opinion on the facts or a charge on the weight of evidence,[42] and is generally held to be within the province of the court.[43]

70 N. E. 763, 209 Ill. 302, 101 Am. St. Rep. 246; Hutchinson v. Dunham, 41 Ill. App. 107.

Ind. Brown v. Langner, 58 N. E. 743, 25 Ind. App. 538; Spence v. Owen County Com'rs, 117 Ind. 573, 18 N. E. 513.

Ky. Elkhorn & B. V. Ry. Co. v. Dingus, 220 S. W. 1047, 187 Ky. 812; Romans v. McGinnis, 160 S. W. 928, 156 Ky. 205.

Me. Libby v. Deake, 54 A. 856, 97 Me. 377.

Md. Doggett v. Tatham, 81 A. 376, 116 Md. 147; Williams v. Woods, 16 Md. 220; Baltimore & O. R. Co. v. Resley, 14 Md. 424.

Mass. Woodbury v. Sparrell Print, 84 N. E. 441, 198 Mass. 1.

N. Y. Schwartz v. Mann (Sup.) 155 N. Y. S. 209.

Tex. Magnolia Warehouse & Storage Co. v. Davis & Blackwell (Civ. App.) 153 S. W. 670.

Utah. Bailey v. Spalding-Livingston Investments Co., 136 P. 962, 43 Utah, 535.

[37] Randolph v. Govan, 14 Smedes & M. (Miss.) 9.

[38] Gardner v. Clark, 17 Barb. (N. Y.) 538.

[39] Gardner v. Clark, 17 Barb. (N. Y.) 538.

[40] Short v. Woodward, 79 Mass. (13 Gray) 86; Rhodes v. Chesson, 44 N. C. 336; Hastings' Adm'r v. Eckley's Adm'r, 8 Pa. 194.

[41] Harmison v. Fleming, 105 Ill. App. 43; La Porte v. Wallace, 89 Ill. App. 517.

Instructions improper within rule. An instruction, in an action for breach of a contract of marriage, that the jury should find for the plaintiff if they believed from the evidence that there was a contract of marriage between the parties, and the defendant failed to carry out the contract "without good and legal cause therefor," and plaintiff was damaged by reason of such failure. Bradley v. Schrayer, 204 Ill. App. 231.

[42] Berry v. Clark, 44 S. E. 824, 117 Ga. 964; Phœnix Ins. Co. of Hartford, Conn., v. Neal, 56 S. W. 91, 23 Tex. Civ. App. 427.

[43] West Missouri Land Co. v.

Whether an ambiguity in a deed is latent or patent should not be left to the jury to decide.[44]

§ 91. Questions relating to negligence

Where negligence is the basis of an action, it is the duty and province of the court to define the standard of care to which the defendant's conduct must conform,[45] and it is therefore error, in such an action, to tell the jury that they are the sole judges of the question of negligence,[46] or to charge that a party must exercise such a degree of care as the law requires,[47] or to charge that by negligence is meant a failure to observe that degree of care and vigilance which circumstances justly demands whereby another suffers injury.[48] The facts in a particular action may be such as to make the question of negligence one of law,[49] and where this is the case the court may so instruct,[50] without invading the province of the jury,[51] or making a forbidden comment

Thompson, 57 S. W. 1042, 157 Mo. 647.

Instructions not objectionable as leaving interpretation to jury. Where the trial court states to the jury that certain deeds are before them, if the jury find they are properly executed, and the court must construe them, and that it had attempted to do so, so far as it appeared necessary, and that that construction must be accepted as the true construction of the instruments, an objection that the court left to the jury the construction of the deeds is not well taken. Glover v. Gasque, 45 S. E. 113, 67 S. C. 18.

[44] Newman v. Lawless, 6 Mo. 279.

[45] Schindler v. Milwaukee, L. S. & W. Ry. Co., 43 N. W. 911, 77 Mich. 136; Casey v. Hoover, 89 S. W. 330, 114 Mo. App. 47; Id., 89 S. W. 336.

Instructions improper within rule. Instructions, in an action against an employer for injury to an employé struck by moving cars, that it was the engineer's duty to use ordinary care to prevent injuring employés; that if the employés in charge of the engine and cars did not use such care, and plaintiff was injured while using ordinary care, he could recover a specified amount of damages; and that plaintiff was bound to use ordinary care for his own safety; and that, though the engineer was negligent, if but for plaintiff's own negligence the injury would not have occurred, he could not recover. West Kentucky Coal Co. v. Davis, 128 S. W. 1074, 138 Ky. 667.

[46] Midland Val. R. Co. v. Bailey, 124 P. 987, 34 Okl. 193.

[47] Anderson v. Thunder Bay River Boom Co., 23 N. W. 776, 57 Mich. 216.

[48] Missouri, K. & T. Ry. Co. of Texas v. Wood (Tex. Civ. App.) 81 S. W. 1187.

[49] Hot Springs St. Ry. Co. v. Hildreth, 82 S. W. 245, 72 Ark. 572; Ohio, I. & W. Ry. Co. v. Kleinsmith, 38 Ill. App. 45, following Toledo, P. & W. Ry. Co. v. Bray, 57 Ill. 515; Snow v. Indianapolis & E. Ry. Co., 93 N. E. 1089, 47 Ind. App. 189; Fort Worth & R. G. Ry. Co. v. Eddleman, 114 S. W. 425, 52 Tex. Civ. App. 181.

Whether it is negligence for a passenger to stand on the platform of car of a rapidly moving commercial train is held to be a question of law in Alabama. Southern Ry. Co. v. Hayes, 69 So. 641, 194 Ala. 194.

[50] Crauf v. Chicago City Ry. Co., 85 N. E. 235, 235 Ill. 262, affirming judgment Chicago City Ry. Co. v. Crauf, 136 Ill. App. 66; Baltimore & O. S. R. Co. v. Kleespies, 78 N. E. 252, 39 Ind. App. 151, denying rehearing Baltimore & O. S. W. R. Co. v. Kleespies, 76 N. E. 1015, 39 Ind. App. 151; Gulf & S. I. R. Co. v. Adkinson, 77 So. 954, 117 Miss. 118.

[51] Chattanooga, R. & C. R. Co. v.

on the weight of the evidence.[52] The same rule applies where certain facts show, as a matter of law, that one was not guilty of contributory negligence,[53] and the court does not encroach on the province of the jury by charging on the effect of contributory negligence.[54] An instruction in a negligence case leaving it to the jury to say whether the defendant has been negligent, regardless of the provisions of a statute governing the subject-matter of the suit is erroneous.[55] An instruction which submits to the jury the determination of the question of whether certain acts of commission or omission of a party constitute negligence, without also submitting the facts bearing on such question, is held to be erroneous, as submitting a question of law.[56] It is held, however, that if an instruction in a negligence case contains a legal definition of negligence, the fact that it permits the jury to determine what acts or failure to act will make negligence will not render it objectionable as submitting a question of law.[57]

§ 92. Construction and effect of pleadings

The jury should not be permitted to determine what is alleged in the pleadings or to construe the effect of allegations therein, these being questions of law.[58] An instruction, therefore, which

Clowdis, 90 Ga. 258, 17 S. E. 88; Chicago, R. I. & P. Ry. Co. v. Dizney, 160 P. 880, 61 Okl. 176; Rice v. Lockhart Mills, 55 S. E. 160, 75 S. C. 150; Houston & T. C. R. Co. v. Hubbard (Tex. Civ. App.) 37 S. W. 25.

[52] Chicago, R. I. & G. Ry. Co. v. Sears (Tex. Civ. App.) 155 S. W. 1003; Texas & P. Ry. Co. v. Laverty, 4 Tex. Civ. App. 74, 22 S. W. 1047; Texas & P. Ry. Co. v. Mallon, 65 Tex. 115.

Instructions held not objectionable. An instruction that, if the jury believed an injury was caused both by the defective construction or unfitness of the engine for the purposes for which it was used and the negligence of the engineer and yard foreman, combined with the defect in the engine, the company would be liable. Missouri Pac. Ry. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838. An instruction that, if a scaffold was built by defendant for the use of plaintiff, and plaintiff was rightfully on it, and it fell while being used in a proper manner, the presumption was that the scaffold was either defective in material or construction in the first instance, or had become so since it was put in use, and that defendant would be liable, does not violate a constitutional provision declaring that judges shall not charge juries on the facts or comment thereon. Cleary v. General Contracting Co., 101 P. 888, 53 Wash. 254.

[53] Rainey v. New York Cent. & H. R. R. Co., 68 Hun, 495, 23 N. Y. S. 80; Houston Belt & Terminal Ry. Co. v. Woods (Tex. Civ. App.) 149 S. W. 372.

[54] Musick v. Borough of Latrobe, 39 A. 226, 184 Pa. 375, 42 Wkly. Notes Cas. 209.

[55] Searcy v. Golden, 188 S. W. 1098, 172 Ky. 42.

[56] Louisville Bridge Co. v. Iring, 203 S. W. 531, 180 Ky. 729; Winslow v. Missouri, K. & T. Ry. Co. (Mo. App.) 192 S. W. 121.

[57] Conner v. Citizens' St. R. Co., 45 N. E. 662, 146 Ind. 430; Henderson v. Heman Const. Co., 199 S. W. 1045, 198 Mo. App. 423; Case v. Atlanta & C. A. L. Ry., 92 S. E. 472, 107 S. C. 216.

[58] Eggleston v. The Fair, 167 Ill. App. 518; Erb v. German-American Ins. Co. of New York, 83 N. W. 1053,

leaves to the jury the determination of what are the material allegations in the pleadings or the material issues in the case, is erroneous.[59] Thus an instruction that every material allegation in the complaint of plaintiff, not denied by the answer, must be taken as true for the purpose of the action, is erroneous,[60] as is an instruction to find for the plaintiff if the allegations of his complaint are "substantially" proved, since thereby the jury are left to say how far the evidence of the plaintiff may depart from such allegations without defeating his right of recovery,[61] and

112 Iowa, 357; Oliver v. Chapman, 15 Tex. 400; Gabrielson v. Hague Box & Lumber Co., 104 P. 635, 55 Wash. 342, 133 Am. St. Rep. 1032.

Instructions held improper within rule. An instruction, in a personal injury action, that defendant was seeking to escape liability by pleading not guilty and that plaintiff was guilty of contributory negligence; that from the pleas of contributory negligence it was not presumed that plaintiff was guilty, and no burden rested on plaintiff to prove affirmatively that he used due care and diligence, but that the burden was upon defendant to prove the pleas, unless plaintiff's evidence established such negligence; and that if defendant did not prove the pleas, and plaintiff proved his allegations, plaintiff should recover. Birmingham Ry., Light & Power Co. v. Hayes, 44 So. 1032, 153 Ala. 178. An instruction, in an action of trespass for destroying a bridge and killing and destroying the hogs and cattle of the plaintiff, if the jury believe, "from the pleadings and evidence, that this is an action merely for an alleged injury to the realty, and that there is no evidence that the realty is located in P. county, or that the injury, if any, was done in that county, to said realty, they may find for the defendants, the venue in such cases being local and material," is erroneous, since it leaves to the jury to determine from the pleadings the nature of the action. Beebe v. Stutsman, 5 Iowa, 271.

[59] **Ill.** Laughlin v. Hopkinson, 126 N. E. 591, 292 Ill. 80; Baker v. Summers, 66 N. E. 302, 201 Ill. 52, reversing judgment 103 Ill. App. 237; Six v. Sikking, 158 Ill. App. 230; Cox v. Cleveland, C., C. & St. L. Ry. Co., 151 Ill. App. 473; Trustees of Schools, etc., St. Clair County v. Yoch, 133 Ill. App. 32; Chicago & E. I. Ry. Co. v. Walker, 127 Ill. App. 212; Illinois Cent. R. Co. v. Hicks, 122 Ill. App. 349; Peoria & P. Terminal Ry. v. Hoerr, 120 Ill. App. 65; Lodge v. Hampton, 116 Ill. App. 414; Davenport, R. I. & N. W. Ry. Co. v. De Yaeger, 112 Ill. App. 537; Chicago Terminal Transfer R. Co. v. Schmelling, 99 Ill. App. 577, judgment affirmed 64 N. E. 714, 197 Ill. 619; Davies v. Cobb, 11 Ill. App. 587.

Iowa. Ottoway v. Milroy, 123 N. W. 467, 144 Iowa, 631; Williams v. Iowa Cent. Ry. Co., 96 N. W. 774, 121 Iowa, 270.

Mo. Alms v. Conway, 78 Mo. App. 490; Fleischmann v. Miller, 38 Mo. App. 177.

W. Va. Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511, 23 S. E. 582.

An instruction, however, that, if the evidence in the case is evenly balanced as between the contention of the plaintiff and that of the defendant on the material issues, the jury should find the defendant not guilty, is properly given, where, under the pleadings, evidence, and instructions as given, the jury could not have been mistaken as to what the material issues were. Chicago City Ry. Co. v. Osborne, 105 Ill. App. 462.

[60] Allard v. Smith, 2 Metc. (Ky.) 297; Tipton v. Triplett, 1 Metc. (Ky.) 570.

[61] Lumaghi v. Gardin, 53 Ill. App. 667.

In Indiana, however, it has been held that a charge that plaintiff is entitled to recover "unless defendant has proved by a preponderance of

where the facts as proved do not tend to support the allegations of the pleadings, it is the province of the court to so instruct.[62] So the court may inform the jury that certain evidence is sufficient in law to satisfy the averments of the declaration of the plaintiff.[63] The question of variance between a pleading and the proofs, however, is properly submitted to the jury, where the facts are in dispute,[64] and an instruction that, if the jury find from the evidence that the plaintiff has made out his case as laid in his complaint, they must find for him, is held not to make the jury the judges of the effect of the averments of the complaint, but merely to empower them to determine whether the evidence introduced sustains the issues made by the pleadings.[65]

§ 93. Burden of proof, admissibility of evidence and competency of witnesses

It is not for the jury to say on whom the burden of proof rests,[66] and instructions which authorize the jury to pass upon the admissibility or competency of evidence are erroneous, as submitting questions of law to them.[67] The jury cannot, therefore,

the evidence in substance the allegations in one or more paragraphs of his answer" is not erroneous, on the theory that such a charge is the equivalent of an instruction that it is only necessary for the defendant to prove the material allegations in some one of the paragraphs of the answer. Walker v. Heller, 73 Ind. 46.

[62] Jaccard v. Anderson, 37 Mo. 91.

[63] Austin v. Richardson, 3 Call (Va.) 201, 2 Am. Dec. 543.

[64] Morris v. Bridgeport Hydraulic Co., 47 Conn. 279.

[65] Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262.

[66] Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497.

Effect of evidence. A charge on the burden of proof in the case is not a charge "on the effect of the evidence," within the Alabama statute prohibiting the court from giving such a charge, unless requested. Hill's Adm'r v. Nichols, 50 Ala. 336.

[67] **Ala.** Wright v. Bolling, 27 Ala. 259.

Cal. People v. Ivey, 49 Cal. 56.

Fla. Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479.

Ga. Chattahoochee Nat. Bank v. Schley, 58 Ga. 369.

Ill. Lambert v. Giffin, 100 N. E. 496, 257 Ill. 152; Karnes v. Belleville & E. R. Co., 89 Ill. 269; Baldwin v. Toledo, St. L. & W. R. Co., 171 Ill. App. 137; Chicago Trust & Savings Bank v. Landfield, 73 Ill. App. 173.

Ind. Indiana Farmers' Live Stock Ins. Co. v. Byrkett, 9 Ind. App. 443, 36 N. E. 779.

Mich. Colby v. Portman, 72 N. W. 1098, 115 Mich. 95.

Mo. Jones v. Roberts, 37 Mo. App. 163.

Tex. Wichita Falls Compress Co. v. W. L. Moody & Co. (Civ. App.) 154 S. W. 1032.

Materiality of testimony. An instruction that the jury are the sole judges of the weight and "importance" of the respective testimony of the witnesses is erroneous, as making the jury the judges of the materiality of the testimony. Hansberger v. Sedalia Electric Ry., Light & Power Co., 82 Mo. App. 566.

Instruction not improper within rule. An instruction that every man is presumed sane, and that insanity can only be proved by clear

be made the judge of what are and what are not material and important features of hypothetical questions,[68] and it is error for the court to intimate doubts as to the competency of legal testimony which has been submitted to the jury on the trial,[69] and an instruction directing the jury to disregard all evidence of a witness which clearly appears to be based upon what others have told him is erroneous.[70]

On the other hand, an instruction which withdraws certain evidence from the jury as not being material to the issues is within the province of the court,[71] as is an instruction to disregard certain parts of documents introduced in evidence, where such parts have been shown to be incorrect.[72]

It is error to submit to the jury the question of the competency of a witness,[73] and where a plaintiff's case rests entirely on the testimony of an incompetent witness, the court should not charge that the plaintiff cannot recover, but should charge directly on the incompetency of the witness.[74]

§ 94. Statutes and ordinances

The question of the existence of a statute is one of law for the court to determine,[75] as is the question of the interpretation of a statute,[76] and it is error to submit such a question to the jury.[77] So ordinarily the construction of an ordinance is one for the court,[78] although in some cases such construction may be left

and unexceptional evidence, asserts a correct legal proposition, and in giving such a charge the court does not shift from itself to the jury the responsibility of passing on the competency of the evidence on that issue. Dominick v. Randolph, 27 So. 481, 124 Ala. 557.

[68] Hanley v. Fidelity & Casualty Co., 161 N. W. 114, 180 Iowa, 805; Same v. Travelers' Protective Ass'n (Iowa) 161 N. W. 125; Ingwersen v. Carr & Brannon, 164 N. W. 217, 180 Iowa, 988; In re Rehard's Estate, 143 N. W. 1106, 163 Iowa, 310; Madden v. Saylor Coal Co., 111 N. W. 57, 133 Iowa, 699; Stutsman v. Sharpless, 101 N. W. 105, 125 Iowa, 335.

[69] Potts v. House, 6 Ga. 324, 50 Am. Dec. 329.

[70] Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030.

[71] In re Darrow, 92 N. E. 369, 175 Ind. 44; Bunck v. McAulay, 147 P. 33, 84 Wash. 473.

[72] Missouri, K. & T. Ry. Co. of Texas v. Magee (Tex. Civ. App.) 49 S. W. 928.

[73] Lake Erie & W. R. Co. v. Bowker, 36 N. E. 864, 9 Ind. App. 428; Chouteau v. Searcy, 8 Mo. 733.

[74] Ross v. Espy, 66 Pa. 481, 5 Am. Rep. 394.

[75] Johnson v. Grady County, 150 P. 497, 50 Okl. 188.

[76] Cooper v. St. Louis, M. & S. W. Ry. Co., 100 S. W. 494, 123 Mo. App. 141; McDaniel v. Lebanon Lumber Co., 140 P. 990, 71 Or. 15.

[77] Winchell v. Town of Camillus, 95 N. Y. S. 688, 109 App. Div. 341, affirmed 83 N. E. 1134, 190 N. Y. 536; Large v. Orvis, 20 Wis. 696.

[78] Sadler v. Peoples (C. C. Pa.) 105 F. 712; Indianapolis Traction & Terminal Co. v. Howard (Ind. Sup.) 128 N. E. 35; Same v. Smith, Id. 38; Plummer v. Indianapolis Union Ry. Co., 104 N. E. 601, 56 Ind. App. 615.

to the jury under rules laid down by the court for their guidance.[79]

§ 95. Foreign laws

The general rule is that the laws of other states or countries must be proved as facts, and ordinarily the question must be left to the jury to decide as a fact what the law of another state is, if it becomes material to be determined.[80] Where, however, the evidence which is given of the law of another state consists of a statute or reports of judicial decisions, the construction of such evidence is for the court,[81] unless the decisions are conflicting, or where inferences of fact must be drawn, in which case the question of what the law is becomes one of fact.[82] Where the laws of a foreign state have been proved, it is for the court to determine their meaning.[83]

§ 96. Effect of error in submitting question of law to jury

An error of the court in submitting for the determination of the jury a question of law is cured by its verdict correctly deciding such question,[84] and such error will not be cause for reversal if the question of law so submitted should have been decided against the party complaining of the error.[85]

[79] Atchison, T. & S. F. R. Co. v. Anderson, 50 P. 603, 6 Kan. App. 923.

[80] Mexican Cent. Ry. Co. v. Gehr, 66 Ill. App. 173; Ufford v. Spaulding, 30 N. E. 360, 156 Mass. 65; Bank of China, Japan and The Straits v. Morse, 61 N. E. 774, 168 N. Y. 458, 56 L. R. A. 139, 85 Am. St. Rep. 676.

[81] Cook v. Bartlett, 179 Mass. 576, 61 N. E. 266; Ufford v. Spaulding, 30 N. E. 360, 156 Mass. 65; Rice v. Raukaus, 101 Mich. 378, 59 N. W. 660; Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715.

Applicability of foreign law. When the evidence as to the applicability of a foreign law consists of statutes and judicial decisions alone, and these are not in conflict, the question of the applicability of the law is wholly for the court, as it is also if to such evidence is added expert opinions in entire accord. Tarbell v. Grand Trunk Ry. Co. (Vt.) 111 A. 567.

[82] Hancock Nat. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232.

[83] Inge v. Murphy, 10 Ala. 885; Ely v. James, 123 Mass. 36; Hooper v. Moore, 50 N. C. 130; Frasier v. Charleston & W. C. Ry., 52 S. E. 964, 73 S. C. 140; Fourth Nat. Bank of Montgomery, Ala., v. Bragg, 102 S. E. 649, 127 Va. 47, 11 A. L. R. 1034.

[84] **Ala.** Courtland v. Tarlton, 8 Ala. 532.

Ill. Consolidated Coal Co. v. Schaefer, 135 Ill. 210, 25 N. E. 788.

Me. Simpson v. Norton, 45 Me. 281.

Mass. Hinds v. Cottle, 143 Mass. 310, 9 N. E. 654.

N. C. Stokes v. Arey, 53 N. C. 66; Vincent v. Corbin, 85 N. C. 108.

Or. Johnson v. Shively, 9 Or. 333.

[85] Randon v. Toby, 11 How. 493, 13 L. Ed. 784; Bernstein v. Humes, 78 Ala. 134.

CHAPTER VII

QUESTIONS OF LAW IN CRIMINAL CASES

§ 97. Jury as judges of the law, in absence of constitutional or statutory provisions governing the subject.
98. Effect of constitutional or statutory provisions on power of jury to judge the law.
99. Effect of power of jury to render general verdict.
100. Power of court to instruct as to the law.
101. Particular questions of law.
102. Sufficiency of defenses.

§ 97. Jury as judges of the law, in absence of constitutional or statutory provisions governing the subject

In the federal courts, the common-law rule, that the jury in a criminal case are not the judges of the law, but that, on the contrary, they are to take the law from the court and apply it to the facts which they find from the evidence, prevails,[1] and in the absence of an inconsistent constitutional or statutory provision on the subject this rule is followed in the state courts.[2]

[1] **U. S.** Sparf v. United States, 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343; (C. C. Cal.) United States v. Greathouse, Fed. Cas. No. 15,254, 2 Abb. (U. S.) 364, 4 Sawy. 457; (C. C. D. C.) Stettinius v. United States, Fed. Cas. No. 13,387, 5 Cranch, C. C. 573; (C. C. Mass.) United States v. Morris, Fed. Cas. No. 15,815, 1 Curt. 23; United States v. Battiste, Fed. Cas. No. 14,545, 2 Sumn. 240; (C. C. N. Y.) United States v. Riley, Fed. Cas. No. 16,164, 5 Blatchf. 204; (C. C. W. Va.) Same v. Keller, 19 Fed. 633.

Wash. State v. Fox, 127 P. 1111, 71 Wash. 185, judgment affirmed Fox v. State of Washington, 35 S. Ct. 383, 236 U. S. 273, 59 L. Ed. 573.

[2] **Ala.** Kennedy v. State, 40 So. 658, 147 Ala. 687; Tidwell v. State, 70 Ala. 33.

Ark. Curtis v. State, 36 Ark. 284.

Cal. People v. Williams, 156 P. 882, 29 Cal. App. 552; People v. Ivey, 49 Cal. 56.

Conn. State v. Gannon, 52 A. 727, 75 Conn. 206.

Iowa. State v. Kirk, 150 N. W. 91, 168 Iowa, 244; State v. Delong, 12 Iowa, 453.

Kan. State v. Truskett, 118 P. 1047, 85 Kan. 804; State v. Bowen, 16 Kan. 475.

Mass. Commonwealth v. Marzynski, 149 Mass. 68, 21 N. E. 228; Commonwealth v. White, 10 Metc. (Mass.) 14; Same v. Porter, 10 Metc. (Mass.) 263.

Mich. People v. Gardner, 106 N. W. 541, 143 Mich. 104; Hamilton v. People, 29 Mich. 173.

Miss. Williams v. State, 32 Miss. 389, 66 Am. Dec. 615.

Mo. State v. Schoenwald, 31 Mo. 147; Hardy v. State, 7 Mo. 607.

N. H. Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; Pierce v. State, 13 N. H. 536.

N. Y. People v. Grout, 161 N. Y. S. 718, 174 App. Div. 608; Duffy v. People, 26 N. Y. 588; People v. Pine, 2 Barb. 566; Same v. Finnegan, 1 Parker, Cr. R. 147; Carpenter v. People, 8 Barb. 603; Safford v. People, 1 Parker, Cr. R. 474.

N. C. State v. Windley, 100 S. E. 116, 178 N. C. 670; State v. Walker, 4 N. C. 662.

Pa. Theel v. Commonwealth, 12 A. 148.

§ 98. Effect of constitutional or statutory provisions on power of jury to judge the law

In a number of jurisdictions there are constitutional and statutory provisions making the jury, in criminal cases, the judges, either unqualifiedly or under the direction of the court, of the law as well as the facts.[3] The effect of these provisions is variously stated. In Illinois it is held that under the statute of that state the jury are not bound by the instructions of the court as to the law, if they can say upon their oaths that they know the law better than the court does,[4] and in certain jurisdictions where the statutory provision relates merely to prosecutions for libel or

S. C. State v. Drawdy, 14 Rich. Law, 87.

S. D. State v. Carlisle, 139 N. W. 127, 30 S. D. 475, writ of error dismissed Carlisle v. State of South Dakota, 35 S. Ct. 663, 238 U. S. 609, 59 L. Ed. 1487.

Tenn. McGowan v. State, 9 Yerg. 184.

Tex. Newton v. State, 138 S. W. 708, 62 Tex. Cr. R. 622; Leonard v. State, 119 S. W. 98, 56 Tex. Cr. R. 84; State v. Phare, 1 Ky. Law Rep. 135.

Va. Brown v. Commonwealth, 86 Va. 466, 10 S. E. 745.

Wash. Hartigan v. Territory, 1 Wash. T. 447.

W. Va. State v. Dickey, 37 S. E. 695, 48 W. Va. 325.

Wis. Campbell v. State, 86 N. W. 855, 111 Wis. 152.

In Vermont, overruling the earlier cases of State v. Meyer, 58 Vt. 457, 3 A. 195, State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90, the later decisions hold that the doctrine that jurors are paramount judges of the law as well as of the facts, in criminal cases, is contrary to the common law, contrary to Const. Vt. c. 1, arts. 4, 10, guaranteeing every person "a certain remedy" for all wrongs, comformable to the laws, and that he shall not be deprived of liberty "except by the laws," contrary to R. L. §§ 1699, 1700, relative to reservation of questions of law to the supreme court after a verdict of guilty, and contrary, also, to Const. U. S. art. 6, declaring such constitution, and all laws in pursuance thereof, the supreme law, binding on all judges in every state. State v. Burpee, 65 Vt. 1, 25 A. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775.

Even in capital cases the jury are not judges of the law as well as of the facts. Pierson v. State, 12 Ala. 149.

The right of counsel to appear in a cause is a question of law for the court. State v. De Wolfe, 74 P. 1084, 29 Mont. 415.

Duty of jury to follow instructions, whether right or wrong. An instruction to find for defendant, accused of seduction, if his promise of marriage was conditioned upon pregnancy resulting from the intercourse, is the law of the case, and, whether right or wrong, binds the jury to find defendant not guilty, where prosecutrix testified that defendant promised to marry her if she would let him have intercourse with her and he got her in a family way. State v. Reilly, 73 N. W. 356, 104 Iowa, 13.

[3] **Ind.** Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171; Fowler v. State, 85 Ind. 538; Keiser v. State, 83 Ind. 234; Clifford v. State, 56 Ind. 245; Lynch v. State, 9 Ind. 541.

La. State v. Malone, 62 So. 350, 133 La. 56; State v. Saliba, 18 La. Ann. 35; Same v. Jurche, 17 La. Ann. 71; State v. Lenares, 12 La. Ann. 226; State v. Scott, 11 La. Ann. 429.

Me. State v. Snow, 18 Me. 346.

Md. Forwood v. State, 49 Md. 531.

Pa. Commonwealth v. Sallager, 3 Clark, 127, 4 Pa. Law J. 511; Same v. Connor, 5 Law T. (N. S.) 83.

Tenn. Ford v. State, 47 S. W. 703, 101 Tenn. 454.

[4] People v. Ezell, 155 Ill. App. 298.

slander it has been held that in such a prosecution the jury are not bound to find as the judge directs,[5] and that the instructions of the court are only to inform the judgments of the jury, and not to bind their consciences.[6] But the general trend of the decisions under such provisions is to the effect that the jury should accept the law as laid down and expounded to them by the judge.[7] Under such provisions the law of which the jury are the judges is ordinarily the law given them in charge by the court,[8] and the jury have no right to disregard the law, but must, upon their oaths, determine it correctly;[9] nor can they make law for the occasion,[10] and where the authority vested in them is to determine the law under the court's direction as to the law they have not the moral right to disregard such direction.[11]

In some jurisdictions it is said that, while the jury are the judges of the law, the best evidence of it is the statement of the law in the charge of the court.[12] In this view the court is a witness to the jury of what the law is,[13] and the jury, in determining the law, have no more right arbitrarily to ignore the court's instructions than they have to disregard the evidence in determining the facts.[14]

Such provisions refer only to such questions of law as the jury

[5] **Gardner v. State**, 139 P. 474, 15 Ariz. 403; State v. Westbrook, 171 S. W. 616, 186 Mo. App. 421; State v. Armstrong, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361, overruling Same v. Hosmer, 85 Mo. 553.

[6] Appeal of Lowe, 46 Kan. 255, 26 P. 749.

[7] **Ga.** Rouse v. State, 71 S. E. 667, 136 Ga. 356; Hunt v. State, 81 Ga. 140, 7 S. E. 142; Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480.

Ill. Schnier v. People, 23 Ill. 17; Fisher v. Same, 23 Ill. 283.

Ind. Fowler v. State, 85 Ind. 538; McDonald v. State, 63 Ind. 544; Williams v. State, 10 Ind. 503; Carter v. State, 2 Ind. 617.

La. State v. Tally, 23 La. Ann. 677.

Md. Wheeler v. State, 42 Md. 563.

Mass. Commonwealth v. Marzynski, 149 Mass. 68, 21 N. E. 228; Commonwealth v. Abbott, 13 Metc. 120.

Ohio. Montgomery v. State, 11 Ohio, 424.

Tenn. Harris v. State, 7 Lea. 538.

[8] Dunham v. State, 70 S. E. 111, 8 Ga. App. 668.

[9] Dean v. State, 46 N. E. 528, 147 Ind. 215; Anderson v. State, 104 Ind. 467, 5 N. E. 711.

[10] State v. Buckley, 40 Conn. 246.

Instruction held proper. A charge that the jury are the sole judges of the facts, and may determine the law as enacted by the Legislature and interpreted by the courts, is not objectionable as invading the province of the jury. Leseuer v. State, 95 N. E. 239, 176 Ind. 448.

[11] State v. Wong Si Sam, 127 P. 683, 63 Or. 266; State v. Daley, 103 P. 502, 54 Or. 514, rehearing denied 104 P. 1, 54 Or. 514; State v. Walton, 99 P. 431, 53 Or. 557, rehearing denied 101 P. 389, 53 Or. 557.

[12] Commonwealth v. Bednorciki, 107 A. 666, 264 Pa. 124; Commonwealth v. McManus, 143 Pa. 64, 21 A. 1018, 22 A. 761, 14 L. R. A. 89; Commonwealth v. Goldberg, 4 Pa. Super. Ct. 142.

[13] Ford v. State, 47 S. W. 703, 101 Tenn. 454.

[14] Dean v. State, 46 N. E. 528, 147 Ind. 215.

are required to consider in making up their verdict.[15] They do not refer to such questions as the sufficiency of the indictment or questions of law arising upon the admissibility of evidence,[16] nor do they give power to determine the constitutionality of the statute upon which the prosecution is based.[17]

§ 99. Effect of power of jury to render general verdict

The power of the jury to render a general verdict of guilty or not guilty gives them the physical ability to disregard the instructions of the court as to the law, and since the rule is that, where a jury returns a general verdict of not guilty in a criminal case, the trial court has no power to set it aside or modify it in any respect,[18] it is sometimes said that in this sense they are the judges of the law.[19] But, as one court has said, the power of giving wrong verdicts with impunity does not render such verdicts right.[20]

§ 100. Power of court to instruct as to the law

In all jurisdictions where jury trials are authorized, the court has power to charge the jury as to the law in criminal cases,[21] this being so even in those jurisdictions where, as stated supra, the jury are made, by constitutional or statutory provision, the judges of the law.[22] Indeed, in one jurisdiction having such a pro-

[15] Anderson v. State, 5 N. E. 711, 104 Ind. 467.

[16] Anderson v. State, 5 N. E. 711, 104 Ind. 467.

[17] United States v. Callender, Fed. Cas. No. 14,709; State v. Main, 37 A. 80, 69 Conn. 123, 36 L. R. A. 623, 61 Am. St. Rep. 30; Franklin v. State, 12 Md. 236; Harrison v. Commonwealth, 123 Pa. 508, 16 A. 611, 23 Wkly. Notes Cas. 75.

[18] Batre v. State, 18 Ala. 123; Appeal of Lowe, 46 Kan. 255, 26 Pac. 749.

[19] **U. S.** United States v. Taylor (C. C. Kan.) 11 Fed. 470; United States v. Wilson, Fed. Cas. No. 16,730, Baldw. 78; Same v. Stockwell, Fed. Cas. No. 16,405, 4 Cranch. C. C. 671; Stettinius v. United States, Fed. Cas. No. 13,387, 5 Cranch, C. C. 573.

Conn. State v. Gannon, 52 A. 727, 75 Conn. 206.

Ga. Berry v. State, 31 S. E. 592, 105 Ga. 683; Robinson v. State, 66 Ga. 517; McDaniel v. State, 30 Ga. 853.

Ky. Commonwealth v. Van Tuyl, 1 Metc. 1, 71 Am. Dec. 455.

La. State v. Scott, 12 La. Ann. 386.

Pa. Commonwealth v. Bednorciki, 107 A. 666, 264 Pa. 124; Commonwealth v. Shurlock, 14 Leg. Int. 33;

Tenn. Brown v. State, 6 Baxt. 422.

[20] Hamilton v. People, 29 Mich. 173.

[21] People v. Fowler, 174 P. 892, 178 Cal. 657; People v. Kelsey, 14 Abb. Prac. (N. Y.) 372; Gwatkin v. Commonwealth, 9 Leigh, 678, 33 Am. Dec. 264; Blunt v. Commonwealth, 4 Leigh (Va.) 689, 26 Am. Dec. 341.

[22] People v. Miller, 106 N. E. 191, 264 Ill. 148, Ann. Cas. 1915B, 1240; Sherer v. State, 121 N. E. 369, 188 Ind. 14; Parker v. State, 136 Ind. 284, 35 N. E. 1105; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117.

In Maryland the constitutional provision declaring that the jury shall be judges as well of law as of fact in criminal cases does not prohibit the court from instructing the jury on the law, when they unanimously request it. Beard v. State, 71 Md. 275, 17 A. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536; although no instructions

vision, the court is also required by statute to instruct as to the law,[23] and in the great majority of jurisdictions, whether affected by such a provision or not, the court may charge that the jury should take the law as given to them by the court.[24] In Indiana the court may tell the jury not to disregard the law,[25] and that it is the duty of the court to instruct them as to what the law is,[26] and that, if the jury are in doubt as to the law, they should give the instructions of the court respectful consideration,[27] and in some of the cases it is held that it is proper to charge that they should take the law from the court.[28] In Illinois it is proper to tell the jury, after instructing that they are the judges of the law as well as of the facts, that, before they can disregard the law as given them by the court, they ought to be able to say, upon their oaths, that they are better judges of the law than the court.[29]

§ 101. Particular questions of law

In accordance with the rule above stated,[30] the court should not submit to the jury the question of the jurisdiction of the court, nor should it submit the question of the constitutionality

can be given except in a merely advisory form, Deems v. State, 96 A. 878, 127 Md. 624.

[23] Clem v. State, 31 Ind. 480.

[24] **Cal.** People v. Crane, 87 P. 239, 4 Cal. App. 142.

Ga. Holton v. State, 72 S. E. 949, 137 Ga. 86; Skrine v. State, 51 S. E. 315, 123 Ga. 171; Jackson v. State, 45 S. E. 604, 118 Ga. 780.

La. State v. McLofton, 82 So. 680, 145 La. 499; State v. Ford, 37 La. Ann. 443; Same v. Vinson, 37 La. Ann. 792; State v. Newton, 28 La. Ann. 65.

Mich. People v. Smith, 108 N. W. 1072, 145 Mich. 530.

N. J. Roesel v. State, 41 A. 408, 62 N. J. Law, 216.

Wash. Leschi v. Territory, 1 Wash. T. 13.

Duty to accept interpretation of court whether right or wrong. Under a statute which requires the jury "to receive as law what is laid down as such by the court," it is not error for the court to say, in charging the jury, "You should receive the law as I state it to be, notwithstanding you may firmly believe that I am wrong, and that the law is, or should be, otherwise." People v. Worden, 45 P. 844, 113 Cal. 569.

In Tennessee it is not error, in a criminal case, to charge the jury that they cannot arbitrarily disregard the instructions of the court as to the law. Robertson v. State, 4 Lea, 425.

[25] Blaker v. State, 130 Ind. 203, 29 N. E. 1077.

[26] Stocking v. State, 7 Ind. 326; Powers v. State, 87 Ind. 144.

Defendant cannot complain of an instruction that it is the duty of the court to instruct it as to the law of the case, but the instructions are advisory merely, and it has the right to disregard them, and determine the law for itself. Walker v. State, 136 Ind. 663, 36 N. E. 356.

[27] Bird v. State, 107 Ind. 154, 8 N. E. 14.

[28] Driskill v. State, 7 Ind. 338; Hogg v. State, 7 Ind. 551.

[29] Davison v. People, 90 Ill. 221; Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320; Reddish v. People, 84 Ill. App. 509.

[30] Renan v. Commonwealth, 2 Ky. Law Rep. 66.

of the statute on which the prosecution is based,[31] nor whether such a statute is so uncertain as to be void,[32] nor the meaning of a term used in such a statute,[33] nor the question as to whether an arrest or the service of legal process was lawful,[34] nor the question as to whether one had a right to carry weapons.[35] On conflicting evidence it is for the jury to say what the law of another state is, under proper instructions from the court.[36]

Questions as to the sufficiency of an indictment or information,[37] or as to what are the material averments therein,[38] are for the court to determine. An instruction in a criminal case that proof of motive is not essential to a conviction does not invade the province of the jury.[39]

Questions relating to the admissibility, competency, or materiality of evidence are for the court to pass upon.[40] It is proper to refuse instructions which include rules governing the admissibility of evidence,[41] and it is error to submit evidence to the jury, to be considered by them if they are of the opinion that it is applicable to the issues, but to be disregarded if they are of a contrary opinion.[42] In some cases, however, the admissibility of

[31] United States v. Riley, Fed. Cas. No. 16,164, 5 Blatchf. 204; State v. McKee, 46 A. 409, 73 Conn. 18, 49 L. R. A. 542, 84 Am. St. Rep. 124.

[32] State v. Main, 37 A. 80, 69 Conn. 123, 36 L. R. A. 623, 61 Am. St. Rep. 30.

[33] St. Louis, I. M. & S. R. Co. v. State, 143 S. W. 913, 102 Ark. 205.

[34] Gibbons v. Territory, 115 P. 129, 5 Okl. Cr. 212; State v. Anselmo, 148 P. 1071, 46 Utah, 137.

[35] Carlisle v. State (Tex. Cr. App.) 56 S. W. 366.

[36] People v. Tufts, 139 P. 78, 167 Cal. 266; State v. Morgan, 176 N. W. 35, 42 S. D. 517.

[37] State v. Woods, 36 So. 626, 112 La. 617; State v. Plough, 97 A. 265, 88 N. J. Law, 428, denying rehearing 97 A. 64, 88 N. J. Law, 425; Smith v. People, 47 N. Y. 303.

[38] Harvey v. State, 73 So. 200, 15 Ala. App. 311; People v. Fleshman, 148 P. 805, 26 Cal. App. 788; Holt v. State, 62 S. E. 992, 5 Ga. App. 184.

[39] Wheeler v. State, 63 N. E. 975, 158 Ind. 687; State v. McIntosh, 39 S. C. 97, 17 S. E. 446.

[40] **Ala.** Ward v. State, 58 So. 788, 4 Ala. App. 112.

Ark. Paxton v. State, 170 S. W. 80, 114 Ark. 393, Ann. Cas. 1916A, 1239.

Cal. People v. Cook, 83 P. 43, 148 Cal. 334.

Ga. Rouse v. State, 69 S. E. 180, 135 Ga. 227.

Idaho. State v. Bouchard, 149 P. 464, 27 Idaho, 500.

Ill. People v. Niles, 129 N. E. 97, 295 Ill. 525.

Ind. Ruse v. State, 115 N. E. 778, 186 Ind. 237, L. R. A. 1917E, 726; Townsend v. State, 2 Blackf. 151.

Ky. Robinson v. Commonwealth, 199 S. W. 28, 178 Ky. 557.

La. State v. Stephen, 45 La. Ann. 702, 12 So. 883.

Mass. Commonwealth v. Knapp, 10 Pick. 477, 20 Am. Dec. 534.

Mich. People v. Hurst, 1 N. W. 1027, 41 Mich. 328.

Neb. Clarence v. State, 125 N. W. 540, 86 Neb. 210.

N. Y. State v. Jewett, 2 Wheeler, Cr. Cas. 589.

Tex. Newton v. State, 138 S. W. 708, 62 Tex. Cr. R. 622.

Wis. Spick v. State, 121 N. W. 664, 140 Wis. 104.

[41] Adkisson v. State, 218 S. W. 167, 142 Ark. 34.

[42] People v. Ivey, 49 Cal. 56.

evidence may present a mixed question of law and fact, in which case the court can submit its admissibility to the jury and instruct them that if they find, under the instructions, that such evidence is admissible to consider it, but otherwise to reject it.[43] Thus whether dying declarations were made, and made when the deceased was in the article of death and conscious of his condition, is finally to be determined by the jury, and an instruction tending to lead the jury to think that they must take dying declarations as evidence is erroneous.[44]

Primarily, the admissibility in evidence of an alleged confession of the accused,[45] including the question of the voluntary character of the confession,[46] is for the court to determine, and in some jurisdictions it is held that the decision of the court as to whether the confession was voluntary, and admitting it in evidence, is final, and that it is error to instruct that the jury can or must reject the confession, if they believe it, under the evidence,

[43] **Cal.** People v. Wagner, 155 P. 649, 29 Cal. App. 363.
Kan. State v. Cook, 17 Kan. 392.
Mass. Commonwealth v. Tucker, 76 N. E. 127, 189 Mass. 457, 7 L. R. A. (N. S.) 1056; Commonwealth v. Robinson, 146 Mass. 571, 16 N. E. 452.
Okl. Gonzalus v. State, 123 P. 705, 7 Okl. Cr. 444; Coleman v. State, 118 P. 594, 6 Okl. Cr. 252.
Tex. Lucas v. State (Cr. App.) 225 S. W. 257; Hilliard v. State, 222 S. W. 553, 87 Tex. Cr. R. 416.
Wash. State v. Mann, 81 P. 561, 39 Wash. 144.

[44] Swain v. State, 101 S. E. 539, 149 Ga. 629.

[45] **Ala.** Carr v. State, 85 So. 852, 17 Ala. App. 539; McKinney v. State, 32 So. 726, 134 Ala. 134.
Ga. Price v. State, 40 S. E. 1015, 114 Ga. 855.
Ky. Dugan v. Commonwealth, 43 S. W. 418, 102 Ky. 241, 19 Ky. Law Rep. 1273.
Mo. State v. Thomas, 157 S. W. 330, 250 Mo. 189.
N. J. Roesel v. State, 41 A. 408, 62 N. J. Law, 216.
N. M. State v. Ascarate, 153 P. 1036, 21 N. M. 191, writ of error dismissed (1917) Ascarate v. State of New Mexico, 38 S. Ct. 8, 245 U. S. 625, 62 L. Ed. 517.
Okl. Berry v. State, 111 P. 676, 4 Okl. Cr. 202, 31 L. R. A. (N. S.) 849.
Or. State v. Humphrey, 128 P. 824, 63 Or. 540; State v. Roselair, 109 P. 865, 57 Or. 8.
Tex. Sharp v. State, 197 S. W. 207, 81 Tex. Cr. R. 256; Belcher v. State, 161 S. W. 459, 71 Tex. Cr. R. 646.

[46] **Ala.** Machen v. State, 85 So. 857, 17 Ala. App. 427; Johnson v. State, 59 Ala. 37; Bob v. State, 32 Ala. 560.
Cal. People v. Haney (App.) 189 P. 338.
D. C. Lorenz v. United States, 24 App. D. C. 337.
Fla. Stiner v. State, 83 So. 595, 78 Fla. 647; Kirby v. State, 32 So. 836, 44 Fla. 81.
Ind. Hauk v. State, 46 N. E. 127, 148 Ind. 238; Id., 47 N. E. 465, 148 Ind. 238.
Kan. State v. Hayes, 187 P. 675, 106 Kan. 253.
Ky. Pearsall v. Commonwealth, 92 S. W. 589, 29 Ky. Law Rep. 222.
Mo. Hector v. State, 2 Mo. 166, 22 Am. Dec. 454.
Mont. State v. Berberick, 100 P. 209, 38 Mont. 423, 16 Ann. Cas. 1077; State v. Sherman, 90 P. 981, 35 Mont. 512, 119 Am. St. Rep. 869.
Nev. State v. Williams, 102 P. 974, 31 Nev. 360.

not to have been voluntary;[47] but the rule, supported by the great weight of authority, is that, where the evidence is conflicting as to whether a confession was made voluntarily, and the court permits the confession to go to the jury, the question as to its voluntary character is ultimately to be decided by the jury, who should be instructed to disregard the confession if they find from the evidence that it was procured by threats or promises.[48] If the court has decided that a confession offered in evidence is

N. J. State v. Hernia, 53 A. 85, 68 N. J. Law, 299; State v. Young, 51 A. 939, 67 N. J. Law, 223.

Or. State v. Seymour, 134 P. 7, 66 Or. 123; State v. Spanos, 134 P. 6, 66 Or. 118; State v. Blodgett, 92 P. 820, 50 Or. 329.

S. C. State v. Perry, 54 S. E. 764, 74 S. C. 551.

S. D. State v. Landers, 114 N. W. 717, 21 S. D. 606.

Wis. Hintz v. State, 104 N. W. 110, 125 Wis. 405.

[47] **Ala.** Rice v. State, 83 So. 437, 204 Ala. 104; Machen v. State, 76 So. 407, 16 Ala. App. 170; Godau v. State, 60 So. 908, 179 Ala. 27; Kirby v. State, 59 So. 374, 5 Ala. App. 128; Fowler v. State, 54 So. 115, 170 Ala. 65; McKinney v. State, 32 So. 726, 134 Ala. 134; Huffman, v. State, 30 So. 394, 130 Ala. 89; Brown v. State, 27 So. 250, 124 Ala. 76; Burton v. State, 107 Ala. 108, 18 So. 284; Redd v. State, 69 Ala. 255; Matthews v. Same, 55 Ala. 65, 28 Am. Rep. 698; Washington v. State, 53 Ala. 29.

Md. McCleary v. State, 89 A. 1100, 122 Md. 394.

Miss. Hunter v. State, 21 So. 305, 74 Miss. 515.

Compare Kinsey v. State, 85 So. 519, 204 Ala. 180; Garrard v. State, 50 Miss. 147.

[48] (U. S.) Wilson v. United States, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090; (D. C. N. Y.) United States v. Oppenheim, 228 F. 220, judgment reversed Oppenheim v. United States, 241 F. 625, 154 C. C. A. 383.

Colo. Martinez v. People, 132 P. 64, 55 Colo. 51, Ann. Cas. 1914C, 559.

Ga. Cantrell v. State, 80 S. E. 649, 141 Ga. 98; Dawson v. State, 59 Ga. 333.

Ill. People v. Colvin, 128 N. E. 396, 294 Ill. 196.

Iowa. State v. Bennett, 121 N. W. 1021, 143 Iowa, 214; State v. Foster, 114 N. W. 36, 136 Iowa, 527; State v. Wescott, 104 N. W. 341, 130 Iowa, 1; State v. Storms, 85 N. W. 610, 113 Iowa, 385, 86 Am. St. Rep. 380.

Mass. Commonwealth v. Sherman, 124 N. E. 423, 234 Mass. 7; Commonwealth v. Antaya, 68 N. E. 331, 184 Mass. 326; Commonwealth v. Burrough, 162 Mass. 513, 39 N. E. 184; Commonwealth v. Piper, 120 Mass. 185.

Mich. People v. McClintic, 160 N. W. 461, 193 Mich. 589, L. R. A. 1917C, 52; People v. Prestige, 148 N. W. 347, 182 Mich. 80; People v. Trine, 129 N. W. 8, 164 Mich. 1; People v. Barker, 27 N. W. 539, 60 Mich. 277, 1 Am. St. Rep. 501.

Mo. State v. Jones, 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786; State v. Moore, 61 S. W. 199, 160 Mo. 443.

N. M. State v. Armijo, 135 P. 555, 18 N. M. 262.

N. J. Roesel v. State, 41 A. 408, 62 N. J. Law, 216.

N. Y. People v. Roach, 109 N. E. 618, 215 N. Y. 592, Ann. Cas. 1917A, 410; People v. Randazzio, 87 N. E. 112, 194 N. Y. 147; People v. Brasch, 85 N. E. 809, 193 N. Y. 46.

Ohio. Spears v. State, 2 Ohio St. 583.

Pa. Commonwealth v. Aston, 75 A. 1019, 227 Pa. 112.

S. C. State v. Rogers, 83 S. E. 971, 99 S. C. 504.

S. D. State v. Montgomery, 128 N. W. 718, 26 S. D. 539; State v. Allison, 124 N. W. 747, 24 S. D. 622.

incompetent, because involuntary, and has excluded the confession, it will then be error to submit any evidence as to its voluntary or involuntary character to the jury.[49]

It is the province of the court to determine in the first instance whether the existence of a conspiracy has been sufficiently established to admit evidence of the declarations and acts of one alleged co-conspirator against the other;[50] but, on conflicting evidence, the jury must find the existence of the conspiracy before considering such declarations.[51]

In a criminal prosecution it is for the trial court to determine whether a foundation has been laid to admit testimony of threats,[52] or to admit testimony of character.[53] The question of whether a witness is an accomplice may be one of law for the court to decide, although frequently, under the facts, it should be left to the jury to determine.[54]

In criminal as in civil cases, instructions which leave to the jury the interpretation of written instruments are ordinarily erroneous.[55]

Tex. Williams v. State (Cr. App.) 225 S. W. 177; Jones v. State, 216 S. W. 884, 86 Tex. Cr. R. 371; Bozeman v. State, 215 S. W. 319, 85 Tex. Cr. R. 653; Robertson v. State, 195 S. W. 602, 81 Tex. Cr. R. 378, 6 A. L. R. 853; Cook v. State, 180 S. W. 254, 78 Tex. Cr. R. 116; Overstreet v. State, 150 S. W. 899, 68 Tex. Cr. R. 238; Blocker v. State, 135 S. W. 130, 61 Tex. Cr. R. 413; Johnson v. State, 94 S. W. 224, 49 Tex. Cr. R. 314; Williams v. State (Cr. App.) 65 S. W. 1059.

Utah. State v. Wells, 100 P. 681, 35 Utah, 400, 136 Am. St. Rep. 1059, 19 Ann. Cas. 631.

Wash. State v. Wilson, 123 P. 795, 68 Wash. 464.

Wyo. Clay v. State, 86 P. 17, 15 Wyo. 42.

[49] Harrold v. Territory of Oklahoma (C. C. A. Okl.) 169 F. 47, 94 C. C. A. 415, 17 Ann. Cas. 868 reversing judgment 89 P. 202, 18 Okl. 395, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818.

[50] Smith v. State, 62 So. 575, 8 Ala. App. 187; Cantrell v. State, 174 S. W. 521, 117 Ark. 233; State v. Thompson, 38 A. 868, 69 Conn. 720; State v. Walker, 100 N. W. 354, 124 Iowa, 414; Schultz v. State, 113 N. W. 428, 133 Wis. 215.

[51] State v. Crofford, 96 N. W. 889, 121 Iowa, 395.

[52] State v. Davis, 48 So. 771, 123 La. 133; State v. Williams, 35 So. 521, 111 La. 205; State v. Perioux, 31 So. 1016, 107 La. 601.

[53] State v. Williams, 35 So. 521, 111 La. 205.

[54] Ryal v. State, 182 P. 253, 16 Okl. Cr. 266. See, also, supra, § 21.

[55] **Ala.** Dotson v. State, 88 Ala. 208, 7 So. 259.

Me. State v. Patterson, 68 Me. 473.

Mass. Commonwealth v. Riggs, 14 Gray, 376, 77 Am. Dec. 333.

Mo. State v. Brown, 71 S. W. 1031, 171 Mo. 477.

Or. State v. Moy Looke, 7 Or. 54.

S. C. State v. Williams, 32 S. C. 123, 10 S. E. 876.

Tex. Jefferson v. State, 214 S. W. 981, 85 Tex. Cr. R. 614.

§ 102. Sufficiency of defenses

Ordinarily a plea of former jeopardy raises an issue for the jury to decide;[56] but where there is no question either as to the identity of the defendant with the defendant in the former indictment, or as to the identity of the transactions involved, the question of former jeopardy is one of law for the court,[57] and it is for the court, and not the jury, to try the issue of nul tiel record.[58] So the construction of the record of a former conviction is for the court,[59] and where upon its face a plea of former jeopardy is insufficient in substance it may be so adjudged on demurrer.[60] A plea of former jeopardy, alleging that the jury at a former trial was discharged without the defendant's consent, presents only a question of law,[61] and such a plea should not be submitted to the jury, if there is no evidence in its support.[62]

The issues raised by the plea of the statute of limitations in a criminal case may be a question of law,[63] although they are fre-

[56] **Ala.** Lyman v. State, 45 Ala. 72.
Ark. State v. Caldwell, 66 S. W. 150, 70 Ark. 74.
Cal. People v. Hamberg, 84 Cal. 468, 24 Pac. 298.
Colo. Dockstader v. People, 97 P. 254, 43 Colo. 437.
Ga. Buhler v. State, 64 Ga. 504.
Ind. Dunn v. State, 70 Ind. 47.
La. State v. Williams, 45 La. Ann. 936, 12 So. 932.
Minn. State v. Dlugi, 143 N. W. 971, 123 Minn. 392.
Miss. Helm v. State, 67 Miss. 562, 7 So. 487.
Mont. State v. Gaimos, 162 P. 596, 53 Mont. 118.
Neb. State v. Priebnow, 16 Neb. 131, 19 N. W. 628.
N. J. State v. Rosa, 62 A. 695, 72 N. J. Law, 462.
N. M. Territory v. West, 99 P. 343, 14 N. M. 546.
N. Y. Grant v. People, 4 Parker, Cr. R. 527.
Ohio. Miller v. State, 8 Ohio St. 475.
Okl. Newton v. State (Cr. App.) 170 P. 270.
Pa. Commonwealth v. Conner, 9 Phila. 591.
S. D. State v. Kieffer, 95 N. W. 289, 17 S. D. 67.
Tex. Villareal v. State, 199 S. W. 642, 82 Tex. Cr. R. 327; Cook v. State, 63 S. W. 872, 43 Tex. Cr. R. 182, 96 Am. St. Rep. 854; McCullough v. State (Cr. App.) 34 S. W. 753.
Utah. People v. Kern, 8 Utah, 268, 30 P. 988.
Wyo. McGinnis v. State, 96 P. 525, 17 Wyo. 106.

[57] State v. Blodgett, 121 N. W. 685, 143 Iowa, 578, 21 Ann. Cas. 231; State v. Williams, 53 S. W. 424, 152 Mo. 115, 75 Am. St. Rep. 441; State v. Haynes, 36 Vt. 667.

[58] Brady v. Commonwealth, 1 Bibb. 517; Hill v. State, 2 Yerg. (Tenn.) 248.

[59] State v. Gorham, 67 Me. 247.

[60] **Cal.** People v. Ammerman, 50 P. 15, 118 Cal. 23.
La. State v. Foley, 38 So. 402, 114 La. 412; State v. Paterno, 43 La. Ann. 514, 9 So. 442; State v. Meeks, 41 La. Ann. 543, 6 So. 822; State v. Shaw, 5 La. Ann. 342.
Mo. State v. Laughlin, 79 S. W. 401, 180 Mo. 342.
N. J. State v. Rosa, 62 N. J. Law, 462, 62 A. 695.

[61] Lanphere v. State, 89 N. W. 128, 114 Wis. 193.

[62] Johnson v. State, 34 Tex. Cr. R. 115, 29 S. W. 473; Id., 29 S. W. 474.

[63] L. & N. & G. S. R. Co. v. Commonwealth, 4 Ky. Law Rep. 627; State v. Hansbrough, 80 S. W. 900, 181 Mo. 348.

quently matters of fact, to be decided by the jury,[64] as where the question is whether the absence of defendant from the state was sufficient to prevent the statute from running.[65] In Louisiana whether the crime charged is prescribed is a mixed question of law and fact, upon which the jury has the power to pass.[66]

Where the defense of insanity is interposed, it is a question of law whether mental disease renders the defendant irresponsible for acts committed while afflicted with such disease,[67] and it is for the court to say whether the form of insanity attempted to be proved is a legal defense,[68] and it is for the court to say in the first instance whether the facts proved would reasonably justify any inference of mental unsoundness.[69]

In some jurisdictions a charge submitting to the jury, in a prosecution for homicide, the issue of what constitutes self-defense is bad, as referring to them a question of law.[70] The court may instruct that mere abusive or opprobrious words can never justify a homicide, or reduce it from the grade of murder to manslaughter.[71]

[64] Durrence v. State, 92 S. E. 962, 20 Ga. App. 192; People v. Clement, 72 Mich. 116, 40 N. W. 190; State v. Newton, 81 P. 1002, 39 Wash. 491.

[65] People v. Price, 74 Mich. 37, 41 N. W. 853; Commonwealth v. Weber, 103 A. 348, 259 Pa. 592, affirming judgment 67 Pa. Super. Ct. 497.

[66] State v. Drummond, 61 So. 778, 132 La. 749; State v. West, 30 So. 119, 105 La. 639; State v. Strong, 39 La. Ann. 1081, 3 So. 266; State v. Cason, 28 La. Ann. 40.

[67] Hankins v. State, 201 S. W. 832, 133 Ark. 38, L. R. A. 1918D, 784; State v. Winter, 72 Iowa, 627, 34 N. W. 475.

[68] State v. Casey, 117 P. 5, 34 Nev. 154.

[69] State v. Morledge, 65 S. W. 226, 164 Mo. 522; Turner v. Territory, 69 P. 804, 11 Okl. 660.

[70] Collins v. State, 84 So. 417, 17 Ala. App. 186; Pounds v. State, 73 So. 127, 15 Ala. App. 223; Jennings v. State, 72 So. 690, 15 Ala. App. 116; Henderson v. State, 65 So. 721, 11 Ala. App. 37.

[71] Gaillard v. State, 99 S. E. 629, 149 Ga. 190.

CHAPTER VIII

DIRECTING VERDICT

A. Direction in Civil Cases

§ 103. Rule that court may direct verdict.
104. Tests for determining when to direct verdict.
105. Directing verdict for one party, where verdict for his adversary would be set aside.
106. Direction of verdict for defendant.
107. Direction of verdict for plaintiff.
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109. Power and duty of court, in general, to direct verdict of acquittal.
110. Rule that court has no power to direct verdict of acquittal.
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A. Direction in Civil Cases

§ 103. Rule that court may direct verdict

There is general agreement on the proposition that in civil cases the court, under a proper state of facts, has the power to direct a verdict for the plaintiff or the defendant.[1] As this rule is not intended to limit the province of the jury to determine questions of fact, it is merely equivalent to saying that, where the evidence is such that, as a matter of law, the verdict should go for one party or the other, the court may or should so declare.

§ 104. Tests for determining when to direct verdict

Where the evidence upon an issue is uncontradicted, and is not discredited by any circumstances appearing in the case,[2] and is

[1] **Cal.** Martin v. Ward, 10 P. 276, 69 Cal. 129.
Ind. Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255; Meikel v. Greene, 94 Ind. 344.
Mo. Ferguson v. Venice Transp. Co., 79 Mo. App. 352.
N. M. Armijo v. New Mexico Town Co., 3 N. M. (Johns.) 244, 5 P. 709.
N. Y. People v. Board of Police, 14 Abb. Prac. 158.

[2] **U. S.** (C. C. A. N. Y.) Hammerschlag Mfg. Co. v. Importers' & Trad-

of a kind from which different inferences cannot reasonably be drawn,[3] the facts may be taken as established, and a verdict directed accordingly. If the party having the burden of proof upon an issue necessary to the maintenance of an action or to the defense of a prima facie case introduces no evidence which, if true, giving to it all its probative force, will authorize the jury to find in his favor, the trial judge may direct a verdict against him.[4] On the other hand, the trial court will direct a verdict only when there is a total absence of evidence on some essential issue, or when there is no conflict in the evidence and it is susceptible of only one construction.[5] If the facts are such that reasonable men may properly draw different inferences therefrom, the case should go to the jury.[6] A verdict should be directed only when there is no evidence before the jury, either strong or weak, tending to prove the contention of the party against whom a direction is sought.[7] A trial court may not direct a verdict on the ground that the weight of the evidence greatly or clearly predominates in favor of one side or the other.[8]

ers' Nat. Bank, 262 F. 266; (C. C. Mich.) National Exchange Bank v. White, 30 F. 412.

Cal. Martin v. Ward, 69 Cal. 129, 10 P. 276.

Ind. Wabash Ry. Co. v. Williamson, 104 Ind. 154, 3 N. E. 814.

Tex. Eason v. Eason, 61 Tex. 225.

Vt. Village of St. Johnsbury v. Thompson, 59 Vt. 300, 9 A. 571, 59 Am. Rep. 731.

[3] Thompson v. McConnell (C. C. A. Tex.) 107 F. 33, 46 C. C. A. 124; Skillern v. Baker, 100 S. W. 764, 82 Ark. 86, 118 Am. St. Rep. 52, 12 Ann. Cas. 243; American Cent. Ins. Co. v. Noe, 75 Ark. 406, 88 S. W. 572; Roots v. Kilbreth, 10 Ohio Dec. 20, 18 Wkly. Law Bul. 58.

[4] Heath v. Jaquith, 68 Me. 433.

[5] **Ind.** Reid v. Terre Haute, I. & E. Traction Co. (App.) 127 N. E. 857; City of New Albany v. Ray, 29 N. E. 611, 3 Ind. App. 321.

Iowa. Citizens' Bank v. Rhutasel, 67 Iowa, 316, 25 N. W. 261; Sperry v. Etheridge, 63 Iowa, 543, 19 N. W. 657.

Or. Marsters v. Isensee, 192 P. 907, 97 Or. 567.

S. D. Haugen v. Chicago M. & St. P. Ry. Co., 53 N. W. 769, 3 S. D. 394.

[6] **U. S.** (C. C. A. Alaska) Alaska Fish Salting & By-Products Co. v. McMillan, 266 F. 26; (C. C. A. Mich.) Schwab v. Doyle, 269 F. 321.

Ala. Armour & Co. v. Alabama Power Co., 84 So. 628, 17 Ala. App. 280.

Colo. City and County of Denver v. Hatter, 188 P. 728, 68 Colo. 194.

Mont. First Nat. Bank of Lewistown v. Wilson, 188 P. 371, 57 Mont. 384.

Okl. Chicago, R. I. & P. Ry. Co. v. Owens, 189 P. 171, 78 Okl. 114.

[7] International Paper Co. v. General Fire Assur. Co. (C. C. A. N. Y.) 263 F. 363.

[8] Armour & Co. v. Alabama Power Co., 84 So. 628, 17 Ala. App. 280; In re Cochrane's Estate, 178 N. W. 673, 211 Mich. 370.

Scintilla of evidence. The refusal of affirmative charge was properly refused, even though evidence was overwhelmingly in favor of party by whom it was requested; a scintilla of evidence being sufficient to take an issue to the jury. Cleveland Laundry Machinery Mfg. Co. v. Southern Steam Carpet Cleaning Co., 85 So. 535, 204 Ala. 297. See Baldwin v. Taylor, 31 A. 250, 166 Pa. 507.

Effect of conflict in evidence. To warrant a court in directing verdict, it is not necessary that there should be an absence of conflict in

§ 105. Directing verdict for one party, where verdict for his adversary would be set aside

In a very considerable number of jurisdictions it is said that the proper test to guide the court in passing upon a motion for a directed verdict is what would be the action of the court with respect to a verdict rendered for the party asking that the case be submitted to the jury, and that if the court would be under obligation to set aside such a verdict as manifestly contrary to the evidence, then the motion for a direction should prevail,[9] or, as stated in some jurisdictions, the trial court, may direct a verdict in any case where the evidence is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.[10] This may serve as a convenient and practical test for the purpose indicated. The objection can be urged, however, to the standard of measurement of judicial duty thus set up, that it is not certain or definite, since the element of discretion enters in, and that the observance of such rule will often lead dangerously close to trespassing on the province of the jury. The true

the evidence, but to deprive the court of the right, if there is a conflict, it must be substantial. Ross v. San Francisco-Oakland Terminal Rys. Co. (Cal. App.) 191 P. 703. The mere fact of conflicts in the testimony does not render a directed verdict erroneous, where it appears that the conflicts are immaterial and that, giving to opposite party the benefit of the most favorable view of the evidence as a whole and of all the legitimate inferences therefrom, the verdict against him is demanded. Stanfield v. McConnon & Co. (Ga. App.) 102 S. E. 908; Hart v. Metropolitan Discount Co., 102 S. E. 375, 24 Ga. App. 807.

[9] **U. S.** (C. C. A. Alaska) Shoup v. Marks, 128 F. 32, 62 C. C. A. 540.

Ariz. Arizona Binghampton Copper Co. v. Dickson, 195 P. 538; Root v. Fay, 43 P. 527, 5 Ariz. 19.

Cal. Downing v. Murray, 45 P. 869, 113 Cal. 455.

Colo. Livesay v. First Nat. Bank of Denver, 86 P. 102, 36 Colo. 526, 6 L. R. A. (N. S.) 598, 118 Am. St. Rep. 120; Brown v. Potter, 58 P. 785, 13 Colo. App. 512.

Ind. Green v. Macy, 76 N. E. 264, 36 Ind. App. 560.

Iowa. Cherry v. Des Moines Leader, 86 N. W. 323, 114 Iowa, 298, 54 L. R. A. 855, 89 Am. St. Rep. 365; Barnhart v. Chicago, M. & St. P. R. Co., 66 N. W. 902, 97 Iowa, 654.

Me. Moore v. McKenney, 21 A. 749, 83 Me. 80, 23 Am. St. Rep. 753.

Mo. Hite v. Metropolitan St. Ry. Co., 130 Mo. 132, 31 S. W. 262, 51 Am. St. Rep. 555.

Mont. Mandoli v. National Council of Knights and Ladies of Security, 194 P. 493, 58 Mont. 671.

Neb. Burke v. First Nat. Bank, 84 N. W. 408, 61 Neb. 20, 87 Am. St. Rep. 447.

N. M. Lockhart v. Wills, 50 P. 318, 9 N. M. 263; Armijo v. New Mexico Town Co., 5 P. 709, 3 N. M. (Gild.) 427.

Okl. O'Neill v. Lauderdale, 195 P. 121, 80 Okl. 170.

Or. Coffin v. Hutchinson, 30 P. 424, 22 Or. 554.

S. D. Fisher v. Porter, 77 N. W. 112, 11 S. D. 311.

W. Va. Cobb v. Glenn Boom & Lumber Co., 49 S. E. 1005, 57 W. Va. 49, 110 Am. St. Rep. 734.

[10] Shoup v. Marks (C. C. A. Alaska) 128 F. 32, 62 C. C. A. 540.

rule is that a verdict should never be directed when the evidence presents an actual issue of fact,[11] or unless as a matter of law no recovery can be had by the party opposing the direction, under any proper view of the facts which the evidence tends to establish,[12] and in a numbr of jurisdictions the view is taken that on a motion for the direction of a verdict the court should directly decide whether there is an issue of fact, without reference to its attitude on a motion to set aside a contrary verdict.

The court of Appeals of New York, in a case in which the trial court directed a verdict for the defendant because it thought it might be its duty to set aside a verdict for plaintiff, if rendered, has pointed out that the results of setting aside a verdict and the result of directing one are widely different, and should not be controlled by the same conditions or circumstances; that in the one case there is a retrial, while in the other the judgment is final; that one rests in discretion, and the other upon legal right; that one involves a mere matter of remedy or procedure, while the other determines substantive and substantial rights; and in this jurisdiction it is considered that, if there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside a contrary one, but because there is an actual defect of proof, and hence, as a matter of law, the party against whom the directed verdict is sought is not entitled to recover.[13] The Supreme Court of this state has held that, where there is a conflict of evidence as to material facts, a verdict cannot be directed for a defendant, although a verdict for the plaintiff would clearly have to be set aside.[14]

In other jurisdictions similar views are held.[15] In Kentucky it is said to be the well-established rule that it is not enough to justify a peremptory instruction to find for defendant that the evidence, in the opinion of the court, is such that possibly a new trial should be awarded in case of a verdict for plaintiff, on the ground that it would be against the weight of the evidence, but if there be evidence conducing to show a right of recovery, however contradictory it may seem to the court, or wherever the preponderance of the evidence in the opinion of the court may be, the plaintiff may insist on a verdict of the jury.[16] In another case in this

[11] McDonald v. Metropolitan St. Ry. Co., 60 N. E. 282, 167 N. Y. 66.

[12] Texas & P. Ry. Co. v. Cox, 12 S. Ct. 905, 145 U. S. 593, 36 L. Ed. 829.

[13] McDonald v. Metropolitan St. Ry. Co., 60 N. E. 282, 167 N. Y. 66.

[14] Schmal v. Rothschild (Sup.) 96 N. Y. S. 179.

[15] Citizens' & People's Nat. Bank v. Louisville & N. R. Co. (Fla.) 85 So. 916; Aiken v. Holyoke St. Ry. Co., 61 N. E. 557, 180 Mass. 8; Derrick v. Harwood Electric Co., 111 A. 48, 268 Pa. 136.

[16] Eskridge's Ex'rs v. Cincinnati, N. O. & T. P. Ry. Co., 12 S. W. 580, 89 Ky. 367.

jurisdiction it is said that the right of a litigant to have a jury pass on the issues ceases only when the evidence of his own witnesses fails to show a right to recover at all, or shows such facts as must preclude a recovery, and that, however strong the proof of the opposite party may be, even to satisfying the court that it would not permit a verdict to stand if returned against this evidence, the case must go to the jury.[17]

In Wisconsin the court refuses to accept the doctrine that a verdict should be directed where the evidence preponderates so strongly in favor of the party seeking a direction that it would be the duty of the court to set aside an opposite verdict and grant a new trial, and in this jurisdiction the test is, taking all the evidence produced, giving thereto the most favorable inferences it will reasonably bear, and admitting that it establishes what it tends to establish, whether it will sustain a contrary verdict. If so, the motion for a direction must be denied.[18] The Supreme Court of Washington holds that the rule that, if the trial court would set aside a verdict in favor of one of the parties as against the evidence, it may direct a verdict for the adverse party, does not obtain in that jurisdiction.[19]

§ 106. Direction of verdict for defendant

In accordance with the principles above stated the court may direct a verdict for the defendant.[20] It is proper to direct such a verdict when the evidence of the plaintiff affords no basis for a recovery by him,[21] or where the evidence is such that the court

17 Dick v. Louisville & N. R. Co., (Ky.) 64 S. W. 725.

18 Lewis v. Prien, 73 N. W. 654, 98 Wis. 87.

19 Weir v. Seattle Electric Co.. 84 P. 597, 41 Wash. 657.

20 Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255; McGibbon v. Walsh, 85 N. W. 409, 109 Wis. 670.

21 **U. S.** Royer v. Shulty Belting Co. (C. C. A. Mo.) 29 F. 281.

Ala. Sweet v. Birmingham Ry. & Electric Co., 39 So. 767, 145 Ala. 667.

Ariz. Root v. Fay, 43 P. 527, 5 Ariz. 19.

Cal. Ross v. San Francisco-Oakland Terminal Rys. Co. (App.) 191 P. 703.

Colo. Murphy v. Cobb, 5 Colo. 281.

Idaho. Haner v. Northern Pac. Ry. Co., 62 P. 1028, 7 Idaho, 305.

Ill. Ackerstadt v. Chicago City Ry. Co., 62 N. E. 884, 194 Ill. 616.

Ind. State, to Use of School Town of Irvington, v. Julian, 93 Ind. 292.

Iowa. Rice-Hinze Piano Co. v. Shellabarger, 56 N. W. 422, 88 Iowa, 752.

Kan. Barr v. Irey, 3 Kan. App. 240, 45 P. 111.

Ky. Leonard v. Enterprise Realty Co., 219 S. W. 1066, 187 Ky. 578, 10 A. L. R. 238.

Md. Standard Scale & Supply Co. v. Baltimore Enamel & Novelty Co., 110 A. 486, 136 Md. 278, 9 A. L. R. 1502.

Mich. Demill v. Moffat, 8 N. W. 79, 45 Mich. 410.

Mo. Jackson v. Hardin, 83 Mo. 175.

Neb. Holdrege v. Watson, 96 N. W. 67, 1 Neb. (Unof.) 687.

N. J. Regan v. Palo, 41 A. 364, 62 N. J. Law, 30.

would be compelled to set aside a verdict for the plaintiff,[22] and in some jurisdictions, although the evidence on the part of the plaintiff, standing alone, would justify submitting the case to the jury, yet if, on the whole evidence, the court could not permit a verdict for the plaintiff to stand, it may direct a verdict for the defendant.[23] On the other hand, it is only where the plaintiff fails to make out a case, so that it would be the duty of the court to set aside a verdict for him as not being supported by any competent evidence on some material point, that a verdict for the defendant should be directed,[24] and it is proper to refuse, and ordinarily improper to grant, a peremptory instruction for the defendant, where the evidence favorable to the plaintiff and reasonable inferences which the jury is permitted to draw therefrom support the essential elements of the cause of action set out in the complaint.[25]

§ 107. Direction of verdict for plaintiff

Where the plaintiff has clearly made out his case, and there is no contrary evidence, it is proper for the trial court to direct a verdict in his favor,[26] and in some jurisdictions, as has already been indicated, the rule is that, if the evidence so preponderates in favor of the plaintiff that a verdict against him would be set aside by the court as contrary to the evidence, it is the duty of

N. M. Candelaria v. Atchison, T. & S. F. R. Co., 27 P. 497, 6 N. M. 266.

N. D. Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000.

Pa. Simrell v. Miller, 169 Pa. 326, 32 A. 548.

S. C. Hillhouse v. Jennings, 38 S. E. 596, 60 S. C. 392.

Tex. Washington v. Missouri, etc., Ry. Co. of Texas (Civ. App.) 36 S. W. 778.

Vt. Knapp v. Winchester, 11 Vt. 351.

W. Va. Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999.

Wis. Cutler v. Hurlbut, 29 Wis. 152.

[22] Armstrong v. Aragon, 79 P. 291, 13 N. M. 19; Fisher v. Porter, 77 N. W. 112, 11 S. D. 311.

[23] Giermann v. St. Paul, M. & M. Ry. Co., 43 N. W. 483, 42 Minn. 5.

[24] Gartside Coal Co. v. Turk, 147 Ill. 120, 35 N. E. 467; Diezi v. G. H. Hammond Co., 60 N. E. 353, 156 Ind. 583. See Cummings v. Railway Mail Ass'n (Iowa) 177 N. W. 466.

[25] **Ind.** Rawlings v. Vreeland (App.) 127 N. E. 786; Jackson v. Mauck, 126 N. E. 851.

Mo. Hunterbrinker v. Tappmeyer (App.) 223 S. W. 692.

Neb. Harrahill v. Bell, 178 N. W. 622, 104 Neb. 777.

Okl. Stevens v. Oklahoma Automobile Co., 188 P. 1075, 78 Okl. 126; Harrison v. Corry Pharmacy, 188 P. 1076, 78 Okl. 127.

Pa. Derrick v. Harwood Electric Co., 111 A. 48, 268 Pa. 136.

[26] **U. S.** Marshall v. Hubbard, 6 S. Ct. 806, 117 U. S. 415, 29 L. Ed. 919; Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855.

Ala. Sims v. Hertzfeld, 10 So. 227, 95 Ala. 145.

Conn. Whitney v. First Ecclesiastical Soc. in Brooklyn, 5 Conn. 405.

Ill. Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75.

Ind. Friedline v. State, 93 Ind. 366.

Kan. Hillis v. First Nat. Bank, 54 Kan. 421, 38 P. 565.

Mich. Rasch v. Bissell, 52 Mich. 455, 18 N. W. 216.

the court to direct a verdict for him.[27] On the other hand, plaintiff is entitled to a directed verdict only when, giving to the defendant the benefit of every inference that can fairly be drawn from the evidence, it is insufficient to authorize a verdict in his favor,[28] and where there is some conflict in the evidence as to material issues it is error to direct a verdict for the plaintiff.[29]

§ 108. Rule in equity

Where, in a suit in equity, issues of fact are submitted to a jury for decision, the general rule is that the court may, in a proper case, direct a verdict; this rule applying whether the parties are,[30] or are not,[31] entitled to a jury trial as of right, and where a jury is impaneled merely as a body advisory to the court, to assist it in determining disputed facts, the court may direct a verdict, although the evidence is conflicting.[32]

B. Direction in Criminal Cases

Form and requisites of request for direction of verdict, see post, § 481.

§ 109. Power and duty of court, in general, to direct verdict of acquittal

In the majority of jurisdictions, and even in some jurisdictions in which the jury are the judges of the law, the rule is, in criminal prosecutions, that where there is no proof reasonably tending to sustain the charge, or where the evidence is so weak and defective that a verdict based upon it cannot be sustained, the court has power to,[33] and should,[34] at least upon request,[35] direct the jury

[27] Bagley v. Cleveland Rolling Mill Co. (C. C. N. Y.) 21 F. 159; Peet v. Dakota Fire & Marine Ins. Co., 1 S. D. 462, 47 N. W. 532.

[28] Fire Ass'n of Philadelphia v. Mechlowitz (C. C. A. N. Y.) 266 F. 322; Citizens' & People's Nat. Bank v. Louisville & N. R. Co. (Fla.) 85 So. 916.

[29] Phillips v. Jacobs (Ga. App.) 103 S. E. 686; Central Nat. Bank v. F. W. Drosten Jewelry Co., 220 S. W. 511, 203 Mo. App. 646.

[30] Ely v. Early, 94 N. C. 1.

[31] Hess v. Miles, 70 Mo. 203; Sparks v. Ross, 65 A. 977, 72 N. J. Eq. 762; Pier v. Prouty, 67 Wis. 218, 30 N. W. 232.

[32] Galvin v. Palmer, 113 Cal. 46, 45 P. 172; Robinson v. Dryden, 24 S. W. 448, 118 Mo. 584; Baldwin v. Taylor, 166 Pa. 507, 31 A. 250.

[33] State v. Trove, 27 N. E. 878, 1 Ind. App. 553; Daniel v. Commonwealth, 186 S. W. 489, 170 Ky. 693; Blankenship v. Commonwealth, 145 S. W. 752, 147 Ky. 768; Commonwealth v. Murphy, 109 S. W. 353, 33 Ky. Law Rep. 141; People v. Gresser (Sup.) 124 N. Y. S. 581.

Effect of admissions by state. Where, by the opening statement for the prosecution in a criminal trial, and after a full opportunity for the correction of any ambiguity, error, or omission in the statement, a fact is clearly and deliberately admitted which must necessarily prevent a conviction and require an acquittal, the court may, upon its own motion or that of counsel, close the case by di-

[34, 35] See notes 34 and 35 on following page.

to return a verdict of not guilty. Under this rule, where there is no substantial evidence of facts excluding every hypothesis ex-

recting a verdict for the accused. United States v. Dietrich (C. C. A. Neb.) 126 F. 676.

Directing clerk to enter verdict. The court has no power to direct the clerk to act for the jury. State v. Ford, 83 S. E. 831, 168 N. C. 165.

34 U. S. (C. C. N. Y.) United States v. Fullerton, Fed. Cas. No. 15,176, 7 Blatchf. 177; (D. C. N. Y.) United States v. Hayden, Fed. Cas. No. 15,333, 52 How. Prac. 471.

Ala. Cobb v. State, 85 So. 870, 17 Ala. App. 479; Condry v. State, 16 Ala. App. 192, 76 So. 476; Jackson v. State, 69 So. 97, 178 Ala. 76; Green v. State, 68 Ala. 539.

Ind. State v. McCaffrey, 103 N. E. 801, 181 Ind. 200; State v. Banks, 48 Ind. 197.

Kan. State v. Gibbs, 181 P. 569, 105 Kan. 52.

Ky. Saylor v. Commonwealth, 166 S. W. 254, 158 Ky. 768; Commonwealth v. Boaz, 131 S. W. 782, 140 Ky. 715; Wilson v. Commonwealth, 121 S. W. 430.

Me. State v. Davis, 101 A. 208, 116 Me. 260; State v. Benson, 98 A. 561, 115 Me. 549; State v. Grondin, 94 A. 947, 113 Me. 479; State v. Simpson, 92 A. 898, 113 Me. 27.

Mich. People v. Minney, 119 N. W. 918, 155 Mich. 534.

Mo. State v. Young, 140 S. W. 873, 237 Mo. 170; State v. Daubert, 42 Mo. 242.

Mont. State v. Welch, 55 P. 927, 22 Mont. 92.

N. Y. People v. Smith, 147 N. Y. S. 541, 84 Misc. Rep. 348.

N. C. State v. Norman, 68 S. E. 917, 153 N. C. 591; State v. Green, 117 N. C. 695, 23 S. E. 98.

Okl. Eggleston v. State, 127 P. 264, 8 Okl. Cr. 264; Nash v. State, 126 P. 260, 8 Okl. Cr. 1; Huffman v. State, 119 P. 644, 6 Okl. Cr. 476; Cummins v. State, 117 P. 1099, 6 Okl. Cr. 180; Pilgrim v. State, 104 P. 383, 3 Okl. Cr. 49; Shires v. State, 99 P. 1100, 2 Okl. Cr. 89.

Pa. Pauli v. Commonwealth, 89 Pa. 432.

Utah. State v. Gordon, 76 P. 882, 28 Utah, 15.

Effect of proof of corpus delicti. Though the corpus delicti is proved beyond a reasonable doubt, a general charge for defendant should be given when there is no legal evidence connecting him with the commission of the crime as charged. Martin v. State, 85 So. 42; 17 Ala. App. 310.

Right to directed verdict at close of evidence for state. The refusal to direct a verdict of not guilty is proper, where the evidence is not all in. State v. May, 68 S. E. 1062, 153 N. C. 600. Whatever the state's evidence, a court is not bound to direct a verdict of acquittal until the conclusion of all the testimony. Commonwealth v. George, 13 Pa. Super. Ct. 542. A motion for directed verdict at close of government's case is waived by accused's introduction of evidence, but waiver does not deprive him of right to have sufficiency in law of entire evidence considered upon like motion at close of all testimony. Kasle v. United States (C. C. A. Ohio) 233 F. 878, 147 C. C. A. 552.

Dismissal of prosecution. Where the trial court finds it is necessary to advise a verdict of not guilty, he should discharge the jury and dismiss the prosecution. Findley v. State, 145 P. 1107, 11 Okl. Cr. 275. A motion by defendants in a criminal case that they be discharged upon the ground that the evidence is not sufficient to establish, in law, the offense charged, calls for the judgment of the court on the question whether the evidence, in any view, could establish the crime charged; and, if it could not, it is the court's duty to withdraw such charge from the jury, and dismiss defendants from further prosecution thereunder. Devoy v. State, 99 N. W. 455, 122 Wis. 148.

35 U. S. (C. C. A. W. Va.) Duff v. United States, 185 F. 101, 107 C. C. A. 319.

Ky. Bailey v. Commonwealth, 113 S. W. 140, 130 Ky. 301.

N. Y. People v. Bennett, 49 N. Y. 137; Reynolds v. People, 41 How. Prac. 179.

Okl. High v. State, 101 P. 115, 2 Okl. Cr. 161, 28 L. R. A. (N. S.) 162.

cept that of guilt,[36] or where there is clear proof of facts negativing an essential element of guilt,[37] or where the proof fails to show the corpus delicti,[38] or where the evidence of the state consists solely of the uncorroborated testimony of an accomplice,[39] the court should direct a verdict for the accused; and where the facts in support of the pleas of former acquittal and once in jeopardy are not in dispute the court should direct a verdict under the pleas.[40]

In a few jurisdictions, in which the court has power to direct a verdict of acquittal, the rule is that a defendant is not entitled as of right to an instructed verdict of not guilty,[41] the matter of such a direction being regarded ordinarily as within the discretion of the trial court.[42] The appellate court, however, when the

Pa. Commonwealth v. Yost, 46 A. 845, 197 Pa. 171.

W. Va. State v. Phillips, 93 S. E. 828, 80 W. Va. 748, L. R. A. 1918A, 1164.

[36] Isbell v. United States (C. C. A. Okl.) 227 F. 788, 142 C. C. A. 312; Union Pacific Coal Co. v. United States (C. C. A. Utah) 173 F. 737, 97 C. C. A. 578; Starkes v. State, 64 So. 158, 11 Ala. App. 268.

[37] State v. Martini, 78 A. 12, 80 N. J. Law, 685.

[38] Waide v. State, 162 P. 1139, 13 Okl. Cr. 165; State v. Brown, 88 S. E. 21, 106 S. C. 437, L. R. A. 1916D, 1295.

[39] Reynolds v. State, 127 P. 731, 14 Ariz. 302; Lane v. Commonwealth, 121 S. W. 486, 134 Ky. 519; Thompson v. State, 132 P. 695, 9 Okl. Cr. 525.

Rule in Maryland. There is no practice which would authorize the court to discharge defendants on motion because the only evidence against them is the uncorroborated evidence of accomplices. Luery v. State, 81 A. 681, 116 Md. 284, Ann. Cas. 1913, 161.

Rule in Wisconsin. When there is no evidence against accused except the uncorroborated testimony of accomplices, it is discretionary with the trial court whether to direct an acquittal. Murphy v. State, 102 N. W. 1087, 124 Wis. 635; Black v. State, 59 Wis. 471, 18 N. W. 457.

[40] Strom v. Territory, 94 P. 1099, 12 Ariz. 26, judgment affirmed 99 P. 275, 12 Ariz. 109, and 170 F. 423, 95 C. C. A. 593; Commonwealth v. Brown, 28 Pa. Super. Ct. 296.

[41] **Fla.** Yarbrough v. State, 83 So. 873; Long v. State, 83 So. 293, 78 Fla. 464; Drayton v. State, 82 So. 801, 78 Fla. 254; Wells v. State, 77 So. 879, 75 Fla. 229; Davis v. State, 76 So. 675, 74 Fla. 100; Bennett v. State, 67 So. 125, 68 Fla. 494; Hughes v. State, 55 So. 463, 61 Fla. 32; Ryan v. State, 53 So. 448, 60 Fla. 25; Menefee v. State, 51 So. 555, 59 Fla. 316.

Ga. O'Neal v. State, 99 S. E. 891, 24 Ga. App. 160; Bishop v. State, 90 S. E. 369, 18 Ga. App. 714; Sheffield v. State, 90 S. E. 356, 18 Ga. App. 697; Stonecypher v. State, 88 S. E. 719, 17 Ga. App. 818; Wobbington v. State, 86 S. E. 417, 17 Ga. App. 267; Bell v. State, 84 S. E. 150, 15 Ga. App. 718; Scott v. State, 82 S. E. 376, 14 Ga. App. 806; Hudson v. State, 81 S. E. 362, 14 Ga. App. 490; Harvey v. State, 70 S. E. 141, 8 Ga. App. 660.

Compare Hunter v. State, 79 S. E. 752, 13 Ga. App. 651.

[42] **U. S.** (C. C. A. N. C.) Breese v. United States, 106 F. 680, 45 C. C. A. 535, judgment reversed on rehearing 108 F. 804, 48 C. C. A. 36.

Fla. McCray v. State, 34 So. 5, 45 Fla. 80.

Md. Ridgely v. State, 75 Md. 510, 23 A. 1099; Goldman v. State, 75 Md. 621, 23 A. 1097.

N. J. State v. Metzger, 82 A. 330, 82 N. J. Law, 749; State v. Lieberman, 79 A. 331, 80 N. J. Law, 506,

whole record is returned, is required to consider whether the defendant has suffered manifest wrong and injustice in the exercise by the trial court of such discretion,[43] and where the state admits that it has not proved the charge laid in the indictment it will be legal error to refuse a request for a directed verdict for defendant.[44]

Where the evidence reasonably tends to show the guilt of defendant of the offense charged against him,[45] or where enough is proved by the state to require the defendant to introduce any evidence, the court has no right to direct an acquittal.[46] The court may properly refuse to direct a verdict of acquittal on the ground of lack of independent direct and express evidence of the capacity of the defendant to commit the crime charged, since such capacity is a question for the jury from the age, appearance and

judgment affirmed 82 A. 1134, 82 N. J. Law, 748.

R. I. State v. Longbottom, 103 A. 699; State v. Collins, 52 A. 990, 24 R. I. 242.

[43] State v. Brown, 60 A. 1117, 72 N. J. Law, 354.

[44] State v. Raymond, 78 A. 761, 78 N. J. Law, 61.

[45] **U. S.** (C. C. A. Mich.) Higgins v. United States, 185 F. 710, 108 C. C. A. 48; (C. C. A. Neb.) Matters v. U. S., 261 F. 826.

Ala. Suttles v. State, 74 So. 400, 15 Ala. App. 582; Chappell v. State, 73 So. 134, 15 Ala. App. 227; Bush v. State, 67 So. 847, 12 Ala. App. 260; Mangum v. State, 47 So. 104, 156 Ala. 95; Dillard v. State, 44 So. 396, 151 Ala. 92; Ferguson v. State, 43 So. 16, 149 Ala. 21; Payne v. State, 42 So. 988, 148 Ala. 609; Hargrove v. State, 41 So. 972, 147 Ala. 97, 119 Am. St. Rep. 60, 10 Ann. Cas. 1126; Gilyard v. State, 98 Ala. 59, 13 So. 391; Pellum v. State, 89 Ala. 28, 8 So. 83.

Me. State v. Cady, 82 Me. 426, 19 A. 906.

Mass. Commonwealth v. Brooks, 164 Mass. 397, 41 N. E. 660.

Mo. State v. Warner, 74 Mo. 83.

Neb. Koenigstein v. State, 173 N. W. 603, 103 Neb. 580; Alt v. State, 129 N. W. 432, 88 Neb. 259, 35 L. R. A. (N. S.) 1212.

N. M. State v. Wilson, 184 P. 531, 25 N. M. 439.

N. C. State v. Dobbins, 62 S. E. 635, 149 N. C. 465.

Ohio. State v. Gross, 110 N. E. 466, 91 Ohio St. 161.

Okl. Radke v. State (Cr. App.) 187 P. 500; State v. Duerksen, 129 P. 881, 8 Okl. Cr. 601, 52 L. R. A. (N. S.) 1013; Faggard v. State, 104 P. 930, 3 Okl. Cr. 159.

S. C. State v. Franklin, 60 S. E. 953, 80 S. C. 332, judgment affirmed Franklin v. State of South Carolina, 30 S. Ct. 640, 218 U. S. 161, 54 L. Ed. 980.

S. D. State v. Egland, 121 N. W. 798, 23 S. D. 323, 139 Am. St. Rep. 1066.

Wash. State v. Welty, 118 P. 9, 65 Wash. 244; State v. Wilson, 10 Wash. 402, 39 P. 106.

Effect of testimony of accomplice. In a prosecution for robbery, where an accomplice testified positively as to defendant's participation, and was sufficiently corroborated to support a conviction, the court properly refused to instruct an acquittal. Perry v. State, 155 S. W. 263, 69 Tex. Cr. R. 644.

Effect of variance. Variance between allegations of indictment and proof does not entitle defendant to affirmative charge. Benjamin v. State, 81 So. 855, 17 Ala. App. 77, certiorari denied Ex parte Benjamin, 82 So. 893, 203 Ala. 696.

[46] State v. Jones, 18 Or. 256, 22 P. 840.

conduct of the accused,[47] and in some jurisdictions the rule is stated to be that if there is any evidence, however slight, conducing to show the guilt of the accused, the court should not give such a direction.[48]

§ 110. Rule that court has no power to direct verdict of acquittal

In a few jurisdictions, usually by reason of particular statutory provisions, the court has no power to direct or advise the jury to return a verdict of not guilty.[49] In Illinois this is the rule, under the statutory provision that the jury shall be judges of the law and the fact; it not being considered improper, however, for the court, if the evidence is thought insufficient to support a verdict of guilty, to so advise the state's attorney that he may exercise his discretion.[50]

§ 111. Rule that court may advise the jury to acquit

In some jurisdictions there are statutory provisions that if the court, at any time after the evidence on either side is closed, deems it insufficient to warrant a conviction, it may advise the jury to acquit; the jury, however, not being bound by the advice. Under such provisions it is usually held that the court has no authority to direct the jury to find a verdict of not guilty.[51] But where the conditions prescribed by the statute are present it will be the duty of the court to advise the jury to acquit, notwithstanding the lack of binding force of such advice,[52] and in one ju-

[47] State v. Vineyard, 101 S. E. 440, 85 W. Va. 293.

[48] **Ky.** Ratliff v. Commonwealth, 206 S. W. 497, 182 Ky. 246; Pace v. Commonwealth, 186 S. W. 142, 170 Ky. 560; Commonwealth v. Little, 131 S. W. 387, 140 Ky. 550; Spencer v. Commonwealth (Ky.) 122 S. W. 800; Bennett v. Commonwealth, 118 S. W. 332, 133 Ky. 452; Commonwealth v. Murphy, 109 S. W. 353, 33 Ky. Law Rep. 141; Crawford v. Commonwealth, 35 S. W. 114.

[49] State v. Dudenhefer, 47 So. 614, 122 La. 288; State v. Albertson, 128 N. W. 1122, 20 N. D. 512; State v. Wright, 126 N. W. 1023, 20 N. D. 216, Ann. Cas. 1912C, 795; State v. Guffey, 163 N. W. 679, 39 S. D. 84; State v. Stone, 137 N. W. 606, 30 S. D. 23.

[50] People v. Karpovich, 123 N. E. 324, 288 Ill. 268; People v. Dettmering, 116 N. E. 205, 278 Ill. 580; People v. Zurek, 115 N. E. 644, 277 Ill. 621.

[51] **Cal.** People v. Stoll, 77 P. 818, 143 Cal. 689; People v. Roberts, 45 P. 1016, 114 Cal. 67; People v. Daniels, 105 Cal. 262, 38 P. 720.

Idaho. State v. Peck, 95 P. 515, 14 Idaho, 712; State v. Wright, 85 P. 493, 12 Idaho, 212; Territory v. Neilson, 2 Idaho (Hasb.) 614, 23 P. 537.

[52] People v. Ward, 79 P. 448, 145 Cal. 736; State v. Downing, 130 P. 461, 23 Idaho, 540; McLaughlin v. State (Okl. Cr. App.) 193 P. 1010; State v. Evans (Okl. Cr. App.) 186 P. 735; Shannon v. State, 160 P. 1131, 12 Okl. Cr. App. 584.

Requisites of motion to advise acquittal. The statute only authorizes the court to advise the jury to acquit, and provides that they shall not be bound by his advice, yet, where there is no competent evi-

risdiction it is held that the court may direct an acquittal if the evidence is wholly insufficient to sustain a conviction; the statutory provision not applying in such case.[53]

§ 112. Rule that court has no power to direct conviction

The almost universal rule is that, where the defendant has pleaded not guilty, the court has no power to require the jury to render a verdict of guilty,[54] no matter how clear and undisputed the evidence may be,[55] and even in a case of the most trivial importance.[56]

dence of the corpus delicti, so that it becomes the duty of the court to advise an acquittal, the fact that counsel, moving orally at the close of the people's case, uses the word "instruct," instead of "advise," does not justify a denial of the motion. People v. Ward, 79 P. 448, 145 Cal. 736.

What constitutes close of evidence. The opening statement is not evidence, within the statutory provision that, "at any time after the evidence on either side is closed," the court may advise the jury to acquit. People v. Stoll, 77 P. 818, 143 Cal. 689.

[53] State v. Gomez, 190 P. 982, 58 Mont. 177.

[54] **U. S.** (C. C. A. Ark.) Cummins v. United States, 232 F. 844, 147 C. C. A. 38; (C. C. A. Cal.) Blair v. United States, 241 F. 217, 154 C. C. A. 137, reversing judgment (D. C.) United States v. Blair-Murdock Co., 228 F. 77; (C. C. Kan.) United States v. Taylor, 11 F. 470.

Ark. Burton v. State, 203 S. W. 1023, 135 Ark. 164; Snead v. State, 203 S. W. 703, 134 Ark. 303; Wylie v. State, 199 S. W. 905, 131 Ark. 572.

Conn. State v. Buonomo, 87 A. 977, 87 Conn. 285.

Ill. People v. Koehler, 146 Ill. App. 541.

Kan. State v. Wilson, 64 P. 23, 62 Kan. 621, 52 L. R. A. 679.

Miss. Woods v. State, 32 So. 998, 81 Miss. 164.

Mo. State v. McNamara, 110 S. W. 1067, 212 Mo. 150.

Mont. State v. District Court, Silver Bow County, 119 P. 1103, 44 Mont. 318, Ann. Cas. 1913B, 396.

N. Y. Howell v. People, 5 Hun. 620.

N. C. State v. Alley, 104 S. E. 365, 180 N. C. 663; State v. Godwin, 59 S. E. 132, 145 N. C. 461, 122 Am. St. Rep. 467; State v. Hill, 53 S. E. 311, 141 N. C. 769; State v. Winchester, 113 N. C. 641, 18 S. E. 657.

Pa. Commonwealth v. Havrilla, 38 Pa. Super. Ct. 292.

Tenn. Shipp v. State, 161 S. W. 1017, 128 Tenn. 499.

Tex. Manning v. State, 145 S. W. 938, 66 Tex. Cr. R. 180; Potts v. State, 74 S. W. 31, 45 Tex. Cr. R. 45, 2 Ann. Cas. 827.

Wash. State v. Holmes, 122 P. 345, 68 Wash. 7.

Rule in Pennsylvania. It is only under very exceptional circumstances, if ever, that the court will be justified in giving binding directions to the jury to convict the defendant in a criminal case. Under no circumstances may this be done, without giving him a fair opportunity to present all of his relevant and material testimony, and according to him the constitutional right to be heard by his counsel upon the question. Commonwealth v. Gamble, 36 Pa. Super. Ct. 146.

[55] **U. S.** (C. C. A. Ill.) Konda v. United States, 166 F. 91, 92 C. C. A. 75, 22 L. R. A. (N. S.) 304.

Ga. Tucker v. State, 57 Ga. 503.

Ky. Lucas v. Commonwealth, 82 S. W. 440, 118 Ky. 818, 26 Ky. Law Rep. 740.

Mont. State v. Koch, 85 P. 272, 33 Mont. 490, 8 Ann. Cas. 804.

[56] People v. Walker, 91 N. E. 806, 198 N. Y. 329, reversing judgment 118 N. Y. S. 1132, 134 App. Div. 909.

An instruction that, if the jury believe the evidence, they will find the defendant guilty, is not a directed verdict within the above rule,[57] and a statement by the judge in his charge that in his opinion it is the duty of the jury to convict in view of the uncontradicted testimony does not amount to a direction to convict, and in some jurisdictions where the court is permitted to comment on the evidence is regarded as within his judicial privilege and duty.[58] In other jurisdictions, however, where such comment is allowed, such a statement is considered improper, as likely to mislead the jury into the belief that they are directed to bring in a verdict of guilty.[59]

§ 113. Qualifications of rule that court cannot direct conviction

In Alabama it has been held that where the evidence is in writing, and consists of a written agreement of the parties, signed by counsel, with respect to the facts upon which the case is tried, and the facts so agreed upon establish the defendant's guilt as a matter of law, the court may charge directly upon the evidence, without referring its credibility to the jury.[60]

In Arkansas, where the courts adhere to the doctrine of the inability of the trial judge, in a trial for an offense punishable either by fine or imprisonment, to direct a conviction,[61] the rule has been laid down that in misdemeanor cases, where the punishment is by fine only, the court may direct a verdict of guilty, when the facts are undisputed, and when from all the evidence guilt is the only inference that can be drawn.[62]

In Michigan, while a verdict of guilty must be rendered by the jury after opportunity for deliberation, where the defendant has pleaded not guilty, and the facts are not conceded,[63] and the court has no power to compel the jury to follow advice or a direction to convict,[64] the court has the power to instruct the jury that it is

Mo. State v. Picker, 64 Mo. App. 126.

N. M. Territory v. West, 99 P. 343, 14 N. M. 546.

N. Y. People v. Walker, 91 N. E. 806, 198 N. Y. 329, reversing judgment 118 N. Y. S. 1132, 134 App. Div. 909.

N. C. State v. Riley, 113 N. C. 648, 18 S. E. 168.

Or. State v. Reed, 97 P. 627, 52 Or. 377.

[57] Everett v. Williams, 67 S. E. 265, 152 N. C. 117.

[58] State v. Seifert, 92 A. 345, 86 N. J. Law, 706, affirming judgment (Sup.) 88 A. 947, 85 N. J. Law, 104.

[59] Breese v. United States, (C. C. A. N. C.) 108 F. 804, 48 C. C. A. 36.

[60] Ligon v. State, 39 So. 662, 145 Ala. 659.

[61] Snead v. State, 203 S. W. 703, 134 Ark. 303.

[62] Roberts v. State, 106 S. W. 952, 84 Ark. 564.

[63] People v. Collison, 85 Mich. 105, 48 N. W. 292; People v. Curry, 128 N. W. 213, 163 Mich. 180, 30 L. R. A. (N. S.) 892.

[64] People v. Warren, 81 N. W. 360, 122 Mich. 504, 80 Am. St. Rep. 582; People v. North, 117 N. W. 63, 153 Mich. 612.

their duty to bring in a verdict of guilty, if the court thinks the evidence warrants such an instruction,[65] and in misdemeanor cases, where the facts are undisputed, it is not considered reversible error to direct a verdict of guilty.[66]

C. Directing Verdict or Declaring Law if the Jury Believe the Evidence

§ 114. In civil cases

Where the evidence is conflicting, or more than one inference can be drawn therefrom, it is error to instruct that, if the jury believe the evidence or believe certain witnesses, they shall find for one party or the other, since such an instruction virtually submits to the jury only the question of the credibility of the witnesses and prevents them from construing the evidence,[67] and the court should refuse to give such a charge unless the party asking it wholly abandons that part of his evidence in conflict with that of his adversary.[68] But where there is no conflict in the evidence, and the facts in issue are directly proved by the evidence of one party or the other, or are a necessary and inevitable inference of law from such evidence,[69] and therefore the case turns solely upon

[65] People v. Neumann, 48 N. W. 290, 85 Mich. 98.

[66] People v. Neumann, 85 Mich. 98, 48 N. W. 290; People v. Collison, 48 N. W. 292, 85 Mich. 105; People v. Neal, 106 N. W. 857, 143 Mich. 271.

[67] **Ala.** Central of Georgia Ry. Co. v. Bagley, 55 So. 894, 173 Ala. 611; United States Life Ins. Co. v. Lesser, 28 So. 646, 126 Ala. 568; Louisville & N. R. Co. v. Malone, 109 Ala. 509, 20 So. 33; Nelson v. Warren, 93 Ala. 408, 8 So. 413; Sublett v. Hodges, 88 Ala. 491, 7 So. 296; Suitzner v. State, 43 Ala. 24.

Ga. Jarrett v. Arnold, 30 Ga. 323.

Idaho. Ralston v. Plowman, 1 Idaho, 595.

Ky. Bucklin v. Thompson, 1 J. J. Marsh. 223; McPherson v. Hickmans, 1 T. B. Mon. 170; Western & Southern Life Ins. Co. v. Kaiser, 13 Ky. Law Rep. (abstract) 206.

Md. Cook v. Duvall, 9 Gill, 460.

N. Y. Reilly v. Third Ave. R. Co. (Sup.) 16 Misc. Rep. 11, 37 N. Y. S. 593; Dolan v. President, etc., of Delaware & H. Canal Co., 71 N. Y. 285.

N. C. Everett v. Receivers of Richmond & D. R. Co., 27 S. E. 991, 121 N. C. 519.

W. Va. Dickeschied v. Exchange Bank, 28 W. Va. 340.

The proper form of instruction in such case is to require that the belief of the jury arise "from" the evidence. Louisville & N. R. Co. v. Sherrell, 44 So. 631, 152 Ala. 213.

[68] Gibson v. J. Snow Hardware Co., 94 Ala. 346, 10 So. 304; Carter v. Shorter, 57 Ala. 253; Williams v. Hartshorn, 80 Ala. 211; Knight v. Bell, 22 Ala. 198.

[69] **Ala.** Birmingham Ry., Light & Power Co. v. Rutledge, 39 So. 338, 142 Ala. 195; Emrich v. Gilbert Mfg. Co., 35 So. 322, 138 Ala. 316.

N. C. Proffitt Mercantile Co. v. State Mut. Fire Ins. Co., 97 S. E. 476, 176 N. C. 545; Cowell v. Phœnix Ins. Co., 36 S. E. 184, 126 N. C. 684; Nelson v. Atlanta Home Ins. Co., 27 S. E. 38, 120 N. C. 302; Gaither v. Ferebee, 60 N. C. 303.

Vt. Lindsay v. Lindsay, 11 Vt. 621.

the credibility of the witnesses, it will be proper in some jurisdictions to give such an instruction,[70] and it is not improper to charge in effect that, if the jury find the facts as they are claimed to be by a party, he is entitled to a verdict, since this involves a determination by the jury whether they will believe the evidence of one side or the other whenever there is a conflict.[71]

§ 115. In criminal cases

Where there is some evidence tending to show the guilt of a defendant in a criminal prosecution, an instruction that if the jury believe the evidence they must find a verdict of not guilty is erroneous, as invading their province,[72] and a charge affirmative of guilt, predicated upon a belief of the evidence by the jury, should not be given where there is any evidence upon which an acquittal can be based, or where the facts pointing to guilt rest in inference only.[73] Such an instruction will be erroneous, where the evidence only tends to show the guilt of the defendant.[74] Where the evidence is without conflict and justifies a conviction, it is not error in some jurisdictions to instruct that, if the jury believe the evidence beyond a reasonable doubt, they should find a verdict of guilty.[75] In one jurisdiction, however, it is held that, while such a charge may not be error under some circumstances,

[70] **Ala.** Bryan v. Ware, 20 Ala. 687; McKenzie v. Stevens, 19 Ala. 691.

Ky. Swartzwelder v. United States Bank, 1 J. J. Marsh. 38.

Me. Todd v. Whitney, 27 Me. 480.

N. C. Wool v. Bond, 118 N. C. 1, 23 S. E. 923; Love v. Gregg, 117 N. C. 467, 23 S. E. 332.

Pa. Daubert v. Pennsylvania R. R., 155 Pa. 178, 26 A. 108.

Direction as to amount of recovery. Where damages for breach of contract are unliquidated and cannot be liquidated with absolute certainty, it is error to instruct that, if the jury believe plaintiff's uncontradicted testimony, they must find in his favor for the amount claimed. Pearce v. Bond, 71 Pa. Super. Ct. 501.

[71] Kleiner v. Third Ave. R. Co., 56 N. E. 497, 162 N. Y. 193, reversing judgment 57 N. Y. S. 1140, 38 App. Div. 623.

[72] **Ala.** Smith v. State, 72 So. 316, 197 Ala. 193; Brock v. State (App.) 61 So. 474; Scott v. State, 43 So. 181, 150 Ala. 59; Moss v. State, 40 So. 340, 146 Ala. 686; Bell v. State, 37 So. 281, 140 Ala. 57; Frost v. State, 27 So. 251, 124 Ala. 85; Keller v. State, 26 So. 328, 123 Ala. 94; Withers v. State, 23 So. 147, 117 Ala. 89.

Instruction predicated on belief in defendant's testimony. Where on a criminal prosecution the evidence as to the commission of the offense was in conflict, defendant's testimony showing him not guilty, it was proper to refuse to instruct that if the jury believed defendant's evidence they should acquit. Stevens v. State, 75 So. 708, 16 Ala. App. 116; Shepherd v. State, 33 So. 266, 135 Ala. 9.

[73] Clemmons v. State, 52 So. 467, 167 Ala. 20; State v. Windley, 100 S. E. 116, 178 N. C. 670; State v. Green, 26 S. E. 234, 48 S. C. 136.

[74] Brewer v. State, 21 So. 355, 113 Ala. 106.

[75] **Ala.** Rogers v. State, 73 So. 994, 15 Ala. App. 483; Warren v. State, 72 So. 624, 197 Ala. 313; Martin v. State, 58 So. 83, 3 Ala. App. 90;

or at least not reversible error,[76] it is subject to criticism, in that it only leaves to the jury the question of the truth of the evidence, and does not permit them to draw the conclusions of fact resulting therefrom.[77]

D. Directing Verdict or Declaring Law on a Hypothetical Statement of Facts, or if Certain Facts are Found

Necessity of instructions grouping facts for purpose of declaring law thereon or directing verdict, see post, § 285.

§ 116. In civil cases

In civil cases it is proper for the court to charge, on conflicting evidence, that, if the jury believe from the evidence that certain facts exist, certain legal consequences will follow, or that they may or should then find for one party or the other;[78] such a

Gilmore v. State, 37 So. 359, 141 Ala. 51; Parrish v. State, 36 So. 1012, 139 Ala. 16; Thompson v. State, 21 Ala. 48.

N. J. Derby v. State, 37 A. 614, 60 N. J. Law, 258.

Instructions held not improper. It is not reversible error for the court to say to the jury that if they believe the evidence of the witnesses of the commonwealth, "as to what they saw, and as to the admissions made by the defendant afterwards, we think you should conclude that the facts as charged in the indictment are sustained by the evidence," as it leaves the jury free to pass on the issues of fact arising under the evidence. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

Conviction on defendant's testimony. When defendant testifies in his own behalf, the court may charge that, if the jury believe his testimony, they may find him guilty, where such charge is justified by the evidence. State v. Woolard, 25 S. E. 719, 119 N. C. 779. But such a charge will be error if it does not appear that the testimony of the defendant, if true, established every fact essential to warrant a conviction. Commonwealth v. Hull, 65 Pa. Super. Ct. 450.

[76] State v. Vines, 93 N. C. 493, 53 Am. Rep. 466.

[77] State v. Seaboard Air Line Ry., 59 S. E. 1048, 145 N. C. 570; State v. Simmons, 56 S. E. 701, 143 N. C. 613.

[78] **U. S.** Stitt v. Huidekopers, 17 Wall. 384, 21 L. Ed. 644.

Ala. American Oak Extract Co. v. Ryan, 112 Ala. 337, 20 So. 644; Carlisle v. Hill, 16 Ala. 398; Irey v. Phifer, 11 Ala. 535.

Ark. Thompson v. Southern Lumber Co., 148 S. W. 537, 104 Ark. 196; Eureka Stone Co. v. Knight, 100 S. W. 878, 82 Ark. 164.

Cal. Arundell v. American Oilfields Co., 160 P. 159, 31 Cal. App. 218; Ryan v. Los Angeles Ice & Cold Storage Co., 112 Cal. 244, 44 P. 471, 32 L. R. A. 524.

Ill. East St. Louis Connecting Ry. Co. v. Eggman, 48 N. E. 981, 170 Ill. 538, 62 Am. St. Rep. 400, affirming judgment Egmann v. East St. Louis Connecting Ry. Co., 65 Ill. App. 345; Ladd v. Piggot, 114 Ill. 647, 2 N. E. 503.

Ind. Fitzpatrick v. Papa, 89 Ind. 17; Bundy v. McKnight, 48 Ind. 502.

Mo. Britton v. City of St. Louis, 120 Mo. 437, 25 S. W. 366; Hamilton v. Home Ins. Co., 94 Mo. 353, 7 S. W. 261; Clemens v. Collins, 14 Mo. 604; Price v. Barnard, 70 Mo. App. 175.

N. C. Barringer v. Burns, 108 N. C. 606, 13 S. E. 142.

Pa. Ham v. Delaware & H. Canal Co., 142 Pa. 617, 21 A. 1012.

S. C. Sandford v. Seaboard Air Line Ry., 61 S. E. 74, 79 S. C. 519;

charge not being within the rule against instructing on the facts or on the weight of the evidence.[79]

§ 117. In criminal cases

The rule in criminal cases, as in civil, is that a charge on a hypothetical statement of facts, declaring the legal result thereof, or stating that, if the jury find the existence of certain facts, certain legal conclusions will follow, is not a charge on the facts, and does not invade the province of the jury.[80] Accordingly the

Boyd v. Blue Ridge Ry. Co., 43 S. E. 817, 65 S. C. 326; Lagrone v. Timmerman, 46 S. C. 372, 24 S. E. 290.

Tex. Andrews v. Parker, 48 Tex. 94.

W. Va. Baltimore & O. R. Co. v. Skeels, 3 W. Va. 556.

Instructions held proper within rule. An instruction that if plaintiff has established a complete title and a better title than defendant, she is entitled to recover the land. Mitchell v. Cleveland, 57 S. E. 33, 76 S. C. 432. An instruction that if in approaching the crossing defendant's employés discovered plaintiff, and caused an unnecessary blast of the whistle to be sounded, that if it was reasonably apparent to them that such blast was calculated to frighten the horse and cause it to run away and injure plaintiff, that if such whistling was negligence and frightened the horse, causing it to run away, etc., and that if such negligence was the proximate cause of the injury, to find for plaintiff, is not objectionable as charging what acts or omissions constituted negligence. Paris & G. N. Ry. Co. v. Calvin (Tex. Civ. App.) 103 S. W. 428, judgment affirmed (Sup.) 106 S. W. 871, 101 Tex. 291. Where, in an action for a certain sum as commissions for the sale of a lighting plant, the court charged that if the jury found for plaintiffs, and they had a contract with defendants either express or implied, for such sum, the jury should find the amount so expressed or implied by the contract, but, if there was no contract for a certain sum as commissions, they should find such an amount as was a reasonable compensation for the services performed, and the jury found for a much less sum it was held that both clauses were addressed to the amount of damages in case the jury found for plaintiffs, and were not a direct charge to find for plaintiffs, or misleading. Ellis v. Kirkpatrick & Skiles, 74 S. W. 57, 32 Tex. Civ. App. 243. Where the issue was whether jobs were placed by a foreign corporation or by a local company of the same name, an instruction that, if the local company in placing jobs acted as agent of the foreign corporation, the verdict must be against the local company, was within the rule permitting a statement of facts hypothetically. La Fitte v. McNeel Marble Co., 70 S. E. 1013, 88 S. C. 378.

[79] Sentell v. Southern Ry., 49 S. E. 215, 70 S. C. 183; Sims v. Southern Ry. Co., 37 S. E. 836, 59 S. C. 246; Jenkins v. Charleston St. Ry. Co., 36 S. E. 703, 58 S. C. 373; Staley v. Stone, 92 S. W. 1017, 41 Tex. Civ. App. 299.

[80] **Cal.** People v. Creeks, 149 P. 821, 170 Cal. 368; People v. Kelly, 79 P. 846, 146 Cal. 119.

Ga. Densley v. State, 99 S. E. 895, 24 Ga. App. 136; Yarborough v. State, 86 Ga. 396, 12 S. E. 650.

La. State v. Mitchell, 41 La. Ann. 1073, 6 So. 785; State v. Lenares, 12 La. Ann. 226.

Me. State v. Beal, 48 A. 124, 94 Me. 520.

Nev. State v. Anderson, 4 Nev. 265.

N. H. State v. Davison, 64 A. 761, 74 N. H. 10.

S. C. State v. Duncan, 68 S. E. 684, 86 S. C. 370, Ann. Cas. 1912A, 1016; State v. Jones, 67 S. E. 160, 86 S. C. 17; State v. Mills, 60 S. E. 664, 79 S. C. 187; State v. Nelson, 60

court may in its charge group the constituent elements of the offense which is the subject of the prosecution, and instruct that if these are proved beyond a reasonable doubt the jury should convict the accused,[81] and if not proved they should acquit.[82]

S. E. 307, 79 S. C. 97; State v. Whittle, 37 S. E. 923, 59 S. C. 297; State v. Aughtrey, 27 S. E. 199, 49 S. C. 285; State v. Aughtry, 26 S. E. 619, 49 S. C. 285.

Tex. Reese v. State, 203 S. W. 769, 83 Tex. Cr. R. 394; Lester v. State, 154 S. W. 554, 69 Tex. Cr. R. 426; Pace v. State (Cr. App.) 79 S. W. 531; Williams v. State, 77 S. W. 215, 45 Tex. Cr. R. 477; Monceveis v. State (Cr. App.) 70 S. W. 94.

Instructions proper within rule. An instruction, on a trial for keeping and maintaining a gaming house, that the state relies on certain facts from which the jury must reach certain conclusions, that if the jury go to a private house in a city about 2 o'clock in the day and see the family sitting around the table in the dining room, with food on the table, they would conclude that those people were at dinner, and that they can tell a gambling den from the facts shown and reach their conclusion. State v. Lane, 63 S. E. 612, 82 S. C. 144. A charge, in a prosecution for assault with intent to kill, in which defendant claimed that he was insane from a blow on his head by the prosecuting witness when he did the cutting, but prosecuting witness claimed that accused was attacking him with a knife when he struck accused, that if accused was insane from the blow when he cut prosecuting witness he was not responsible unless he was at fault in bringing on the difficulty was not objectionable for hypothesizing whether accused was at fault. State v. Coyle, 67 S. E. 24, 86 S. C. 81, 138 Am. St. Rep. 1022. An instruction, in a homicide case, where the defense was that the killing was in self-defense while defendants were attempting to arrest deceased, who was an escaped convict, that if a convict take a gun from a guard forcibly for the purpose of making safe his escape, but not feloniously with intent to appropriate the same to his own use, the offense would not be robbery, and not a felony. State v. Whittle, 37 S. E. 923, 59 S. C. 297. An instruction on manslaughter, that if the jury should conclude from the evidence that accused wilfully and intentionally shot deceased because she had thrown up negroes to him, or because she had loaned her mule, or had drunk or was drinking whisky, he was guilty of murder. State v. Taylor, 34 S. E. 939, 56 S. C. 360.

Charge on right of self-defense. A charge that if the jury believe that defendant cursed deceased, and told him he was going to kill him, and said this as soon as he saw deceased, and, further, that defendant, immediately after using this language, shot deceased, then defendant could not be acquitted on the plea of self-defense, is not error, as invading the province of the jury. Logan v. State, 43 So. 10, 149 Ala. 11. In a homicide case, an instruction that if, before accused threatened to shoot decedent, the latter attempted to seize or handle a gun in such a manner as to induce accused to believe that decedent intended to shoot him, accused could shoot until it reasonably appeared to him that he was free from danger; but, if he began shooting before decedent had made a hostile demonstration, he was not justified in self-defense, is not on the weight of the evidence and is proper; the evidence showing that accused began the shooting without provocation. Arnwine v. State, 114 S. W. 796, 54 Tex. Cr. R. 213; Id., 114 S. W. 802.

[81] **Ga.** Blumenthal v. State, 49 S. E. 597, 121 Ga. 477; Bradley v. State, 48 S. E. 981, 121 Ga. 201; Thomas v. State, 90 Ga. 437, 16 S. E. 94;

[82] State v. Butts, 78 N. W. 687, 107 Iowa, 653.

Such a statement should not embody any facts not proved beyond a reasonable doubt.[83] The manner of the giving of it should not be such as to be likely to influence the minds of the jury with respect to what facts have been proved in the case,[84] and the court in giving it should not intimate that one witness is more credible than another, or that the jury ought to believe any particular testimony,[85] and the court should caution the jury that they are not to assume the existence or nonexistence of any of the facts included in such statement.[86]

Hill v. State, 63 Ga. 578, 36 Am. Rep. 120.

Ill. Bleich v. People, 81 N. E. 36, 227 Ill. 80.

Ind. McNulty v. State, 81 N. E. 109, 40 Ind. App. 113; Bloom v. State, 58 N. E. 81, 155 Ind. 292.

Miss. Hemingway v. State, 68 Miss. 371, 8 So. 317.

N. Y. People v. Crotty, 47 N. Y. S. 845, 22 App. Div. 77.

Tex. Lewis v. State, 162 S. W. 866, 72 Tex. Cr. R. 377; Dickson v. State, 146 S. W. 914, 66 Tex. Cr. R. 270; Gavinia v. State, 145 S. W. 594, 65 Tex. Cr. R. 572; Hernandez v. State (Cr. App.) 145 S. W. 596; Henderson v. State, 117 S. W. 825, 55 Tex. Cr. R. 640; Valles v. State (Cr. App.) 71 S. W. 598; Crook v. State, 45 S. W. 720, 39 Tex. Cr. R. 252.

Wash. State v. Gohl, 90 P. 259, 46 Wash. 408.

Instructions proper within rule. An instruction to convict defendant "if you believe from the evidence beyond a reasonable doubt that at the time in question he committed an assault, or aided or advised the assault upon the prosecuting witness for the purpose of robbery, and that in making the assault he intended to use whatever force might be necessary to overcome the prosecuting witness and accomplish his purpose —that of robbery." State v. Fenton, 70 P. 741, 30 Wash. 325. An instruction that if defendant took hold of the prosecutrix, and tore open her coat, and seized her arm, with intent to have carnal intercourse against her will, and with the intent of accomplishing his object at all events, without regard to any resistance she would make, he was guilty of an assault with intent to commit rape. State v. Urie, 70 N. W. 603, 101 Iowa, 411.

Hypothesizing proof of allegations of indictment. Where the allegations of an indictment are legally sufficient to describe the act charged, it is not error to instruct the jury that on proof thereof beyond a reasonable doubt it must convict. Walker v. State, 52 S. E. 319, 124 Ga. 97; McCaughey v. State, 59 N. E. 169, 156 Ind. 41.

[83] Danford v. State, 43 So. 593, 53 Fla. 4.

[84] Sharpe v. State, 48 Ga. 16; State v. Durr, 39 La. Ann. 751, 2 So. 546.

[85] Thomas v. State, 86 S. W. 404, 74 Ark. 431.

[86] People v. Chadwick, 76 P. 884, 143 Cal. 116.

CHAPTER IX

GENERAL CONSIDERATIONS AS TO NECESSITY OF INSTRUCTIONS

§ 118. General rule requiring instructions to juries.
119. Some limitations upon the general rule requiring instructions.
120. Necessity of general instructions in addition to those given on request.

§ 118. General rule requiring instructions to juries

The general rule is, both in civil[1] and in criminal cases,[2] that it is the right of the parties to demand and the duty of the court to give instructions to the jury within proper limits, and where the court refuses to answer separately requests presented by counsel it is necessary that proper instructions be given on all the principles of law which necessarily arise in the case.[3] In some jurisdictions statutory provisions make it the duty of the court to charge the "law of the case," by which is meant the substantial issues of the case.[4] In a criminal case any doubt as to the propriety of instructions should be resolved in favor of the accused,[5] and the fact that the defendant has offered no evidence in his own behalf does not bar him from asserting the right to have proper instructions given.[6]

[1] **Fla.** Seaboard Air Line Ry. Co. v. Kay, 74 So. 523, 73 Fla. 554.

Ind. Pittsburgh, C., C. & St. L. Ry. Co. v. Cottman, 101 N. E. 22, 52 Ind. App. 661; Welch v. Watts, 9 Ind. 115.

Mont. T. C. Power & Bro. v. Turner, 97 P. 950, 37 Mont. 521.

Tex. Beaumont, S. L. & W. Ry. Co. v. Myrick (Civ. App.) 208 S. W. 935; Whaley v. McDonald (Civ. App.) 194 S. W. 409; Lyon v. Bedgood, 117 S. W. 897, 54 Tex. Civ. App. 19.

Va. Brooke v. Young, 3 Rand. 106.

[2] **Cal.** People v. Fox (App.) 185 P. 211.

Ga. Thomas v. State, 67 Ga. 767.

Ind. Bloom v. State, 58 N. E. 81, 155 Ind. 292; Parker v. State, 35 N. E. 1105, 136 Ind. 284.

Ky. King v. Commonwealth, 220 S. W. 755, 187 Ky. 782; Heilman v. Commonwealth, 84 Ky. 457, 1 S. W. 731, 8 Ky. Law Rep. 451, 4 Am. St. Rep. 207.

La. State v. Tucker, 38 La. Ann. 536.

Mass. Commonwealth v. Kneeland, 20 Pick. 206.

Mo. State v. Chick, 221 S. W. 10. 282 Mo. 51; State v. Stonum, 62 Mo. 596; State v. Matthews, 20 Mo. 55.

Neb. Young v. State, 104 N. W. 867, 74 Neb. 346, 2 L. R. A. (N. S.) 66.

N. M. Territory v. Baca, 71 P. 460, 11 N. M. 559.

N. C. State v. Fulford, 32 S. E. 377, 124 N. C. 798.

N. D. State v. Lesh, 145 N. W. 829, 27 N. D. 165.

Or. State v. Reed, 97 P. 627, 52 Or. 377.

Tenn. Lang v. State, 16 Lea, 433, 1 S. W. 318.

Tex. Curry v. State, 4 Tex. App. 574; Noland v. State, 3 Tex. App. 598.

[3] Jacobs v. Curtis (Pa.) 11 Leg. Int. 27.

[4] Gibson & Cunningham v. Purifoy, 120 S. W. 1047, 56 Tex. Civ. App. 379.

[5] Gambrell v. State, 46 So. 138, 92 Miss. 728, 17 L. R. A. (N. S.) 291, 131 Am. St. Rep. 549, 16 Ann. Cas. 147.

[6] Frazier v. Commonwealth (Ky.) 114 S. W. 268.

In the performance of this duty the court should instruct as to just what the jury is to decide giving the law applicable to the case and calling their attention to whatever is necessary and proper to guide them to a right decision.[7] Such duty requires the court to tell the jury what facts are admitted of record,[8] and to instruct on all the material issues presented by the pleadings and the evidence,[9] and upon every point pertinent to the issues so raised.[10] The jury should not be left to determine the issues

[7] **U. S.** (C. C. A. Mo.) Northern Central Coal Co. v. Hughes, 224 F. 57, 139 C. C. A. 619; (C. C. A. Tenn.) Massee v. Williams, 207 F. 222, 124 C. C. A. 492.

Ark. Hot Springs St. Ry. Co. v. Hildreth, 82 S. W. 245, 72 Ark. 572.

Conn. Beardsley v. Irving, 71 A. 580, 81 Conn. 489; Wilson v. Town of Granby, 47 Conn. 59, 36 Am. Rep. 51.

Ga. Moody v. Davis, 10 Ga. 403.

Ill. Sampsell v. Rybczynski, 82 N. E. 244, 229 Ill. 75.

Ind. Henry v. Epstein, 95 N. E. 275, 50 Ind. App. 660.

Iowa. Bruckshaw v. Chicago, R. I. & P. Ry. Co., 155 N. W. 273, 173 Iowa, 207; Blades v. Des Moines City Ry. Co., 123 N. W. 1057, 146 Iowa, 580; Wise v. Outtrim, 117 N. W. 264, 139 Iowa, 192, 130 Am. St. Rep. 301.

S. C. Osteen v. Southern Ry. Co., 86 S. E. 30, 101 S. C. 532, L. R. A. 1916A, 505.

W. Va. Davis v. Webb, 33 S. E. 97, 46 W. Va. 6.

[8] Dwight Mfg. Co. v. Word, 75 So. 979, 200 Ala. 221; Barton v. City of Odessa, 82 S. W. 1119, 109 Mo. App. 76; Butcher v. Death, 15 Mo. 271.

[9] **Ga.** Savannah Electric Co. v. Johnson, 76 S. E. 1059, 12 Ga. App. 154.

Neb. Kimball v. Lanning, 165 N. W. 890, 102 Neb. 63.

N. Y. Jacobson v. Fraade, 107 N. Y. S. 706, 56 Misc. Rep. 631.

N. C. Patterson v. North Carolina Lumber Co., 58 S. E. 437, 145 N. C. 42.

Ohio. Baltimore & O. R. Co. v. Lockwood, 74 N. E. 1071, 72 Ohio St. 586.

Okl. Tubby v. State, 178 P. 491, 15 Okl. Cr. 496.

Tex. Flewellen v. State, 204 S. W. 657, 83 Tex. Cr. R. 568.

Utah. McKinney v. Carson, 99 P. 660, 35 Utah, 180.

W. Va. State v. Alle, 96 S. E. 1011, 82 W. Va. 601.

In North Carolina the court is required by statute, held to be mandatory, to submit the issues "arising on the pleadings." Burton v. Rosemary Mfg. Co., 43 S. E. 480, 132 N. C. 17. And, while a party cannot complain because a particular issue was not submitted to the jury unless he tendered it, the issues submitted must in themselves be sufficient to dispose of the controversy and enable the court to proceed to judgment. Falkner v. Pilcher & Co., 49 S. E. 945, 137 N. C. 449.

[10] **Ill.** Mississippi Valley Traction Co. v. Coburn, 132 Ill. App. 624; Williams v. Watson, 71 Ill. App. 130.

Ind. Jared v. Goodtitle, 1 Blackf. 29.

Me. Lapish v. Wells, 6 Greenl. 175.

N. C. Allen v. Durham Traction Co., 56 S. E. 942, 144 N. C. 288.

N. D. Putnam v. Prouty, 140 N. W. 93, 24 N. D. 517.

Ohio. Lytle v. Boyer, 33 Ohio St. 506.

Pa. Freeman v. Pennock, 1 Watts, 405, note, 3 Pen. & W. 317, note.

Tex. Galveston, H. & S. A. Ry. Co. v. Worth (Civ. App.) 107 S. W. 958.

Vt. Rowell v. Town of Vershire, 62 Vt. 405, 19 A. 990, 8 L. R. A. 708; Vaughan v. Porter, 16 Vt. 266.

Va. Lemons v. Harris, 80 S. E. 740, 115 Va. 809; Lynchburg Telephone Co. v. Booker, 50 S. E. 148, 103 Va. 594.

Matters upon which instructions required within rule. Where, in an action for injury to plaintiff's business by false representations, the court withdrew the plaintiff's claim

for themselves,[11] but should be clearly and concisely told what material facts must be found to authorize or bar a recovery,[12] and if there is no evidence to support a particular count of a declaration the jury should be instructed to disregard such count.[13] The

to recover because of contracts in restraint of trade, with a long discussion of the proper construction of the law in regard thereto, and the charge failed to furnish sufficient guidance as to the facts necessary to warrant a recovery, or as to the measure or elements of damage, there was such a failure to charge as to vital issues as to authorize reversal of an order denying a new trial. Virtue v. Creamery Package Mfg. Co., 142 N. W. 930, 123 Minn. 17, L. R. A. 1915B, 1179, reargument denied 142 N. W. 1136, 123 Minn. 17, L. R. A. 1915B, 1195. Where, in an action for injuries to a servant, defendant pleaded negligence of plaintiff's fellow servants as the proximate cause of her injuries, and such defense was not submitted by the court's main charge, it was its duty to give special charges on such issue if there was any evidence to support the defense, and the request embodied a correct enunciation of the law applicable thereto. G. A. Duerler Mfg. Co. v. Eichhorn, 99 S. W. 715, 44 Tex. Civ. App. 638. Where, in an action for personal injuries, there was evidence tending to show that plaintiff's bladder trouble resulted from the improper use of a catheter, it was error to refuse to instruct that if the trouble was not caused directly by his injuries, but from the improper use of the catheter, or any other cause not connected with the accident, he could not recover for such trouble, though the court instructed that plaintiff could only recover for injuries proximately resulting from the alleged negligence. Missouri, K. & T. Ry. Co. of Texas v. Smith (Tex. Civ. App.) 101 S. W. 453.

In cases of felony, the court is required to charge the law upon every phase of the case; and a conviction for murder should be set aside for a failure to charge the law of homicide by negligence, where it is applicable to facts put in evidence. Elliston v. State, 10 Tex. App. 361.

Construction of written instruments. It is the duty of the court, on request, to instruct the jury as to the legal effect of all written instruments which are the subject of the controversy and the basis of the suit, or which are in evidence before the jury.

Ala. Earbee v. Craig, 1 Ala. 607; Branch Bank at Mobile v. Boykin, 9 Ala. 320; Long v. Rogers, 17 Ala. 540.

Fla. Ropes v. Minshew, 41 So. 538, 51 Fla. 299.

Ill. Montag v. Linn, 23 Ill. 551.

R. I. Wheeler v. Schroeder, 4 R. I. 383.

Tenn. Kendrick v. Cisco, 13 Lea, 247; Louisville & N. R. Co. v. McKenna, 13 Lea, 280.

Tex. Houston & T. C. Ry. Co. v. Shirley, 89 Tex. 95, 31 S. W. 291; Coyle v. McNabb (App.) 18 S. W. 198.

Va. Norwich Lock Mfg. Co. v. Hockaday, 16 S. E. 877, 89 Va. 557.

[11] Kohr v. Metropolitan St. Ry. Co., 92 S. W. 1145, 117 Mo. App. 302; Boyd v. St. Louis Transit Co., 83 S. W. 287, 108 Mo. App. 303; Ferris v. Marshall, 96 N. W. 602, 1 Neb. (Unof.) 377.

Withdrawal of certain counts of petition. An instruction withdrawing certain counts of a petition from the consideration of the jury, and stating that the verdict must be based on the remaining count, is erroneous, unless the issues presented by such count are defined in the instructions. Blackmore v. Missouri Pac. Ry. Co., 62 S. W. 993, 162 Mo. 455.

[12] Krieger v. Aurora, E. & C. R. Co., 90 N. E. 266, 242 Ill. 544; Monoghan v. Bowers, 171 N. W. 38, 185 Iowa, 708; Henry v. Disbrow Mining Co., 128 S. W. 841, 144 Mo. App. 350.

[13] Bachmann v. Southern Coal & Mining Co., 165 Ill. App. 485; Richmond Railway & Electric Co. v. Bowles, 92 Va. 738, 24 S. E. 388. Compare Gulf, C. & S. F. Ry. Co. v. Kelly (Tex. Civ. App.) 34 S. W. 140.

court should submit all issues of fact raised by the pleadings and evidence, and not merely such as are supported by a preponderance of the evidence,[14] and the jury should be instructed on the precise issues of fact in the case, whether the verdict is to be special or general;[15] the submission of a case on special issues not depriving a party of the right to have the attention of the jury affirmatively called to an issue asserted by him which has evidence to support it.[16] Facts or principles of law which have an important bearing on the case should be brought to the notice of the jury, although the arguments of counsel have failed to cover them,[17] and the fact that the court has reason to believe that the jury is familiar with the particular proposition of law involved in the case on trial will not, as a general rule, justify it in refusing to instruct thereon if so requested.[18] The trial judge should be careful, not only to state all appropriate rules of law, but to point out their relevancy with sufficient explicitness to enable the jury intelligently to apply the law to the facts.[19]

Either party is entitled to have an instruction given presenting his theory of the case, if it has support in the pleadings and evidence,[20] and the court may be required affirmatively to state the

[14] Hutchinson Purity Ice Cream Co. v. Des Moines City Ry. Co., 154 N. W. 890, 172 Iowa, 527; Parks v. Sullivan (Tex. Civ. App.) 152 S. W. 704.

[15] Village of Madisonville v. Rosser, 28 Ohio Cir. Ct. R. 834.

[16] Texas Baptist University v. Patton (Tex. Civ. App.) 145 S. W. 1063; International & G. N. R. Co. v. Jackson, 103 S. W. 709, 47 Tex. Civ. App. 26, rehearing denied 105 S. W. 67.

[17] Bailey v. Poole, 35 N. C. 404.

[18] Wolfe v. Ives, 76 A. 526, 83 Conn. 174, 19 Ann. Cas. 752.

[19] Commonwealth v. Principatti, 104 A. 53, 260 Pa. 587.

[20] **Ark.** Western Coal & Mining Co. v. Harrison, 182 S. W. 525, 122 Ark. 125; Taylor v. McClintock, 112 S. W. 405, 87 Ark. 243.

Cal. Raymond v. Hill, 143 P. 743, 168 Cal. 473; Tognazzini v. Freeman, 123 P. 540, 18 Cal. App. 468; Wanlorek v. United Railroads of San Francisco, 118 P. 947, 17 Cal. App. 121; Buckley v. Silverberg, 45 P. 804, 113 Cal. 673.

Colo. Denver City Tramway Co. v. Doyle, 167 P. 777, 63 Colo. 500.

Conn. Murphy v. Connecticut Co., 81 A. 961, 84 Conn. 711.

Ill. Keokuk & H. Bridge Co. v. Wetzel, 81 N. E. 864, 228 Ill. 253, affirming judgment 130 Ill. App. 81; Klofski v. Railroad Supply Co., 85 N. E. 274, 235 Ill. 146, affirming judgment Railroad Supply Co. v. Klofski, 138 Ill. App. 468; Illinois Cent. R. Co. v. McDaniel, 199 Ill. App. 282; Casey v. Grand Trunk Western Ry. Co., 165 Ill. App. 108; Kokoshkey v. Chicago City Ry. Co., 162 Ill. App. 613.

Ind. Baltimore & O. R. Co. v. Peck, 101 N. E. 674, 53 Ind. App. 281.

Iowa. Biggs v. Seufferlein, 145 N. W. 507, 164 Iowa, 241, L. R. A. 1915F, 673.

Kan. Binkley v. Dewall, 58 P. 1028, 9 Kan. App. 891.

Ky. Louisville & N. R. Co. v. McCoy, 197 S. W. 801, 177 Ky. 415; Pack v. Camden Interstate Ry. Co., 157 S. W. 906, 154 Ky. 535; Julius Winter, Jr., & Co. v. Forrest, 140 S. W. 1005, 145 Ky 581.

Md. Lion v. Baltimore City Pass Ry. Co., 44 A. 1045, 90 Md. 266, 47 L. R. A. 127.

Mich. American Cushman Tel. Co.

negative side of an issue.[21] If a party has two or more theories of a cause of action or defense, each of which has some support in

v. Noble, 56 N. W. 1100, 98 Mich. 67; Miller v. Miller, 56 N. W. 348, 97 Mich. 151; Wildey v. Crane, 36 N. W. 734, 69 Mich. 17; Comstock v. Norton, 36 Mich. 277.

Minn. Defoe v. St. Paul City Ry. Co., 65 Minn. 319, 68 N. W. 35.

Mo. Boles v. Dunham (App.) 208 S. W. 480; Rooker v. Deering Southwestern Ry. Co. (App.) 204 S. W. 556; Collins v. Rankin Farms (App.) 180 S. W. 1053; National Warehouse & Storage Co. v. Toomey, 163 S. W. 558, 181 Mo. App. 64.

Neb. Mentz v. Omaha & C. B. St. Ry. Co., 170 N. W. 889, 103 Neb. 216, rehearing denied 173 N. W. 478, 103 Neb. 216; McKennan v. Omaha & C. B. St. R. Co., 146 N. W. 1014, 95 Neb. 643; Hancock v. Stout, 28 Neb. 301, 44 N. W. 446.

Nev. Crosman v. Southern Pac. Co., 173 P. 223, 42 Nev. 92; Zelavin v. Tonopah Belmont Development Co., 149 P. 188, 39 Nev. 1.

N. J. Scott v. Mitchell, 41 N. J. Law, 346.

N. M. Cerrillos Coal R. Co. v. Deserant, 49 P. 807, 9 N. M. 49.

N. Y. Kearns v. Brooklyn Heights R. Co., 69 N. Y. S. 856, 60 App. Div. 631.

Okl. Bristow v. Central State Bank (Sup.) 173 P. 221; Mountcastle v. Miller (Sup.) 166 P. 1057; Menten v. Richards, 153 P. 1177, 54 Okl. 418; Spurrier Lumber Co. v. Dodson, 120 P. 934, 30 Okl. 412.

Or. De Vol v. Citizens' Bank, 179 P. 282, 92 Or. 606, rehearing denied 181 P. 985, 92 Or. 606; Cerrano v. Portland Ry., Light & Power Co., 126 P. 37, 62 Or. 421; Ayer v. Moon, 117 P. 991, 59 Or. 599.

Tenn. Memphis St. Ry. Co. v. Newman, 69 S. W. 269, 108 Tenn. 666.

Tex. Southern Traction Co. v. Jones (Civ. App.) 209 S. W. 457; Southwestern Telegraph & Telephone Co. v. Andrews (Civ. App.) 178 S. W. 574; Warren v. Kimmell (Civ. App.) 141 S. W. 159; Bangle v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 140 S. W. 374; Pecos & N. T. Ry. Co. v. Bivins, 130 S. W. 210, 61 Tex. Civ. App. 170; International & G. N. R. Co. v. Williams (Civ. App.) 129 S. W. 847; Barnes v. Dallas Consol. Electric St. Ry. Co. (Sup.) 128 S. W. 367, reversing judgment Dallas Consol. Electric St. Ry. Co. v. Barnes (Civ. App.) 119 S. W. 122.

Utah. Pratt v. Utah Light & Traction Co., 169 P. 868; Martineau v. Hanson, 155 P. 432, 47 Utah, 549.

Va. Baylor v. Hoover, 97 S. E. 309, 123 Va. 659; Norfolk & W. Ry. Co. v. Parrish, 89 S. E. 923, 119 Va. 670; Virginia Ry. & Power Co. v. McDemmick, 86 S. E. 744, 117 Va. 862; Adamson's Adm'r v. Norfolk & P. Traction Co., 69 S. E. 1055, 111 Va. 556.

Wash. Gabrielson v. Hague Box & Lumber Co., 104 P. 635, 55 Wash. 342, 133 Am. St. Rep. 1032.

W. Va. Angrist v. Burk, 87 S. E. 74, 77 W. Va. 192.

Wyo. Taylor v. Stockwell, 145 P. 743, 22 Wyo. 492, rehearing denied 147 P. 328, 22 Wyo. 492.

Illustrations of instructions required under rule. In an action by a passenger for injuries received while alighting, where the court authorized a verdict in favor of plaintiff if the jury believed that the train was started without giving reasonable time to plaintiff to alight therefrom, defendant was entitled to have given a requested instruction which was the converse of such instruction. Cincinnati, N. O. & T. P. Ry. Co. v. Francis, 220 S. W. 739, 187 Ky. 703. Where

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[21] Galveston, H. & S. A. Ry. Co. v. Wilson (Civ. App.) 214 S. W. 773; Gammage v. Gamer Co. (Com. App.) 213 S. W. 930, setting aside judgment (Com. App.) 209 S. W. 389, which reversed (Civ. App.) Gamer Co. v. Gammage, 162 S. W. 980; Southern Traction Co. v. Jones (Civ. App.) 209 S. W. 457; Quanah, A. & P. Ry. Co. v. Lancaster (Civ. App.) 207 S. W. 606; Sherrill v. Union Lumber Co. (Civ. App.) 207 S. W. 149; Northern Texas Traction Co. v. Moberly (Civ. App.) 109 S. W. 483; Wimberly v. State, 22 Tex. App. 506, 3 S. W. 717; Irvine v. State, 20 Tex. App. 12.

the evidence, he has a right to instructions covering all of such theories;[22] and a party has a right, not only to tender his own theory of the cause, but likewise, without waiving his own theory, to tender instructions to meet the theory of the opposite party.[23]

In a criminal case the trial judge must state the contentions of both the state and the defendant,[24] and charge on all the issues made by the testimony, whether the same are raised by the testimony of the accused or some other witness,[25] and the contentions of the defense regarding which instructions are to be given are not confined exclusively to the contentions of the defendant in his statement to the jury, but include such as may be made and argued by his counsel before the court and jury,[26] and the trial court should fairly and freely submit for the consideration of the jury any issue or theory, favorable to the accused, presented by the evidence.[27]

In some jurisdictions the court may be required to declare to the jury its judicial knowledge of relevant facts.[28]

§ 119. Some limitations upon the general rule requiring instructions

The rule that a party has a right to have the jury instructed upon his theory of the case does not apply, if his theory is contrary to the law applicable to the case.[29] The trial court is not required to give a formal statement of the issues to the jury; it

derailment of a train is alleged to be due to the negligence of defendant in certain specified particulars, and the railroad offers evidence of facts which it claims caused the accident, and which would relieve it from responsibility, the court should present both theories to the jury. St. Louis & S. F. R. Co. v. Posten, 124 P. 2, 31 Okl. 821.

Right of accused. Defendant in a criminal case is entitled to a proper, specific instruction applied to the facts of the case developed by the evidence, notwithstanding the giving of a general instruction on the essential elements of the offense and the necessity of establishing them beyond a reasonable doubt. Hipes v. State, 73 Ind. 39.

It is held, however, that where the court correctly lays down the law applicable to the case, without undertaking to state the theory of either party, it is not error to refuse instructions embracing the theory of one party, even though the propositions of law therein embodied are sound. St. Louis, I. M. & S. Ry. Co. v. Hatch, 94 S. W. 671, 116 Tenn. 580.

[22] Stevens & Elkins v. Lewis-Wilson-Hicks Co., 182 S. W. 840, 168 Ky. 648, judgment modified on rehearing 185 S. W. 873, 170 Ky. 238; Crow v. Burgin (Miss.) 38 So. 625; Miller & Co. v. Lyons, 74 S. E. 194, 113 Va. 275.

[23] Ziehme v. Metz, 157 Ill. App. 543.

[24] Parks v. State, 100 S. E. 724, 24 Ga. App. 243; Banks v. State, 89 Ga. 75, 14 S. E. 927; Snowden v. State, 12 Tex. App. 105, 41 Am. Rep. 667; Davis v. State, 10 Tex. App. 31.

[25] Medford v. State, 216 S. W. 175, 86 Tex. Cr. R. 237.

[26] Autrey v. State, 100 S. E. 782, 24 Ga. App. 414.

[27] Peyton v. State, 183 P. 639, 16 Okl. Cr. 410; Jones v. State, 216 S. W. 884, 86 Tex. Cr. R. 371.

[28] State v. Magers, 57 P. 197, 35 Or. 520.

[29] Sturm v. Central Oil Co., 156 Ill. App. 165.

being sufficient if it directs the jury as to the facts necessary to justify a recovery and states what will defeat a recovery.[30] It is proper to refuse instructions which are not necessary to enable the jury to perform their duty.[31] Only such instructions should be requested as bear upon the law of the case and will aid the jury in trying and determining the issues, as unnecessary instructions afford opportunities for error and are burdensome to the courts, and are calculated to confuse and mislead the jury.[32] Thus a refusal to charge as to an obvious fact,[33] or on a matter of fact which has been made plain by the evidence and as to which no doubt can exist in the minds of the jury, is not error;[34] nor is it error to refuse to charge as to matters of common knowledge and

[30] Kenny v. Bankers' Accident Ins. Co. of Des Moines, 113 N. W. 566, 136 Iowa, 140.

[31] **U. S.** (C. C. Mass.) Locke v. United States, Fed. Cas. No. 8,442, 2 Cliff. 574.

Cal. Cody v. Market St. Ry. Co., 82 P. 666, 148 Cal. 90.

Fla. Randall v. Parramore, 1 Fla. 409.

Mo. Corbitt v. Mooney, 84 Mo. App. 645.

N. C. Duckworth v. Orr, 36 S. E. 150, 126 N. C. 674.

Tex. Stark v. Burkitt (Civ. App.) 120 S. W. 939.

Wash. Lambert v. La Conner Trading & Transportation Co., 79 P. 608, 37 Wash. 113.

Wis. Burns v. Town of Elba, 32 Wis. 605.

In Oregon, a statute requiring the court, in charging the jury, to state all matters of law which the court thinks necessary for their information in giving their verdict, does not make it the duty of the court, in the absence of a request, to charge on all collateral matters. State v. Smith, 83 P. 865, 47 Or. 485.

Instructions with respect to disposition of an accused, acquitted on ground of insanity. Under a statute providing that in charging the jury the court must state to them all matters of law which are necessary for their information in giving their verdict, it is not necessary to instruct as to what is done with one acquitted on the ground of insanity, but defendant's counsel, in argument, may call attention thereto. Copenhaver v. State, 67 N. E. 453, 160 Ind. 540.

Where an affidavit for continuance was admitted as the deposition of the absent witness, and as such read to the jury, it was not error for the court not to instruct them specially that it was to be treated as the deposition. Deitz v. Regnier, 27 Kan. 94.

Effect of pleadings. Although it is the province of the court to determine from the pleadings what allegations are admitted or denied, instructions to the jury on the effect of the pleadings can only be demanded as of right when a necessity for them exists. Fannon v. Robinson, 10 Iowa, 272; Potter v. Wooster, Id., 334.

But a new trial will be granted, where the jury is not instructed by the court, on the ground that the case is too clear for one of the parties to render such instruction useful, and the jury find for the other party. Page v. Pattee, 6 Mass. 459.

[32] Farnsworth v. Tampa Electric Co., 57 So. 233, 62 Fla. 166; State v. Donnelly, 130 Mo. 642, 32 S. W. 1124.

The extent of the court's duty to instruct is to give such instructions as are correct in law, adapted to the issues, and sufficient for the guidance of the jury. Baer v. Baird Mach. Co., 79 A. 673, 84 Conn. 269.

[33] People v. Scott, 141 P. 945, 24 Cal. App. 440; Keys v. State, 70 So. 457, 110 Miss. 433.

[34] Bell v. Chicago, B. & Q. Ry. Co., 74 Iowa, 343, 37 N. W. 768; Edwards v. Schreiber, 153 S. W. 69, 168 Mo.

experience of all men who have arrived at years of discretion,[35] and it is proper to refuse an instruction on a matter as much within the knowledge of the jury as of the judge.[36] It is not the province of the court to give to the jury a statement which is true as a matter of fact, and is a plain common-sense proposition, but is not a legal proposition.[37] The court is not required to instruct the jury as to matters of art or science,[38] and is not bound to tell the jury that, according to the principles of natural philosophy or of physics, one fact necessarily results as a consequence from another fact.[39] The reasons for the giving of instructions need not be incorporated therein,[40] and the giving of a wrong reason for an instruction otherwise correct will not render it improper.[41]

A statute which provides that the court shall give such instructions upon the law as may be necessary cannot be considered mandatory to the extent of making it obligatory upon the court to instruct as to the law of a case, where no instructions are asked and no questions of law are involved.[42] In criminal cases in some jurisdictions the court cannot be required to instruct as to

App. 197; Farmers' Bank v. Fudge, 82 S. W. 1112, 109 Mo. App. 186; Missouri, K. & T. Ry. Co. of Texas v. Box (Tex. Civ. App.) 93 S. W. 134; Thomson Bros. v. Lynn, 81 S. W. 330, 36 Tex. Civ. App. 79.

[35] **U. S.** (C. C. A. Ark.) Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 F. 133, 52 C. C. A. 95.

Cal. In re Nutt's Estate, 185 P. 393, 181 Cal. 522; Higgins v. Williams, 45 P. 1041, 114 Cal. 176; Davis v. McNear, 101 Cal. 606, 36 P. 105.

Iowa. Bailey v. City of Le Mars, 179 N. W. 73.

Mo. Williams v. St. Louis, M. & S. E. R. Co., 96 S. W. 307, 119 Mo. App. 663; State v. Garth, 65 S. W. 275, 164 Mo. 553.

Advising jury to consult together. That part of defendant's requested instruction to effect that jury should consult with one another about the case, the evidence, etc., and in case of difference of opinion talk over the case carefully, etc., involved a mere commonplace, and its refusal was not error, especially where court charged to that effect. People v. Epperson, 176 P. 702, 38 Cal. App. 486.

[36] Birmingham Railway & Electric Co. v. Wildman, 24 So. 548, 119 Ala. 547.

[37] Oglesby v. Missouri Pac. Ry. Co., 150 Mo. 137, 37 S. W. 829, reversed on rehearing 51 S. W. 758, 150 Mo. 137.

Statement as to mental capacity of boy. A request to charge that the undisputed evidence shows that intestate was a bright boy of his age and had more mental capacity than the average boy of his age was properly refused as asserting no proposition of law. Moss v. Mosley, 41 So. 1012, 148 Ala. 168.

[38] Howland v. Marine Ins. Co. of Alexandria (C. C. D. C.) Fed. Cas. No. 6,798, 2 Cranch, C. C. 474; Sewanee Min. Co. v. Best, 3 Head (Tenn.) 701.

[39] Case v. Weber, 2 Ind. 108.

[40] King Solomon Tunnel & Development Co. v. Mary Verna Mining Co., 127 P. 129, 22 Colo. App. 528; Strong v. Kadlec, 163 Ill. App. 298; Corn Exchange Nat. Bank v. Ochlare Orchards Co., 150 N. W. 651, 97 Neb. 536.

[41] Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; Rupp v. Orr, 31 Pa. 517; State v. Garvin, 26 S. E. 570, 48 S. C. 258.

[42] Hamill v. Hall, 4 Colo. App. 290, 35 P. 927.

the law,[43] and in some other jurisdictions instructions are not required in prosecutions for misdemeanors.[44]

§ 120. Necessity of general instructions in addition to those given on request

In some jurisdictions the court need not instruct generally of its own motion, in addition to giving requested instructions,[45] where the instructions so given sufficiently cover the case;[46] but, if the instructions given on request contain only separate and disconnected propositions, a failure to give a general charge in the court's own language will be erroneous,[47] and in some jurisdictions there are mandatory statutes requiring the court at the conclusion of arguments of counsel to give general instructions to the jury.[48]

[43] Esterline v. State, 66 A. 269, 105 Md. 629; Baltimore & Y. Turnpike Road v. State, 63 Md. 573, 1 A. 285.

[44] State v. Poundstone, 124 S. W. 79, 140 Mo. App. 399; State v. O'Connor, 65 Mo. App. 324; Goode v. State, 171 S. W. 714, 75 Tex. Cr. R. 550.

[45] Reasoner v. Brown, 19 Ark. 234; Davis v. Michigan Cent. R. Co., 111 N. W. 76, 147 Mich. 479; Steiner v. Anderson (Tex. Civ. App.) 130 S. W. 261; Dejarnette v. Commonwealth, 75 Va. 867.

[46] Neihardt v. Kilmer, 12 Neb. 35, 10 N. W. 531.

[47] Bowman v. Fuher, 11 Ohio Cir. Ct. R. 231, 5 O. C. D. 218.

[48] Cleveland v. Emerson, 99 N. E. 796, 51 Ind. App. 339.

CHAPTER X

RELATION AND APPLICABILITY OF INSTRUCTIONS TO PLEADINGS AND EVIDENCE

A. RULE AGAINST GIVING ABSTRACT INSTRUCTIONS

§ 121. In general.
122. Limitations of rule.
123. Specific applications of rule.
124. What are abstract instructions.

B. INSTRUCTIONS AS AFFECTED OR CONTROLLED BY THE PLEADINGS

1. *In Civil Cases*

125. Rule that instructions must not be broader than the pleadings.
126. Scope of rule against broadening issues by instructions.
127. Instructions on matters outside the pleadings, but shown by the evidence.
128. Declaring legal effect of evidence not pertinent to issues raised by the pleadings.
129. Effect of failure to object to evidence upon issues outside scope of pleadings.
130. Specific applications of rule against broadening issues.
131. Rule that instructions must not be narrower than the pleadings.
132. Instructions considered with reference to complaint containing more than one count.

2. *In Criminal Cases*

133. Rule that instructions should conform to allegations of indictment or to issues raised by pleadings.
134. Limitations of rule.
135. Instructions on conspiracy, although not alleged in indictment.
136. Instructions where indictment contains more than one count, or where several distinct criminal acts are proved.

C. APPLICABILITY OF INSTRUCTIONS TO THE EVIDENCE

137. Rule that instructions must be based on the evidence.
138. Rule in criminal cases.
139. Evidence excluded or withdrawn, or improperly admitted.
140. Sufficiency of evidence to support instructions.
141. Who to determine question of sufficiency of evidence.
142. Effect of violation of rule.

D. INSTRUCTIONS EXCLUDING OR IGNORING ISSUES, DEFENSES, OR EVIDENCE

143. General rule.
144. Ignoring evidence.
145. Limitations or rule.

A. RULE AGAINST GIVING ABSTRACT INSTRUCTIONS

§ 121. In general

The practice of announcing correct general principles of law, without applying them to particular phases of the evidence, is

not to be commended,[1] and the modern tendency is to depart from the former practice of giving general or abstract instructions and to charge in as specific and concrete a form as possible.[2] Instructions, therefore, which announce mere abstract principles of law, without specific application to the case in hand, are properly refused,[3] and while, if the principle enunciated is correct and

[1] Southern Anthracite Coal Co. v. Bowen, 124 S. W. 1048, 93 Ark. 140.

[2] Louisville & N. R. Co. v. King's Adm'r, 115 S. W. 196, 131 Ky. 347.

[3] **Ala.** Atlanta B. & A. R. Co. v. Ballard, 82 So. 470, 203 Ala. 220; Mobile County v. Linch, 73 So. 423, 198 Ala. 57.

Ark. Helena Gas Co. v. Rogers, 147 S. W. 473, 104 Ark. 59; Ong Chair Co. v. Cook, 108 S. W. 203, 85 Ark. 390.

Cal. Conlin v. Southern Pac. R. Co., 182 P. 67, 40 Cal. App. 733; Schmidt v. Union Oil Co. of California, 149 P. 1014, 27 Cal. App. 366.

Conn. Kelley v. Town of Torrington, 68 A. 855, 80 Conn. 378.

Fla. American Mfg. Co. v. A. H. McLeod & Co., 82 So. 802, 78 Fla. 162.

Ill. People v. Adams, 124 N. E. 575, 289 Ill. 339; Thorne v. Southern Illinois Ry. & Power Co., 206 Ill. App. 262; Sanboeuf v. Murphy Const. Co., 202 Ill. App. 548; Born v. Schrieber, 199 Ill. App. 101; Hardin v. City of Moline, 179 Ill. App. 101; Fisher v. Leesman, 168 Ill. App. 606; Grimm v. Donk Bros. Coal & Coke Co., 161 Ill. App. 101; King v. Gray, 160 Ill. App. 259; Perido v. Chicago, B. & Q. R. Co., 144 Ill. App. 446.

Iowa. Withey v. Fowler Co., 145 N. W. 923, 164 Iowa, 377.

Kan. Lebanon State Bank v. Garber, 181 P. 572, 105 Kan. 44; State v. Menlicott, 9 Kan. 257.

Ky. Burton Const. Co. v. Metcalfe, 172 S. W. 698, 162 Ky. 366; City of Louisville v. Uebelhor, 134 S. W. 152, 142 Ky. 151.

Md. Mutual Life Ins. Co. of New York v. Murray, 75 A. 348, 111 Md. 600.

Mich. Fors v. Fors, 123 N. W. 579, 159 Mich. 156.

Minn. McClure v. Village of Browns Valley, 173 N. W. 672, 143 Minn. 339, 5 A. L. R. 1168.

Mo. Seago v. Paul Jones Realty Co., 170 S. W. 372, 185 Mo. App. 292.

N. H. Osgood v. Maxwell, 95 A. 954, 78 N. H. 35.

N. Y. Hine v. Bowe, 114 N. Y. 350, 21 N. E. 733.

N. C. Edwards v. Western Union Telegraph Co., 60 S. E. 900, 147 N. C. 126.

Tex. Prentice v. Security Ins. Co. (Civ. App.) 153 S. W. 925.

Utah. Emelle v. Salt Lake City, 181 P. 266, 54 Utah, 360.

Vt. Green v. Stockwell, 89 A. 870, 87 Vt. 459.

Va. Washington & O. D. Ry. v. Ward's Adm'r, 89 S. E. 140, 119 Va. 334.

W. Va. State v. Ringer, 100 S. E. 413, 84 W. Va. 546.

Wis. Blankavag v. Badger Box & Lumber Co., 117 N. W. 852, 136 Wis. 380.

Comparing liability of a corporate litigant to that of an individual. In an action against a town, based upon its alleged negligence in constructing and maintaining certain culverts across the grade of one of its highways, whereby surface water was collected and discharged upon the plaintiff's land, to her injury, the trial court did not err in refusing to charge the jury that a town, in the disposition of surface water, has the same rights, and is subject to the same liabilities, as an individual, for the reason that it was an abstract proposition. Oftelie v. Town of Hammond, 80 N. W. 1123, 78 Minn. 275.

In Ohio it is held, however, that if a request is a correct statement of the law and pertinent to the issue it should be given, notwithstanding the request is an abstract proposition of law and requires construction as to its application. Cleveland, P. & E. R. Co. v. Nixon, 21 Ohio Cir. Ct. R. 736, 12 O. C. D. 79.

applicable to the case, it may be sometimes proper to give such an instruction,[4] the general rule is that it is objectionable and should not be given.[5] On the contrary, instructions should be predicated upon the issues made by the pleadings and the facts appertaining to such issues, furnished by competent evidence introduced at the trial.[6] A charge which applies to the facts of a case the rules of law which govern the issues, and states the questions which the jury must answer, is more useful than abstract propositions or dissertations on sound theories, concerning the application of which to the issues the jury are left in doubt.[7] Accordingly instructions which submit to the jury issues not

[4] **U. S.** (C. C. A. Mich.) Curcuru v. Peninsular Electric Light Co., 258 F. 785, 170 C. C. A. 79.

Ala. McCutchen v. Loggins, 109 Ala. 457, 19 So. 810.

Fla. Gracy v. Atlantic Coast Line R. Co., 42 So. 903, 53 Fla. 350.

Ill. Lipsey v. People, 81 N. E. 348, 227 Ill. 364; Riggin v. Keck, 203 Ill. App. 87; Hoehn v. East Side Levee & Sanitary Dist., 203 Ill. App. 48; Eaton v. Marion County Coal Co., 173 Ill. App. 444, judgment affirmed 101 N. E. 58, 257 Ill. 567; East St. Louis Ry. Co. v. Gray, 135 Ill. App. 642; Olcese v. Mobile Fruit & Trading Co., 112 Ill. App. 281, judgment affirmed 71 N. E. 1084, 211 Ill. 539; Norton v. Volzke, 54 Ill. App. 545; Little v. Munson, 54 Ill. App. 437.

Ind. Grand Rapids & I. Ry. Co. v. Jaqua, 115 N. E. 73, 66 Ind. App. 113; Behymer v. State, 95 Ind. 140.

Mo. Cool v. Petersen, 175 S. W. 244, 189 Mo. App. 717.

Neb. Strong v. State, 88 N. W. 772, 63 Neb. 440.

Tenn. Knoxville Iron Co. v. Dobson, 15 Lea, 409.

Tex. Martinez v. Bruni (Civ. App.) 216 S. W. 655; Goldstein v. Cook (Civ. App.) 22 S. W. 762.

W. Va. State v Long, 108 S. E. 279.

[5] **Ala.** Montgomery-Moore Mfg. Co. v. Leith, 50 So. 210, 162 Ala. 246.

Ark. Warren Vehicle Stock Co. v. Siggs, 120 S. W. 412, 91 Ark. 102.

Ga. Clements v. Citizens' Banking Co. of Eastman, 85 S. E. 935, 16 Ga. App. 636.

Ill. Cleveland, C., C. & St. L. Ry. Co. v. Henry, 143 Ill. App. 265, judgment affirmed Henry v. Cleveland, C., C. & St. L. Ry. Co., 86 N. E. 231, 236 Ill. 219; Diefenthaler v. Hall, 116 Ill. App. 422.

Ind. Town of Salem v. Goller, 76 Ind. 291.

Iowa. Mitchell v. Des Moines City Ry. Co., 141 N. W. 43, 161 Iowa, 100.

Kan. Meyer v. Reimer, 70 P. 869, 65 Kan. 822.

Ky. American Book Co. v. Archer, 186 S. W. 672, 170 Ky. 744.

Mo. Hudgings v. Burge (App.) 194 S. W. 886; Edwards v. Lee, 126 S. W. 194, 147 Mo. App. 38; State v. Elsey, 100 S. W. 11, 201 Mo. 561.

Mont. Surman v. Cruse, 187 P. 890.

N. H. Smith v. Bank of New England, 54 A. 385, 72 N. H. 4.

Okl. Holmes v. Halstid, 183 P. 969, 76 Okl. 31; Chickasaw Compress Co. v. Bow, 149 P. 1166, 47 Okl. 576.

Utah. State v. Anselmo, 148 P. 1071, 46 Utah, 137; Smith v. Clark, 106 P. 653, 37 Utah, 116, 26 L. R. A. (N. S.) 953, Ann. Cas. 1912B, 1366.

Va. Newport News & O. P. Ry. & Electric Co. v. McCormick, 56 S. E. 281, 106 Va. 517.

W. Va. Frank v. Monongahela Valley Traction Co., 83 S. E. 1009, 75 W. Va. 364; Claiborne v. Chesapeake & O. Ry. Co., 33 S. E. 262, 46 W. Va. 363.

[6] Louisville & N. R. Co. v. Moore, 150 S. W. 849, 150 Ky. 692.

[7] Frizzell v. Omaha St. Ry. Co. (C. C. A. Neb.) 124 F. 176, 59 C. C. A. 382; Abbitt v. Lake Erie & W. Ry. Co., 50 N. E. 729, 150 Ind. 498.

authorized or made by the pleadings or evidence are erroneous,[8] and it is proper to refuse instructions which, although correctly

[8] **Ariz.** Gila Valley G. & N. R. Co. v. Lyon, 71 P. 857, 8 Ariz. 118.

Ark. St. Louis, I. M. & S. R. Co. v. Thurman, 161 S. W. 1054, 110 Ark. 188.

Cal. Crabbe v. Mammoth Channel Gold Mining Co., 143 P. 714, 168 Cal. 500.

Colo. Globe Exp. Co. v. Taylor, 158 P. 717, 61 Colo. 430; Creighton v. Campbell, 149 P. 448, 27 Colo. App. 120; Atchison, T. & S. F. Ry. Co. v. Adcock, 88 P. 180, 38 Colo. 369.

Ga. Union Cotton Mills v. Harris, 87 S. E. 1029, 144 Ga. 716; Adams v. Greeson, 85 S. E. 936, 16 Ga. App. 649; Mallett & Nutt v. Watkins, 64 S. E. 999, 132 Ga. 700, 131 Am. St. Rep. 226; Savannah Electric Co. v. Elarbee, 64 S. E. 570, 6 Ga. App. 137.

Idaho. Austin v. Brown Bros. Co., 164 P. 95, 30 Idaho, 167; Exchange State Bank v. Taber, 145 P. 1090, 26 Idaho, 723.

Ill. Lyons v. Joseph T. Ryerson & Son, 90 N. E. 288, 242 Ill. 409; Himrod Coal Co. v. Clingan, 114 Ill. App. 568; Wabash R. Co. v. Stewart, 87 Ill. App. 446.

Ind. Lake Erie & W. R. Co. v. Beals, 98 N. E. 453, 50 Ind. App. 450; Black v. Duncan, 60 Ind. 522.

Iowa. Miller v. Jones, 159 N. W. 671, 178 Iowa, 168; Hardwick v. Hardwick, 106 N. W. 639, 130 Iowa, 230; Blackman v. Kessler, 81 N. W. 185, 110 Iowa, 140.

Kan. First Nat. Bank of Arkansas City v. Skinner, 62 P. 705, 10 Kan. App. 517.

Ky. Polk v. Brown, 10 Ky. Law Rep. (abstract) 541.

Md. Davison Chemical Co. v. Andrew Miller Co., 89 A. 401, 122 Md. 134; Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. 338.

Mich. Comstock v. Norton, 36 Mich. 277.

Miss. Fairfield v. Louisville & N. R. Co., 48 So. 513, 94 Miss. 887, 136 Am. St. Rep. 611.

Mo. Small v. Polar Wave Ice & Fuel Co., 162 S. W. 709, 179 Mo. App. 456; Schumacher v. Kansas City Breweries Co., 152 S. W. 13, 247 Mo. 141; Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389.

Mont. Mitchell v. Henderson, 97 P. 942, 37 Mont. 515; First Nat. Bank of Portland v. Carroll, 88 P. 1012, 35 Mont. 302.

Neb. Harvey v. Harvey, 106 N. W. 660, 75 Neb. 557; Thom v. Dodge County, 90 N. W. 763, 64 Neb. 845; Rath v. Rath, 89 N. W. 612, 2 Neb. (Unof.) 600; Omaha Loan & Trust Co. v. Douglas County, 86 N. W. 936, 62 Neb. 1; Swift & Co. v. Holoubek, 84 N. W. 249, 60 Neb. 784, modified on rehearing 86 N. W. 900, 62 Neb. 31.

N. Y. Traynor v. New York Cent. & H. R. R. Co., 140 N. Y. S. 625, 155 App. Div. 600; Franklin v. Hoadley, 130 N. Y. S. 47, 145 App. Div. 228.

N. C. Frick Co. v. Boles, 84 S. E. 1017, 168 N. C. 654.

Ohio. Cincinnati Traction Co. v. Forrest, 75 N. E. 818, 73 Ohio St. 1.

Okl. St. Louis & S. F. Ry. Co. v. Dobyns, 157 P. 735, 57 Okl. 643.

Or. Ringue v. Oregon Coal Co., 75 P. 703, 44 Or. 407.

Pa. Saunders v. Philadelphia Rapid Transit Co., 87 A. 420, 240 Pa. 66.

S. C. Daniels v. Florida Cent. & P. R. Co., 39 S. E. 762, 62 S. C. 1.

Tenn. Louisville & N. R. Co. v. Satterwhite, 79 S. W. 106, 112 Tenn. 185.

Tex. Biard & Scales v. Tyler Building & Loan Ass'n (Civ. App.) 147 S. W. 1168; Ramsey & Montgomery v. Empire Timber & Lumber Co., 134 S. W. 294, 63 Tex. Civ. App. 576; Settle v. San Antonio Traction Co. (Civ. App.) 126 S. W. 15; Houston, E. & W. T. Ry. Co. v. Dolan (Civ. App.) 84 S. W. 297; Galveston, H. & S. A. Ry. Co. v. Herring (Civ. App.) 36 S. W. 129; Hartford Fire Ins. Co. v. Josey, 6 Tex. Civ. App. 290, 25 S. W. 685.

Wash. Kenworthy v. Richmond, 149 P. 348, 86 Wash. 127; Buyken v. Lewis Const. Co., 99 P. 1007, 51 Wash. 627.

W. Va. Wilhelm v. Parkersburg, M. & I. Ry. Co., 82 S. E. 1089, 74 W. Va. 678.

stating the law, are inapplicable to the issues and the evidence.[9] An instruction stating an abstract proposition of law not pertinent and necessary to the case as made, and not applicable to any inquiry legitimately before the jury tends rather to confuse

[9] **U. S.** (C. C. A. Mich.) Farmers' & Merchants' Bank of Vandalia, Ill., v. Maines, 195 F. 62, 115 C. C. A. 64; (C. C. A. Ohio) William Sebald Brewing Co. v. Tompkins, 221 F. 895, 137 C. C. A. 465; (C. C. A. Tenn.) Memphis St. Ry. Co. v. Illinois Cent. R. Co., 242 F. 617, 155 C. C. A. 307.

Ala. Hampton v. Tant, 73 So. 825, 15 Ala. App. 463; Robinson v. Crotwell, 57 So. 23, 175 Ala. 194; Southern Ry. Co. v. W. T. Adams Machinery Co., 51 So. 779, 165 Ala. 436.

Ark. Bocquin v. Theurer, 202 S. W. 845, 133 Ark. 448; Graves v. Melio, 99 S. W. 80, 81 Ark. 347.

Cal. Shelton v. Michael, 160 P. 578, 31 Cal. App. 328; In re Budan's Estate, 104 P. 442, 156 Cal. 280.

Conn. Goldman v. New York, N. H. & H. R. Co., 75 A. 148, 83 Conn. 59.

Ga. Central of Georgia Ry. Co. v. Cooper, 82 S. E. 310, 14 Ga. App. 738; Deen v. Wheeler, 67 S. E. 212, 7 Ga. App. 507.

Idaho. Henry v. Jones, 1 Idaho, 48.

Ill. Martin v. Hertz, 79 N. E. 558, 224 Ill. 84, affirming judgment 118 Ill. App. 297; Leonard v. Excelsior Motor & Mfg. Co., 187 Ill. App. 81; Kohn v. Clarkson, 182 Ill. App. 519; Schwartz v. Anheuser-Busch Brewing Ass'n, 182 Ill. App. 388; Pley v. Lavette, 167 Ill. App. 494; James v. Conklin & Hill, 158 Ill. App., 640; Farley v. Wabash R. Co., 153 Ill. App. 493.

Ind. Evansville Rys. Co. v. Cooksey, 112 N. E. 541, 63 Ind. App. 482; Plummer v. Indianapolis Union Ry. Co., 104 N. E. 601, 56 Ind. App. 615; Ross v. Thompson, 78 Ind. 90.

Kan. City of Abilene v. Hendricks, 36 Kan. 196, 13 Pac. 121.

Mass. Coles v. Boston & M. R. R., 111 N. E. 893, 223 Mass. 408; Hodgens v. Sullivan, 95 N. E. 969, 209 Mass. 533.

Me. Ross v. Maine Cent. R. Co., 96 A. 223, 114 Me. 287; Lunge v. Abbott, 95 A. 942, 114 Me. 177.

Mich. Schoenberg v. Boigt, 36 Mich. 310.

Mo. Ludwig v. H. D. Williams Cooperage Co., 136 S. W. 749, 156 Mo. App. 117.

Mont. Townsend v. City of Butte, 109 P. 969, 41 Mont. 410.

Neb. Usher v. American Smelting & Refining Co., 150 N. W. 814, 97 Neb. 526; Boesen v. Omaha St. Ry. Co., 119 N. W. 771, 83 Neb. 378.

N. C. Tilghman v. Seaboard Air Line R. Co., 83 S. E. 315, 167 N. C. 163.

Ohio. Lear v. McMillen, 17 Ohio St. 464.

Okl. Grisso v. Crump, 160 P. 453, 61 Okl. 83; Finch v. Brown, 111 P. 391, 27 Okl. 217; First Nat. Bank v. Walworth, 98 P. 917, 22 Okl. 878; Citizens' Bank of Wakita v. Garnett, 95 P. 755, 21 Okl. 200.

Tex. Northwestern Nat. Ins. Co. v. Westmoreland (Civ. App.) 215 S. W. 471; Ablon v. Wheeler & Motter Mercantile Co. (Civ. App.) 179 S. W. 527; Freeman v. Ortiz (Civ. App.) 136 S. W. 113; Birge-Forbes Co. v. St. Louis & S. F. R. Co., 115 S. W. 333, 53 Tex. Civ. App. 55.

Utah. Manti City Sav. Bank v. Peterson, 93 P. 566, 33 Utah, 209, 126 Am. St. Rep. 817.

Vt. Vermont Box Co. v. Hanks, 102 A. 91, 92 Vt. 92; Boville v. Dalton Paper Mills, 85 A. 623, 86 Vt. 305.

Immaterial matters. It is not error to refuse an instruction on an immaterial matter. Minneapolis Steel & Machinery Co. v. Schalansky, 165 P. 289, 100 Kan. 562; Mendenhall v. North Carolina R. Co., 31 S. E. 480, 123 N. C. 275.

Definitions. It was not error to refuse an instruction requesting a definition of the abstract meaning of a word, apart from the connection in which the jury might find that the word was used. Way v. Greer, 81 N. E. 1002, 196 Mass. 237.

than to aid them,[10] and where it appears that the giving of such an instruction is calculated to mislead, or probably has misled the jury to the prejudice of the party complaining thereof, the judgment will be reversed and a new trial granted.[11]

The above rule applies to criminal cases.[12]

[10] **U. S.** (C. C. A. Ark.) Salmon v. Helena Box Co., 158 F. 300, 85 C. C. A. 551.

Ark. Holt v. Leslie, 173 S. W. 191, 116 Ark. 433.

Ga. Gorman v. Campbell, 14 Ga. 137.

Ill. Bone Gap Banking Co. v. Porter, 203 Ill. App. 15; Sibert v. Shoal Creek Coal Co., 181 Ill. App. 11; Latham v. Cleveland, C., C. & St. L. Ry. Co., 164 Ill. App. 559.

Ind. T. Missouri, K. & T. Ry. Co. v. Webb, 97 S. W. 1010, 6 Ind. T. 280.

Iowa. Long v. Ottumwa Ry. & Light Co., 142 N. W. 1008, 162 Iowa, 11.

Illustrations of misleading instructions within rule. In an action for the death of an automobile driver at an interurban railroad crossing, where there was no contention that the driver did not have a right to be where he was and the evidence barely supported an inference of freedom from contributory negligence, it was misleading to give a correct charge that the driver had a right equal to the interurban company to use the street, from which the jury might have inferred it was not negligence for him to go upon the crossing as he did. Galveston-Houston Electric Ry. Co. v. Patella (Tex. Civ. App.) 222 S. W. 615.

[11] **Ala.** State v. Vance, 80 Ala. 356; Beck v. State, 80 Ala. 1; Herring v. Skaggs, 73 Ala. 446.

Ark. N. P. Sloan Co. v. Barham, 211 S. W. 381, 138 Ark. 350.

Cal. Slaughter v. Fowler, 44 Cal. 195.

Colo. White v. City of Trinidad, 52 P. 214, 10 Colo. App. 327.

Ill. Richter v. Tegtmeyer, 167 Ill. App. 478; Pierce v. Decatur Coal Co., 151 Ill. App. 47; Gilbert v. People, 121 Ill. App. 423.

Ind. Terre Haute, I. & E. Traction Co. v. Ellsbury (App.) 123 N. E. 810.

Kan. Zimmerman v. Knox, 8 P. 104, 34 Kan. 245; Raper v. Blair, 24 Kan. 374.

Mass. Cunningham v. Davis, 175 Mass. 213, 56 N. E. 2.

Mo. Grout v. Central Electric R. Co., 131 S. W. 891, 151 Mo. App. 330; De Donato v. Morrison, 61 S. W. 641, 160 Mo. 581.

Mont. St. John v. Taintor, 182 P. 129, 56 Mont. 204.

Neb. Sabin v. Cameron, 117 N. W. 95, 82 Neb. 106; Esterly v. Van Slyke, 21 Neb. 611, 33 N. W. 209.

N. M. Cerrillos Coal R. Co. v. Deserant, 49 P. 807, 9 N. M. 49.

N. Y. Holley v. A. W. Haile Motor Co., 177 N. Y. S. 429, 188 App. Div. 798.

Ohio. Cincinnati Traction Co. v. Forrest, 75 N. E. 818, 73 Ohio St. 1.

Or. Rosenwald v. Oregon City Transp. Co., 163 P. 831, 84 Or. 15.

S. C. Holmes v. Weinheimer, 44 S. E. 82, 66 S. C. 18.

Va. Pasley v. English, 10 Grat. 236.

An instruction, even though correct as a proposition of law, if misleading as to the issues, inapplicable to the evidence, and calculated to prejudice the substantial rights of the losing party, cannot be held to be a harmless error. Perot v. Cooper, 17 Colo. 80, 28 P. 391, 31 Am. St. Rep. 258.

[12] **U. S.** Battle v. United States, 28 S. Ct. 422, 209 U. S. 36, 52 L. Ed. 670, affirming judgment United States v. Battle (C. C. Ga.) 154 F. 540.

Ala. Minor v. State, 74 So. 98, 15 Ala. App. 556; Osborn v. State, 73 So. 985, 198 Ala. 21; Jones v. State, 69 So. 66, 193 Ala. 10; Anderson v. State (Sup.) 68 So. 56; Forman v. State, 67 So. 583, 190 Ala. 22; Kirkwood v. State, 63 So. 990, 184 Ala. 9, denying certiorari 62 So. 1011, 8 Ala. App. 108; Smith v. State, 62 So. 864,

§ 122. Limitations of rule

On the other hand, as the foregoing statement implies, the giving of such an instruction will not constitute ground for reversal,

183 Ala. 10; Brooks v. State, 62 So. 569, 8 Ala. App. 277, judgment reversed 64 So. 295, 185 Ala. 1; Lewis v. State, 59 So. 577, 178 Ala. 26; Hosey v. State, 59 So. 549, 5 Ala. App. 1; Faulk v. State, 59 So. 225, 4 Ala. App. 177; Cardwell v. State, 56 So. 12, 1 Ala. App. 1; Thomas v. State, 47 So. 257, 156 Ala. 166; Phillips v. State, 47 So. 245, 156 Ala. 140; Washington v. State, 46 So. 778, 155 Ala. 2; Hays v. State, 46 So. 471, 155 Ala. 40; Lawson v. State, 46 So. 259, 155 Ala. 44; Fowler v. State, 45 So. 913, 155 Ala. 21; Reynolds v. State, 45 So. 894, 154 Ala. 14; Pate v. State, 43 So. 343, 150 Ala. 10; Simmons v. State, 40 So. 660, 145 Ala. 61; Nordan v. State, 39 So. 406, 143 Ala. 13; Barnes v. State, 111 Ala. 56, 20 So. 565; Scales v. State, 96 Ala. 69, 11 So. 121; Bostic v. State, 94 Ala. 45, 10 So. 602; Floyd v. State, 82 Ala. 16, 2 So. 683; Street v. State, 67 Ala. 87; Leonard v. State, 66 Ala. 461; Bain v. State, 61 Ala. 75; Glenn v. State, 60 Ala. 104; Beasley v. State, 59 Ala. 20; Drake v. State, 51 Ala. 30; Clark v. State, 49 Ala. 37; Molette v. State, 49 Ala. 18; Taylor v. State, 48 Ala. 157; Stephen v. State, 40 Ala. 67; Donohoo v. State, 36 Ala. 281; Aikin v. State, 35 Ala. 399; Brister v. State, 26 Ala. 107; Murray v. State, 18 Ala. 727.

Ariz. Groce v. Territory, 94 P. 1108, 12 Ariz. 1.

Ark. Beavers v. State, 54 Ark. 336, 15 S. W. 1024; Johnson v. State, 36 Ark. 242; Harris v. State, 34 Ark. 469.

Cal. People v. Ashland, 128 P. 798, 20 Cal. App. 168; People v. Carroll, 128 P. 4, 20 Cal App. 41; People v. Emmons, 95 P. 1032, 7 Cal. App. 685; People v. Donnolly, 77 P. 177, 143 Cal. 394; People v. Buckley, 77 P. 169, 143 Cal. 375; People v. Hawes, 98 Cal. 648, 33 P. 791; People v. Murphy, 47 Cal. 103; People v. Kelly, 46 Cal. 356; People v. Sanchez, 24 Cal. 17; People v. Hurley, 8 Cal. 390.

D. C. United States v. Lee, 4 Mackey, 489, 54 Am. Rep. 293.

Fla. Robertson v. State, 60 So. 118, 64 Fla. 437; Peeler v. State, 59 So. 899, 64 Fla. 385; West v. State, 46 So. 93, 55 Fla. 200; Washington v. State, 21 Fla. 328; Irvin v. State, 19 Fla. 872; Gladden v. State, 12 Fla. 562.

Ga. Lindsay v. State, 76 S. E. 369, 138 Ga. 818; Jackson v. State, 18 S. E. 298, 91 Ga. 271, 44 Am. St. Rep. 22; Bell v. State, 69 Ga. 752; Brown v. State, 28 Ga. 199; Johnson v. State, 26 Ga. 611; Pressley v. State, 19 Ga. 192; Boyd v. State, 17 Ga. 194; McCoy v. State, 15 Ga. 205.

Idaho. Territory v. Evans, 2 Idaho, 425, 17 P. 139.

Ill. People v. Williams, 88 N. E. 1053, 240 Ill. 633; Spears v. People, 77 N. E. 112, 220 Ill. 72, 4 L. R. A. (N. S.) 402; Conn v. People, 116 Ill. 458, 6 N. E. 463; Devlin v. People, 104 Ill. 504.

Ind. Brown v. State, 105 Ind. 385, 5 N. E. 900; Bissot v. State, 53 Ind. 408.

Iowa. State v. Cessna, 153 N. W. 194, 170 Iowa, 726, Ann. Cas. 1917D, 289; State v. Phipps, 95 Iowa, 487, 64 N. W. 410; State v. Thompson, 45 Iowa, 414.

Kan. State v. Labore, 103 P. 106, 80 Kan. 664; State v. Whitaker, 35 Kan. 731, 12 P. 106; State v. Medlicott, 9 Kan. 257; Lewis v. State, 4 Kan. 296.

Ky. Gamble v. Commonwealth, 151 S. W. 924, 151 Ky. 372; Day v. Commonwealth, 110 S. W. 417, 33 Ky. Law Rep. 560; Greer v. Commonwealth, 63 S. W. 443, 111 Ky. 93, 23 Ky. Law Rep. 489; Deatley v. Commonwealth, 29 S. W. 741, 16 Ky. Law Rep. 893.

La. State v. Warton, 67 So. 350, 136 La. 516; State v. Caron, 42 So. 960, 118 La. 349; State v. Tibbs, 20 So. 735, 48 La. Ann. 1278; State v. Brackett, 12 So. 129, 45 La. Ann. 46; State v. Beck, 6 So. 431, 41 La. Ann. 584; State v. Primeaux, 2 So. 423, 39

where no prejudice is shown to the party complaining of it, and

La. Ann. 673; State v. Simmons, 38 La. Ann. 41; State v. Daly, 37 La. Ann. 576; State v. Ford, 37 La. Ann. 443; State v. Riculfi, 35 La. Ann. 770; State v. Thomas, 34 La. Ann. 1084.

Me. State v. Wilkinson, 76 Me. 317; State v. Robinson, 39 Me. 150; State v. Hall, 39 Me. 107.

Mass. Commonwealth v. John T. Connor Co., 110 N. E. 301, 222 Mass. 299, L. R. A. 1916B, 1236, Ann. Cas. 1918C, 337.

Mich. People v. Considine, 105 Mich. 149, 63 N. W. 196.

Minn. State v. Ronk, 98 N. W. 334, 91 Minn. 419; State v. Staley, 14 Minn. 105 (Gil. 75).

Miss. Wood v. State, 64 Miss. 761, 2 So. 247; Browning v. State, 30 Miss. 656; Preston v. State, 25 Miss. 383; McDaniel v. State, 8 Smedes & M. 401, 47 Am. Dec. 93.

Mo. State v. Holmes, 144 S. W. 417, 239 Mo. 469; State v. McNamara, 110 S. W. 1067, 212 Mo. 150; State v. Campbell, 109 S. W. 706, 210 Mo. 202, 14 Ann. Cas. 403; State v. Harris, 150 Mo. 56, 51 S. W. 481; State v. Chambers, 87 Mo. 406; State v. Gerber, 80 Mo. 94; State v. Wilforth, 74 Mo. 528, 41 Am. Rep. 330; State v. Ware, 62 Mo. 597; State v. Stockton, 61 Mo. 382; State v. Bailey, 57 Mo. 131; State v. Rose, 32 Mo. 346; State v. Ross, 29 Mo. 32; State v. Houser, 28 Mo. 233; Wein v. State, 14 Mo. 125; Nicholas v. State, 6 Mo. 6.

Mont. State v. Mitten, 92 P. 969, 36 Mont. 376.

Neb. Steinkuhler v. State, 109 N. W. 395, 77 Neb. 331; Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; Caw v. People, 3 Neb. 357.

Nev. State v. Ah Loi, 5 Nev. 99; State v. Squaires, 2 Nev. 226.

N. J. State v. Skillman, 70 A. 83, 76 N. J. Law, 464, judgment affirmed 76 A. 1073, 77 N. J. Law, 804.

N. M. Territory v. Baker, 4 N. M. (Johns.) 117, 13 P. 30.

N. Y. People v. McCallam, 3 N. Y. Cr. R. 189.

N. C. State v. Lambert, 93 N. C. 618; State v. McCurry, 63 N. C. 33; State v. Murph, 60 N. C. 129; State v. Clara, 53 N. C. 25; State v. Harrison, 50 N. C. 115; State v. Cain, 47 N. C. 201; State v. Peace, 46 N. C. 251; State v. Rash, 34 N. C. 382, 55 Am. Dec. 420.

Ohio. Lewis v. State, 4 Ohio, 389.

Okl. Kirk v. Territory, 60 P. 797, 10 Okl. 46.

Or. State v. Glass, 5 Or. 73.

S. C. State v. Petsch, 43 S. C. 132, 20 S. E. 993.

Tenn. Crabtree v. State, 1 Lea, 267.

Tex. Davis v. State, 151 S. W. 313, 68 Tex. Cr. R. 259; Pettis v. State, 150 S. W. 790, 68 Tex. Cr. R. 221; Woodward v. State, 111 S. W. 941, 54 Tex. Cr. R. 86; Moore v. State, 110 S. W. 911, 53 Tex. Cr. R. 559; Baker v. State, 108 S. W. 665, 53 Tex. Cr. R. 14; Hooten v. State, 108 S. W. 651, 53 Tex. Cr. R. 6; Ballew v. State (Cr. App.) 34 S. W. 616; Arbuthnot v. State, 34 S. W. 269, 38 Tex. Cr. R. 509; Ratigan v. State, 33 Tex. Cr. R. 301, 26 S. W. 407; Sanchez v. State (Cr. App.) 21 S. W. 45; Levy v. State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; McVey v. State, 23 Tex. App. 659, 5 S. W. 174; Sparks v. State, 23 Tex. App. 447, 5 S. W. 135; Bramlette v. State, 21 Tex. App. 611, 2 S. W. 765, 57 Am. Rep. 622; Adams v. State, 34 Tex. 526; Seal v. State, 28 Tex. 491; Daniels v. State, 24 Tex. 389; Burrell v. State, 18 Tex. 713; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; Stewart v. State, 15 Tex. App. 598; Williams v. State, 13 Tex. App. 285, 46 Am. Rep. 237; Scott v. State, 10 Tex. App. 112; Priesmuth v. State, 1 Tex. App. 480; Rogers v. State, 1 Tex. App. 187; Dorsey v. State, 1 Tex. App. 33.

Va. Hill v. Commonwealth, 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744.

Wash. Yelm Jim v. Territory, 1 Wash. T. 63.

W. Va. State v. Prater, 43 S. E. 230, 52 W. Va. 132; State v. Thompson, 21 W. Va. 741.

Wis. Firmeis v. State, 61 Wis. 140, 20 N. W. 663.

Illustrations of instructions held objectionable as abstract. An instruction containing a general dissertation on the rights of accused to life and liberty, the duties of jurors,

it appears that the jury could not have been misled thereby,[13]

and the importance of convicting the guilty, informing the jury as to the method by which they were chosen, the reason why they were impaneled, and that they were selected as intelligent, and qualified jurors. People v. Davidson, 88 N. E. 565, 240 Ill. 191. An instruction that the policy of the law deems it better that many guilty persons shall escape rather than one innocent person should be convicted and punished. People v. Darr, 179 Ill. App. 130, judgment affirmed 104 N. E. 389, 262 Ill. 202. A charge that the plea of insanity is sometimes resorted to where aggravated crimes have been committed under circumstances which render hopeless all other means of evading punishment, and while such proof, when satisfactorily established, should be viewed as a full and complete defense, yet it should be examined into with great care. People v. Methever, 64 P. 481, 132 Cal. 326. A charge that if any of the state's witnesses had exhibited bias against defendant, or anger, and had satisfied the jury that they had not testified truly and were not worthy of belief, and the jury thought their testimony should be disregarded, they might disregard it altogether. Wright v. State, 47 So. 201, 156 Ala. 108. A charge that flight of defendant might or might not be considered a circumstance tending to prove guilt, depending on its prompting motive, whether consciousness of guilt and apprehension of justice or other and more innocent motive, and the jury might look to the fact that he gave himself up. Bondurant v. State, 27 So. 775, 125 Ala. 31. A charge, in a prosecution for assault, that, where personal property is wrongfully withheld from an owner, such owner can obtain possession by peaceable means, or, if it comes to his hands, he has a right to hold it against the world. People v. Johns, 190 Ill. App. 367. An instruction that the mere possession "of any article," whether it can or cannot be used, in the perpetration of a crime, is not of itself sufficient to convict accused, but is merely a circumstance, etc. People v. Weber, 86 P. 671, 149 Cal. 325. A charge, in a prosecution against an agent for embezzlement of money, that the jury could not convict defendant unless the evidence satisfied them beyond all reasonable doubt that defendant embezzled money of his principal, and that, if the evidence should convince them that he embezzled checks and property, but no money,

[13] **U. S.** (C. C. A. Minn.) Northern Pac. R. Co. v. Teeter, 63 F. 527, 11 C. C. A. 332.

Ala. Robinson v. Crotwell, 57 So. 23, 175 Ala. 194.

Ark. C. H. Smith Tie & Timber Co. v. Weatherford, 121 S. W. 943, 92 Ark. 6.

Conn. Smith v. Carr, 16 Conn. 450.

Fla. Florala Sawmill Co. v. Smith, 46 So. 332, 55 Fla. 447.

Ill. Carney v. Marquette Third Vein Coal Min. Co., 103 N. E. 204, 260 Ill. 220, affirming judgment 175 Ill. App. 139; People v. Fuller, 87 N. E. 336, 238 Ill. 116, affirming judgment 141 Ill. App. 374; Wallace v. City of Farmington, 83 N. E. 180, 231 Ill. 232; Chicago, R. I. & P. Ry. Co. v. Rathneau, 80 N. E. 119, 225 Ill. 278, affirming judgment 124 Ill. App. 427; Tuttle v. Robinson, 78 Ill. 332; People v. Mullen, 179 Ill. App. 262; Neumann v. Neumann, 147 Ill. App. 218; Comerford v. Morrison, 145 Ill. App. 615.

Iowa. McGregor v. Armill, 2 Iowa, 30.

Mo. Hemphill v. Kansas City, 100 Mo. App. 563, 75 S. W. 179; Clark v. Cox, 118 Mo. 652, 24 S. W. 221; Dodds v. Estill, 32 Mo. App. 47.

Mont. Hogan v. Shuart, 11 Mont. 498, 28 P. 969.

N. C. Evans v. Howell, 84 N. C. 460.

Or. Salmon v. Olds, 9 Or. 488.

Tex. Gulf, C. & S. F. Ry. Co. v. Reagan (Civ. App.) 34 S. W. 796.

Wash. Carstens v. Stetson & Post Mill Co., 14 Wash. 643, 45 P. 313.

Charge in favor of party complaining. A party cannot complain of an inapplicable charge, which is in his favor, if it have any effect. Mulligan v. Bailey, 28 Ga. 507.

this rule applying in criminal cases,[14] and it is not error to state

he could not be convicted. Willis v. State, 33 So. 226, 134 Ala. 429. A charge, in a prosecution for gaming, that the mere fact that money was on the table where a game of cards was being played, without some evidence to show that it was being bet or staked on the game, would authorize a conviction. Butler v. State, 58 S. E. 1114, 2 Ga. App. 623. A charge, in a prosecution for homicide, that it was for the jury to say whether the same punishment should be inflicted on the defendant, who had taken the life of a turbulent, revengeful, bloodthirsty, dangerous man, who had recently, only a few hours before, violated and outraged the person of defendant, as though the deceased had been a man of good character and peacable disposition. Harrison v. State (Ala.) 40 So. 57. Where, in a prosecution for theft of a horse, the evidence conclusively showed that it was in possession of a certain person, and there was no testimony that it was in the possession of any one else, it was not error to refuse an instruction that if the horse was in the possession of some other person, or there was a reasonable doubt as to whether it was in the possession of such person at the time it was stolen, defendant should be acquitted. Garcia v. State (Tex. Cr. App.) 61 S. W. 122. On a prosecution for horse theft, where the testimony of the prosecuting witness showed that he had the exclusive care and control of the animal, an instruction that, if the horse taken from prosecutor was at the time of the taking in the possession and control of a certain other person, defendant should be acquitted, was properly refused. Wingo v. State (Tex. Cr. App.) 75 S. W. 29. A charge, in a prosecution for larceny, that the recent possession of stolen property, while not alone sufficient evidence to find the possessor thereof guilty of the crime of having stolen such property, may be taken into consideration, with all the other evidence in the case, in determining guilt, and, if the defendant offers evidence in explanation of his possession, it is for the jury to say under all the evidence whether or not such explanatory evidence is reasonable. State v. Trosper, 109 P. 858, 41 Mont. 442. Refusal to charge that defendant, indicted for perjury, should be acquitted unless the state had proved beyond a reasonable doubt that the court had jurisdiction of the action in which the perjury was committed was proper, where it appeared from the record of such case in evidence that the court had jurisdiction, and defendant made no attempt to prove the contrary. Thompson v. People, 59 P. 51, 26 Colo. 496. Where defendant, in a trial for robbery, denied all knowledge of the transaction, the court did not err in refusing an instruction authorizing a conviction of petit larceny, since defendant was either innocent of any offense or guilty of robbery. State v. Moore, 106 Mo. 480, 17 S. W. 658. Where the prosecution has made no attempt to compel accused to submit to a second physical examination, the right to do so is a mere abstract question, and the refusal of an instruction that the privilege of the accused as a witness does not extend to such physical circumstances as may exist on his body or about his person is not error. State v. Mehojovich, 43 So. 660, 118 La. 1013. Where, in a prosecution for homicide, there was no evidence to implicate any other person than accused in the crime, the court properly refused an abstractly correct instruction that the failure of the evidence to disclose any other criminal agent than accused was not a circumstance to be considered in determining whether he was guilty of the crime charged, but that he was presumed to be innocent until his guilt was established, and he was not to be prejudiced by the inability of the commonwealth to point any other criminal agency, nor was he called

[14] People v. Dean, 58 Hun, 610, 12 N. Y. S. 749; Welch v. State, 185 P. 119, 16 Okl. Cr. 513; State v. Selby, 144 P. 657, 73 Or. 378; Reed v. Commonwealth, 36 S. E. 399, 98 Va. 817; Whitehurst v. Commonwealth, 79 Va. 556; State v. Long, 108 S. E. 279.

correctly an abstract proposition of law, in the absence of any request that it be explained or enlarged upon;[15] nor is it error to make an abstract statement of legal principles, for the purpose of illustrating and emphasizing the rules governing the points in issue,[16] if the use of such illustration is not misleading[17] and the announcement by an instruction of an abstract proposition of law is not cause for reversal, if another part of such instruction or other instructions apply such proposition to the facts of the case.[18]

on to vindicate his own innocence by naming the guilty party. Jessie v. Commonwealth, 71 S. E. 612, 112 Va. 887.

Instructions held not improper as being abstract. A charge, in a prosecction for burglary, that the confessions of a defendant while under arrest cannot lawfully be used against him, even when they show or tend to show his guilt, unless the defendant in connection with such confessions makes statements of facts that are found to be true and that conduce to establish his guilt, such as the finding of stolen property, and that, if the jury find beyond a reasonable doubt that the defendant made the statements which the state claims that he made in the presence of the witnesses M. and S., and that the same show or tend to show his guilt, they will not consider said statements, or any part of them, against the defendant for any purpose, unless they further find beyond a reasonable doubt that the defendant in connection with said statements made a statement of facts as to the whereabouts of the watch which has been introduced in evidence, and that said statement was found to be true, and that said statement conduces to establish his guilt of the offense of burglary alleged. Smith v. State, 111 S. W. 939, 53 Tex. Cr. R. 643. A charge, in a prosecution for burglary, that the principal witness was an accomplice, and that they could not convict upon his testimony alone, that they must believe it to be true, and find other corroborating evidence other than the fact of the commission of the crime. Pitts v. State, 132 S. W. 801, 60 Tex. Cr. R. 524.

[15] Hanson v. Gaar, Scott & Co., 70 N. W. 853, 68 Minn. 68.

[16] **Ga.** Smith v. Central R. & Banking Co., 90 Ga. 526, 5 S. E. 772.

Ind. Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. App. 415, 31 N. E. 838.

Mass. Jones v. Root, 6 Gray, 435; Melledge v. Boston Iron Co., 5 Cush. 158, 51 Am. Dec. 59.

Mo. McGrew v. Missouri Pac. Ry. Co., 109 Mo. 582, 19 S. W. 53.

S. C. Baker v. Hornik, 35 S. E. 524, 57 S. C. 213.

Tenn. West Memphis Packet Co. v. White, 41 S. W. 583, 99 Tenn. 256, 38 L. R. A. 427.

[17] Mason v. Southern Ry. Co., 36 S. E. 440, 58 S. C. 70, 53 L. R. A. 913, 79 Am. St. Rep. 826, rehearing denied 37 S. E. 226, 58 S. C. 582,

[18] Central of Georgia Ry. Co. v. Blackman, 68 S. E. 339, 7 Ga. App. 766: First Nat. Bank v. Gatton, 50 N. E. 121, 172 Ill. 625, affirming 71 Ill. App. 323; Burdoin v. Town of Trenton, 116 Mo. 358, 22 S. W. 728; McGrew v. Missouri Pac. Ry. Co., 109 Mo. 582, 19 S. W. 53.

Instructions clearly advising jury in the concrete. When correct abstract propositions of law are given, and the instructions, considered together, advise the jury clearly and in the concrete, the abstract propositions do not necessarily vitiate the charge. Denver Tramway Co. v. Owens, 20 Colo. 107, 36 P. 848. Defendants cannot complain that, in an action for the killing of decedent by blasting, the court embodied in the charge, as an abstract proposition, what is known as the "rule of the prudent man" in response to its requests, where, in specific instruc-

§ 123. Specific applications of rule

The above rule has been applied to instructions on the question of the existence of the relation of carrier and passenger,[19] or of the relation of partnership,[20] on the question of a dual agency,[21] on the issue of the delivery of a deed,[22] on the question whether the rule of caveat emptor applied,[23] on the effect of a railroad ticket,[24] on the effect of a custom,[25] on the duties of a carrier,[26] on the question whether a train was run at excessive speed,[27] on the ejection of a passenger by force,[28] on the issue of gross negligence,[29] on the right to recover for wantonness, as distinguished from negligence,[30] on the issue of the negligence of an employer in selecting servants,[31] on the duty of a master to make rules,[32] on the duty of a master to guard machinery,[33] on the question of the assumption of risk,[34] on the question of contributory negligence,[35] on the question of the invalidity of a contract as against public policy,[36] on the issue of bad faith or fraud,[37] on questions arising under the statute of frauds,[38] on the defense of ultra

tions, the court correctly applies the law of negligence and contributory negligence to the facts of the case. Blackwell v. Lynchburg & D. R. Co., 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786.

[19] Hains v. Parkersburg, M. & I. Ry. Co., 84 S. E. 923, 75 W. Va. 613.

[20] Pearson v. Campbell, 12 Ky. Law Rep. (abstract) 637.

[21] Schwartz v. Meschke, 141 P. 175, 92 Kan. 650.

[22] Irvin v. Johnson, 120 S. W. 1085, 56 Tex. Civ. App. 492.

[23] Mastin v. Bartholomew, 92 P. 682, 41 Colo. 328.

[24] Dixon v. New England R. R., 60 N. E. 581, 179 Mass. 242.

[25] Pierce v. Aiken (Tex. Civ. App.) 146 S. W. 950.

[26] Sullivan v. Fugazzi, 79 N. E. 775, 193 Mass. 518.

[27] Hamman v. Illinois Cent. R. Co., 188 Ill. App. 414.

[28] Missouri, K. & T. Ry. Co. of Texas v. Meyers (Tex. Civ. App.) 35 S. W. 421.

[29] Coe v. Ricker, 101 N. E. 76, 214 Mass. 212, 45 L. R. A. (N. S.) 30; Ann. Cas. 1914B, 1178.

[30] Cameron v. Duluth-Superior Traction Co., 102 N. W. 208, 94 Minn. 104; Holwerson v. St. Louis & S. Ry. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850.

[31] Austin & N. W. Ry. Co. v. Flannagan (Tex. Civ. App.) 40 S. W. 1043.

[32] Oklahoma Portland Cement Co. v. Brown, 146 P. 6, 45 Okl. 476; Lawrence's Adm'r v. Hyde, 88 S. E. 45, 77 W. Va. 639.

[33] Radic v. Thomas Jackson & Co., 146 N. W. 136, 178 Mich. 618.

[34] Springfield Electric Light & Power Co. v. Mott, 120 Ill. App. 39.

[35] Carpenter v. Village of Dickey, 143 N. W. 964, 26 N. D. 176.

[36] Snow v. Penobscot River Ice Co., 77 Me. 55.

[37] Rara Avis Gold & Silver Min. Co. v. Bouscher, 9 Colo. 385, 12 P. 433; Bayer Steam Soot Blower Co. v. City of Milan (Mo. App.) 199 S. W. 712; Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440; Purtle v. Casey, 11 Mont. 229, 28 P. 305; Addleman v. Manufacturers' Light & Heat Co., 89 A. 674, 242 Pa. 587.

[38] Ridenour v. H. C. Dexter Chair Co., 95 N. E. 409, 209 Mass. 70; Huggins v. Carey (Tex. Civ. App.) 149 S. W. 390.

vires,[39] on act of God as a defense,[40] on the question of waiver,[41] on the unreliability of verbal admissions,[42] on elements of damages,[43] on mitigation of damages,[44] on punitive damages,[45] and on the right to recover the reasonable value of services.[46]

§ 124. What are abstract instructions

Whether an instruction is abstract must be determined by reference to the evidence and to the instructions as a whole.[47] An

[39] City Council of Augusta v. Owens, 36 S. E. 830, 111 Ga. 464.

[40] City of Cuthbert v. Gunn, 94 S. E. 637, 21 Ga. App. 442; St. Louis Southwestern Ry. Co. of Texas v. Lewellen Bros. (Tex. Civ. App.) 116 S. W. 116.

[41] German Ins. Co. v. Goodfriend, 97 S. W. 1098, 30 Ky. Law Rep. 218.

[42] Thomas v. Paul, 87 Wis. 607, 58 N. W. 1031.

[43] **U. S.** (Sup.) American R. Co. of Porto Rico v. Didricksen, 33 S. Ct. 224, 227 U. S. 145, 57 L. Ed. 456.

Ga. Sammons v. Wilson, 92 S. E. 950, 20 Ga. App. 241; City Council of Augusta v. Owens, 36 S. E. 830, 111 Ga. 464.

Ind. Cleveland, C., C. & St. L. Ry. Co. v. Griswold, 97 N. E. 1030, 51 Ind. App. 497.

Iowa. Negley v. Cowell, 91 Iowa, 256, 59 N. W. 48, 51 Am. St. Rep. 344.

Mo. Vanderbeck v. Wabash Ry. Co., 133 S. W. 1178, 154 Mo. App. 321; Moellman v. Gieze-Henselmeier Lumber Co., 114 S. W. 1023, 134 Mo. App. 485; Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483.

N. Y. Weber v. Kingsland, 21 N. Y. Super. Ct. 415.

N. D. Swords v. McDonell, 154 N. W. 258, 31 N. D. 494; Selland v. Nelson, 132 N. W. 220, 22 N. D. 14.

Or. Scheurmann v. Mathison, 136 P. 330, 67 Or. 419.

Tex. Gulf, C. & S. F. Ry. Co. v. Jackson, 69 S. W. 89, 29 Tex. Civ. App. 342; Missouri Pac. Ry. Co. v. Mitchell, 75 Tex. 77, 12 S. W. 810.

Wash. Paysse v. Paysse, 146 P. 840, 84 Wash. 351.

Wis. Dralle v. Town of Reedsburg, 122 N. W. 771, 140 Wis. 319.

[44] Steinman v. John Hall Tailoring Co., 163 P. 452, 99 Kan. 699.

[45] Wilson v. Atlantic Coast Line R. Co., 55 S. E. 257, 142 N. C. 333; Reed v. Coughran, 111 N. W. 559, 21 S. D. 257.

[46] Bernth v. Smith, 127 N. W. 427, 112 Minn. 72.

[47] Cook v. Danaher Lumber Co., 112 P. 245, 61 Wash. 118.

Illustrations of abstract instructions within rule. In an action by a wife to cancel a deed to her brother-in-law alleged to have been procured by coercion of her husband, where the effect of a conveyance by a wife of her separate estate to her husband's creditor to pay the husband's debts was not involved under the pleadings and evidence, it was error to charge upon such subject, though the charge correctly stated the law. McClellan v. McClellan, 68 S. E. 1025, 135 Ga. 95. A charge, in an action against a president of a bank for misleading a depositor in relation to its financial condition, that fraud must be proved, and is never presumed. Giddings v. Baker, 80 Tex. 308, 16 S. W. 33. In an action against a telephone company for negligently permitting its wires along a public highway to remain down so as to endanger the safety of the traveling public, an instruction that the company, if not otherwise negligent, is not responsible for damages resulting from an unusual storm, which could not have been reasonably foreseen and its consequences guarded against, is properly refused, because it fails to apply the law stated to any issue or evidence in the case. Snee v. Clear Lake Telephone Co., 123 N. W. 729, 24 S. D. 361. In an action against a telephone company for the death of a city lineman while at work on the company's pole, an instruction that

instruction is not abstract if there is any evidence from which the

where an employé chooses a dangerous way of performing his work, instead of a safe way, which was equally open to him, he is guilty of negligence which will preclude recovery, was properly refused, being applicable only to the relation of master and servant, which was not involved. Lundy v. Southern Bell Telephone & Telegraph Co., 72 S. E. 558, 90 S. C. 25. A request for a ruling in a writ of entry that demandants, to recover, must rely on the strength of their own title and not on the weakness of the tenant's. Merrick v. Betts, 101 N. E. 131, 214 Mass. 223. An instruction, in an action on a contract, that "if the jury think that any circumstance proven in the case is of greater weight in determining any issue than the oral testimony of witnesses they are at liberty to so decide." Hale Elevator Co. v. Hale, 98 Ill. App. 430, affirmed 66 N. E. 249, 201 Ill. 131. An instruction that the opinion of expert witnesses, if opposed to the physical facts proved, must give way to such physical facts. Starett v. Chesapeake & O. Ry. Co., 110 S. W. 282, 33 Ky. Law Rep. 309. An instruction which tells the jury that they should consider the evidence "in the light of the knowledge which you have obtained as men of affairs." Gormley v. Hartray, 105 Ill. App. 625. In an injury action, predicated wholly upon the statutes of Wisconsin abolishing the fellow servant doctrine as respects railroad employment, and tried throughout upon the theory of liability thereunder, it was error to submit the case to the jury upon the question whether defendant was liable under the federal employer's liability act (Act April 22, 1908. c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657–8665]). Creteau v. Chicago & N. W. Ry. Co., 129 N. W. 855, 113 Minn. 418. An instruction, in an action by a servant for personal injuries to the effect that an employer is under no greater obligation to look after the safety of a servant than the servant is to look after his own safety. Western Stone Co. v. Muscial, 63 N. E. 664, 196 Ill. 382, 89 Am. St. Rep. 325, affirming judgment 96 Ill. App. 288. An instruction, in an action to recover for the death of plaintiff's intestate by suffocation while working in defendant's mine, that if the injury resulted from the consequences of a certain act or omission, but only by means of an intervening cause, from which cause the injury followed as a direct consequence, the law will refer the damage to the last cause. Alabama Consol. Coal & Iron Co. v. Heald, 154 Ala. 580, 45 So. 686. Charges that there could be no recovery in an action for negligently constructing and maintaining a drain, if the city used due diligence in selecting the site. City of Montgomery v. Stephens, 69 So. 970, 14 Ala. App. 274. An instruction, in an action against a city for injuries occasioned by negligence of a bridge tender employed by the city and that of a helper employed by the tender personally, that the city is not liable for the acts of persons not in its employ. City of Chicago v. O'Malley, 63 N. E. 652, 196 Ill. 197, affirming judgment 95 Ill. App. 355. Where the evidence of partnership was in issue, but it was not a case of partnership established by circumstantial evidence, an instruction that it is not necessary that a partnership be established by direct evidence, that it may be shown by circumstances or by facts in evidence from which a partnership may be inferred, was properly refused as abstract. Rector v. Robins, 102 S. W. 209, 82 Ark. 424. An instruction that the law will not infer payment from the facts tending to prove it, however fully they support such an inference. Hays v. Hays, 97 N. E. 198, 49 Ind. App. 298. A charge that the degree of care required of a railroad company is that used by a good specialist in the same business. Norfolk & W. R. Co. v. Burge, 84 Va. 63, 4 S. E. 21. In an action against a railroad company for an injury at a crossing, a charge in effect that if the jury should find that the maintenance of gates and watchmen at the crossing was reasonably

jury might infer the existence of the fact supposed.[48] An instruc-

necessary, and that they were not provided, defendant would be negligent, was erroneous, where there was no allegation or proof that the maintenance of gates at the crossing was either authorized or required by any governmental authority, or that gates were the only practical means of rendering the crossing safe, or other showing that would make a failure to maintain gates at the crossing negligence as matter of law. Atlantic Coast Line R. Co. v. Wallace, 54 So. 893, 61 Fla. 93. An instruction, in an action against a railroad for injuries through frightening a horse at a crossing, as to the duty of defendant to use care at the crossing, where the view of the tracks was obstructed. Culbertson v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 178 S. W. 269. Instructions making it a defense in replevin, if defendant paid part of the purchase price when plaintiff bought the articles, and plaintiff did not repay or tender to defendant the amount paid by him, and intimating that defendant might be the owner of the articles by virtue of such payment for plaintiff, if plaintiff then, or later, made a gift of the articles to defendant, are erroneous, as inapplicable to the case; defendant making no claim of a lien, and not basing his title or right of possession on a gift. Woods v. Latta, 88 P. 402, 35 Mont. 9. Where the only issue in an action was whether the defendant purchased a jack of the plaintiff, and there is evidence that it was of some value, an instruction that plaintiff was entitled to a verdict modified so as to include the conditions that the animal was without any value at the time of the alleged sale, and that the plaintiff made no misrepresentation as to its qualities, is erroneous as being inapplicable to the issues and evidence. Brown v. Emerson, 134 S. W. 1108, 155 Mo. App. 459. In an action against a street railroad for the death of a fireman in a collision between a hose wagon and a car, it was not error to refuse an instruction that, in determining whether plaintiff's intestate was guilty of contributory negligence, the jury should not take into account the instinct of self-preservation, where the attention of the jury was not in any way called to such doctrine. McBride v. Des Moines City Ry. Co., 109 N. W. 618, 134 Iowa, 398. Where the only issue raised by the pleadings and evidence, in an action for injuries in a collision with defendant's street car, was whether those in charge of the car used all reasonable efforts to prevent the accident after they saw, or should with reasonable care have seen, plaintiff's peril, an instruction as to the relative rights of way of the parties at the place of the accident was erroneously given because having no relation to the issues. Grout v. Central Electric Ry. Co., 131 S. W. 891, 151 Mo. App. 330. Where, in an action for injuries to a traveler on a defective highway, the answer charged contributory negligence of plaintiff herself, and there was ample ground for a finding that the vehicle was overloaded, a requested charge that there was no pretense that plaintiff was guilty of want of ordinary care, and that the question related only to the driver, plaintiff's son, was properly refused. Vollmer v. Town of Fairbanks, 132 N. W. 542, 146 Wis. 630. Where, in trespass for unlawful taking and retention of plaintiff's cattle, counsel, in opening for the defense, stated that he did not claim that defendant had the right, under the statute, to take the cattle out of the highway, but that he claimed that they were trespassing on defendant's premises when taken, and plaintiff's evidence showed that they were on the highway, but not running at large, when defendant took them; the cattle being watched by him and his family, this being contradicted by defend-

[48] Arkadelphia Lumber Co. v. Asman, 107 S. W. 1171, 85 Ark. 568; Jacksonville Electric Co. v. Cubbage, 51 So. 139, 58 Fla. 287; Brecher v. Chicago Junction Ry. Co., 119 Ill. App. 554.

tion in the language of the statute under which an indictment was found cannot be considered abstract,[49] nor is an instruction abstract if, according to the theory of one party, supported by some competent evidence, it is not abstract.[50]

B. Instructions as Affected or Controlled by the Pleadings

1. In Civil Cases

§ 125. Rule that instructions must not be broader than the pleadings

With an exception to be hereafter noted, Post, § 129, the general rule is that instructions to juries in civil cases should be limited to the questions presented by the pleadings,[51] and that instructions

ant's evidence, going to show that they were on his premises at the time, it was held that an instruction that, if they were running at large on the highway, defendant had the right to take them into his custody, was properly refused, as not based on the evidence or theory of defense. Eklund v. Toner, 80 N. W. 791, 121 Mich. 687. An instruction, in an action of trover, that if the parties had been putting wood along a railroad, and the defendants had been taking it up in parcels, then the defendants had the right to act on this plan, and taking up the wood paid for by the defendants would not make them liable in trover. Nashville, C. & St. L. Ry. v. Walley, 41 So. 134, 147 Ala. 697. An instruction, in an action on a note which a bank purchased in the regular course of business, the transaction not being usurious, that a bank which charges usury in discounting a note cannot be a bona fide purchaser. Hudson v. Repton State Bank, 75 So. 695, 16 Ala. App. 101. Where, in an action for damages through the maintenance of a dam, it neither appeared from the pleadings nor from the testimony that plaintiff was seeking damages that could have been avoided by him, a requested instruction as to plaintiff's duty to lessen the loss by properly draining the land if he could reasonably have done so was properly refused. Auten v. Catawba Power Co., 65 S. E. 274, 84 S. C. 399, judgment modified on rehearing, 66 S. E. 180, 84 S. C. 399. An instruction, in an action for deflecting surface water into a sink hole, causing injury to plaintiff's spring, defining a known and well-defined channel. Killian v. Killian, 57 So. 825, 175 Ala. 224. An instruction in a will contest that undue influence and mental capacity cannot be separated, where the testatrix is of advanced age and suffering from a disease affecting her brain and vital powers. Hayes v. Moulton, 80 N. E. 213, 194 Mass. 157.

[49] White v. People, 53 N. E. 570, 179 Ill. 356.

[50] Strickland v. Smith, 198 S. W. 690, 131 Ark. 350.

[51] **U. S.** (C. C. A. N. J.) Morris v. Beach, 191 F. 34, 111 C. C. A. 566.

Ark. St. Louis & S. F. R. Co. v. Vaughan, 105 S. W. 573, 84 Ark. 311.

Colo. Reynolds v. Hart, 94 P. 14, 42 Colo. 150.

Conn. Eckler v. Wake, 88 A. 369, 87 Conn. 708.

Fla. Town of De Funiak Springs v. Perdue, 68 So. 234, 69 Fla. 326.

Ga. Southern Ry. Co. v. Chambers, 55 S. E. 37, 126 Ga. 404, 7 L. R. A. (N. S.) 926.

Idaho. Tarr v. Oregon Short Line R. Co., 93 P. 957, 14 Idaho, 192, 125 Am. St. Rep. 151.

Ill. Kendall v. Chicago Rys. Co., 185 Ill. App. 145.

submitting to the jury matters outside of the issues made by the pleadings are not only properly refused,[52] but constitute positive

Kan. Oil Well Supply Co. v. Johnson, 98 P. 381, 78 Kan. 751.

Ky. Mathis v. Bank of Taylorsville, 124 S. W. 876, 136 Ky. 634.

Md. Coughlin v. Blaul, 87 A. 766, 120 Md. 28; Darby Candy Co. of Baltimore City v. Hoffberger, 73 A. 565, 111 Md. 84.

Minn. Hostetter v. Illinois Cent. Ry. Co., 115 N. W. 748, 104 Minn. 25.

Mo. Lorton v. Trail (App.) 216 S. W. 54; Silverthorne v. Summit Lumber Co., 176 S. W. 441, 190 Mo. App. 716; Alexander v. Missouri Pac. Ry. Co., 165 S. W. 1156, 178 Mo. App. 184.

N. Y. Newman v. Acme Metal Ceiling Co. (Sup.) 134 N. Y. S. 518.

[52] **U. S.** (C. C. A. Ohio) Beaver Hill Coal Co. v. Lassilla, 176 F. 725, 100 C. C. A. 283; Republic Iron & Steel Co. v. Yanuszka, 166 F. 684, 92 C. C. A. 280.

Ala. Alabama Steel & Wire Co. v. Griffin, 42 So. 1034, 149 Ala. 423.

Ariz. Ewing v. United States, 89 P. 593, 11 Ariz. 1.

Ark. Southwestern Telegraph & Telephone Co. v. Abeles, 126 S. W. 724, 94 Ark. 254, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006; St. Louis, I. M. & S. Ry. Co. v. Fambro, 114 S. W. 230, 88 Ark. 12.

Cal. Medlin v. Spazier, 137 P. 1078, 23 Cal. App. 242; De Gottardi v. Donati, 99 P. 492, 155 Cal. 109.

Colo. Rice v. Van Why, 111 P. 599, 49 Colo. 7.

Conn. Billings v. McKenzie, 89 A. 344, 87 Conn. 617; Leone v. I. & F. Motor Car Co., 80 A. 520, 84 Conn. 463.

D. C. Washington, A. & M. V. R. Co. v. Fincham, 40 App. D. C. 412.

Fla. Jacksonville Electric Co. v. Sloan, 42 So. 516, 52 Fla. 257.

Ga. Georgia, F. & A. Ry. Co. v. Sasser, 61 S. E. 505, 4 Ga. App. 276.

Ind. Lake Erie & W. R. Co. v. Sanders (App.) 125 N. E. 793; Cleveland, C., C. & St. L. Ry. Co. v. Smith, 97 N. E. 164, 177 Ind. 524; Ætna Life Ins. Co. v. Bockting, 79 N. E. 524, 39 Ind. App. 586.

Iowa. Dugane v. Hvezda Pokroku No. 4, 119 N. W. 141.

Kan. Reynolds v. Curry, 105 P. 437, 81 Kan. 443.

Ky. Minor v. Gordon, 188 S. W. 768, 171 Ky. 790, modifying judgment on rehearing 186 S. W. 480, 170 Ky. 609; Turner & Frazer v. Frazier, 163 S. W. 245, 157 Ky. 388; Edge v. Ott, 152 S. W. 764, 151 Ky. 672; Eirk's Adm'r v. Louisville Ry. Co., 98 S. W. 293, 30 Ky. Law Rep. 325.

Me. Smith v. Tilton, 101 A. 722, 116 Me. 311; Lunge v. Abbott, 95 A. 942, 114 Me. 177.

Mich. In re Keene's Estate, 155 N. W. 514, 189 Mich. 97, Ann. Cas. 1918E, 367; Ruthruff v. Faust, 117 N. W. 902, 154 Mich. 409.

Minn. Foot, Schulze & Co. v. Porter, 154 N. W. 1078, 131 Minn. 224; Evertson v. McKay, 144 N. W. 950, 124 Minn. 260.

Mo. Cotner v. St. Louis & S. F. R. Co., 119 S. W. 610, 220 Mo. 284; National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co., 98 S. W. 620, 201 Mo. 30.

Mont. Smith v. Barnes, 149 P. 963, 51 Mont. 202, Ann. Cas. 1917D, 330; Marron v. Great Northern Ry. Co., 129 P. 1055, 46 Mont. 593.

N. C. Martin v. Knight, 61 S. E. 447, 147 N. C. 564.

Okl. Cassingham v. Berry, 150 P. 139.

Or. Clearwater v. Forrest, 143 P. 998, 72 Or. 312; Zanello v. Smith & Watson Iron Works, 124 P. 660, 62 Or. 213.

Pa. Foringer v. New Kensington Stone Co., 72 A. 797, 223 Pa. 425.

R. I. Eagle Brewing Co. v. Colaluca, 94 A. 680, 38 R. I. 224.

S. C. Gibson v. Atlantic Coast Line R. Co., 70 S. E. 1030, 88 S. C. 360; Craig Milling Co. v. Cromer, 67 S. E. 289, 85 S. C. 350; Auten v. Catawba Power Co., 65 S. E. 274, 84 S. C. 399, judgment modified on rehearing, 66 S. E. 180, 84 S. C. 399.

S. D. Comeau v. Hurley, 123 N. W. 715, 24 S. D. 275.

error,[53] which ordinarily will work a reversal,[54] as being calculated to mislead the jury.[55]

Tenn. Fletcher v. Louisville & N. R. Co., 49 S. W. 739, 102 Tenn. 1.

Tex. Smith v. Bryan (Civ. App.) 204 S. W. 359; Petty v. City of San Antonio (Civ. App.) 181 S. W. 224; Bartley v. Marino (Civ. App.) 158 S. W. 1156; Ripley v. Ocean Accident & Guarantee Corporation (Civ. App.) 146 S. W. 974; Temple Electric Light Co. v. Halliburton (Civ. App.) 136 S. W. 584; San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574, 52 Tex. Civ. App. 22; Galveston, H. & H. R. Co. v. Alberti, 103 S. W. 699, 47 Tex. Civ. App. 32.

Utah. Larson v. Calder's Park Co., 180 P. 599, 54 Utah, 325, 4 A. L. R. 731; Edd v. Union Pac. Coal Co., 71 P. 215, 25 Utah, 293.

Vt. Bancroft v. Town of East Montpelier, 109 A. 39, 94 Vt. 163; Douglass & Varnum v. Village of Morrisville, 95 A. 810, 89 Vt. 393.

Va. Norfolk Southern R. Co. v. Crocker, 84 S. E. 681, 117 Va. 327.

Wash. Loveland v. Jenkins-Boys Co., 95 P. 490, 49 Wash. 369; Starr v. Ætna Life Ins. Co., 87 P. 1119, 45 Wash. 128.

Wis. Taylor v. Northern Coal & Dock Co., 152 N. W. 465, 161 Wis. 223, Ann. Cas. 1916C, 167; Ryan v. Oshkosh Gaslight Co., 120 N. W. 264, 138 Wis. 466.

[53] **Ala.** Alabama Great Southern R. Co. v. McWhorter, 47 So. 84, 156 Ala. 269; Garth v. Alabama Traction Co., 42 So. 627, 148 Ala. 96.

Ark. Helena Hardwood Lumber Co. v. Maynard, 138 S. W. 469, 99 Ark. 377.

Ga. Rawlings v. Cohen, 85 S. E. 851, 143 Ga. 726.

Idaho. Smith v. Graham, 164 P. 354, 30 Idaho, 132.

Ind. Lake Erie & W. R. Co. v. Beals, 98 N. E. 453, 50 Ind. App. 450; Cleveland, C., C. & St. L. Ry. Co. v. Powers, 89 N. E. 485, 173 Ind. 105, denying rehearing 88 N. E. 1073, 173 Ind. 105.

Iowa. Garvey v. Boody-Holland & New, 155 N. W. 1027, 176 Iowa, 273.

Mo. Williamson v. Kansas City Stock Yards (App.) 217 S. W. 614; Emerson-Brantingham Implement Co. v. Simpson, 217 S. W. 559, 205 Mo. App. 56; Riley v. City of Independence, 167 S. W. 1022, 258 Mo. 671, Ann.

[54] **Fla.** Pensacola Electric Terminal Ry. Co. v. Haussman, 40 So. 196, 51 Fla. 286.

Ill. Chicago City Ry. Co. v. Schaefer, 121 Ill. App. 334.

Ind. Southern Ry. Co. v. Crone, 99 N. E. 762, 51 Ind. App. 300.

Neb. Farmers' & Merchants' Bank v. Upham, 37 Neb. 417, 55 N. W. 1044.

N. Y. McLewee v. Hall, 103 N. Y. 639, 8 N. E. 486; Horgan v. Rapid Transit Subway Const. Co. (Sup.) 146 N. Y. S. 219.

Ohio. Cincinnati Traction Co. v. Stephens, 79 N. E. 235, 75 Ohio St. 171; Cincinnati Traction Co. v. Johnson, 30 Ohio Cir. Ct. R. 702.

Tex. St. Louis Southwestern Ry. Co. of Texas v. Evans (Civ. App.) 158 S. W. 1179; St. Louis, B. & M. Ry. Co. v. Maddox (Civ. App.) 152 S. W. 225.

[55] Gibbs v. Wall, 10 Colo. 153, 14 Pac. 216; Dolson v. Dunham, 104 N. W. 964, 96 Minn. 227; Sooby v. Postal Telegraph-Cable Co. (Mo. App.) 217 S. W. 877; Kingfisher Nat. Bank v. Johnson, 98 P. 343, 22 Okl. 228.

Impossibility of telling from verdict whether jury misled. Where the complaint in an action for injuries to a servant while operating an unguarded machine charged merely a negligent failure to warn the servant as to the dangers incident to the work, without claiming that the machine was defective, the submission to the jury of the issue whether the machine was dangerous to employés when engaged in their ordinary duties of operating it, and reading in connection therewith a statute requiring the guarding of specified machinery, was erroneous, necessitating a reversal, it being impossible to tell from the verdict whether the jury based their conclusion of negligence on the failure to warn, or on the unguarded condition of the machine. Keena v. American Box Toe Co., 128 N. W. 858, 144 Wis. 231.

§ 126. Scope of rule against broadening issues by instructions

The above rule applies, as has already been shown to an instruction which is correct as an abstract proposition of law, but which

Cas. 1915D, 748; Bryan v. United States Incandescent Lamp Co., 159 S. W. 754, 176 Mo. App. 716: Kellogg v. City of Kirksville, 112 S. W. 296, 132 Mo. App. 519.

Mont. Chan v. Slater, 82 P. 657, 33 Mont. 155.

Neb. Norfolk Beet-Sugar Co. v. Hight, 76 N. W. 566, 56 Neb. 162.

N. J. Duel v. Mansfield Plumbing Co., 92 A. 367, 86 N. J. Law, 582.

N. M. Bank of Commerce v. Broyles, 120 P. 670, 16 N. M. 414.

N. Y. Limerick v. Holdsworth, 139 N. Y. S. 737, 154 App. Div. 747.

Ohio. Cincinnati Traction Co. v. Kroger, 30 Ohio Cir. Ct. R. 654.

Okl. Comanche Mercantile Co. v. Wheeler & Motter Mercantile Co., 155 P. 583, 55 Okl. 328; Chicago, Rock Island & P. Ry. Co. v. Mailes, 152 P. 1131, 52 Okl. 278.

Or. Ingram v. Carlton Lumber Co., 152 P. 256, 77 Or. 633; Oberlin v. Oregon-Washington R. & Navigation Co., 142 P. 554, 71 Or. 177.

Pa. Monier v. Philadelphia Rapid Transit Co., 75 A. 1070, 227 Pa. 273.

S. C. Fanning v. Stroman, 101 S. E. 861, 113 S. C. 495.

S. D. Christiernson v. Hendrie & Bolthoff Mfg. & Supply Co., 128 N. W. 603, 26 S. D. 519.

Tex. Schaff v. Holmes (Civ. App.) 215 S. W. 864; Scruggs v. E. L. Woodley Lumber Co. (Civ. App.) 179 S. W. 897.

Utah. Lochhead v. Jensen, 129 P. 347, 42 Utah, 99.

Va. Baltimore & O. R. Co. v. Lee, 55 S. E. 1, 106 Va. 32.

W. Va. Britton v. South Penn Oil Co., 81 S. E. 525, 73 W. Va. 792.

Instructions erroneous within rule. Where a bill of particulars alleged that defendant contracted to take good care of the horse and colt of plaintiff intrusted to his keeping, and that said horse and colt sickened and died for want of proper care and attention, it was held that it was error to instruct the jury under such pleadings, over the objection of the defendant, what the duty of defendant would have been if they should find that special and extra care had been contracted for. Ransom v. Getty, 14 P. 487, 37 Kan. 75. In an action for the unlawful killing of a dog, where it was not contended that dogs were not property, an instruction that dogs were property under the laws of the state was erroneous, being upon a matter not in issue. Brisco v. Laughlin, 143 S. W. 65, 161 Mo. App. 76. Where it is alleged that the damage to a shipment of bananas resulted from negligence and delay, followed by specific allegations ascribing the damages to the failure to stop the car as per contract, it is error to submit to the jury as a separate ground of recovery the failure to ice the car. Houston & T. C. R. Co. v. Corsicana Fruit Co. (Tex. Civ. App.) 170 S. W. 849. Where the petition in an action against a shipper of calves in consequence of their having been put into pens infected with a contagious disease alleged that the carrier had been notified that the pens had been quarantined, and had permitted the shipper, in ignorance of the fact, to place his calves therein, the court erred in submitting as a ground of recovery the duty of the carrier to have suitable shipping and feeding pens, since no such ground was averred in the petition. Texas & P. Ry. Co. v. Beal & Self, 97 S. W. 329, 43 Tex. Civ. App. 588. Where, in an action against a carrier for the penalty imposed by a statute for delay in the transportation of freight, the court submitted the issue, what amount, if any, is the plaintiff entitled to recover of defendant on account of the failure to promptly ship the freight, a charge that if the jury believed the evidence they should answer the issues, "Yes," was erroneous, for the charge and the issue did not correspond, and the response directed to be made was inappropriate to the issue. Davis v. Southern Ry. Co., 60 S. E. 722, 147 N. C. 68. In an action against a railroad company which had

is inapplicable to any issue in the case,[56] and requires the instruc-

contracted with the county court to transport sick persons to the pesthouse by such a person, instructions for plaintiff based on the theory of an implied contract, and which ignore the special contract alleged in the declaration, should be refused. Jenkins v. Chesapeake & O. Ry. Co., 57 S. E. 48, 61 W. Va. 597, 49 L. R. A. (N. S.) 1166, 11 Ann. Cas. 967. In an action for injuries to a passenger, received while attempting to enter the middle door of a car, caused by falling into a space between the door and the station platform, an instruction charging that if defendant could have opened the end doors of the car and taken the passengers in there with safety, but failed to do so, because it was not paying attention to the safety of the passengers, its failure to do so would be negligence, was erroneous, as not justified by the issues, where neither the pleadings nor the evidence raised any issue as to the company's duty to open the end doors. Plummer v. Boston Elevated Ry. Co., 84 N. E. 849, 198 Mass. 499. Where, in an action on a note and mortgage, there was no plea of non est factum, and plaintiff produced in evidence the note and mortgage, it was error to submit to the jury the question whether defendant executed the note and mortgage. Walker v. Tomlison, 98 S. W. 906, 44 Tex. Civ. App. 446. Where the issues made by the pleadings in an action on notes given for an engine covered by a chattel mortgage was that the property was seized and sold under the terms of the mortgage, and a sum realized in excess of the indebtedness, it was error to submit the case upon the theory that plaintiff had wrongfully converted the mortgaged property. Aultman & Taylor Machinery Co. v. Forest, 130 P. 1086, 23 Colo. App. 558. Where, in an action on a note given for a policy premium, the answer did not allege that plaintiff represented to defendant that there would be any stipulations in the policy that were not contained in it, especially one that she would receive 7 per cent. per annum interest on premiums paid, an instruction that, if plaintiff represented to defendant that the policy would contain such stipulation which defendant believed to be true, and by reason thereof was induced to execute the note, they should find for defendant, was erroneous. Sympson v. Bell, (Ky.) 112 S. W. 1133. In an action for breach of contract by which plaintiff agreed to dig a well 300 feet deep, where plaintiff alleged that the well was dug 286 feet deep when the drill was accidentally lost, and that plaintiff offered to drill another well near by without charge, which offer was refused, and sought recovery for digging 300 feet at the contract price, or, in the alternative, reasonable compensation for the work actually done, it was error to authorize recovery on the basis of what the well dug was actually worth to defendant. Mitchell v. Boyce (Tex. Civ. App.) 120 S. W. 1016. Where plaintiff contracted to drill a well not less than 200 nor more than 400 feet, at the option of defendant, who was to furnish the casing, no payment to be made if he abandoned the work before completion, it was error, in an action for compensation for a partially completed well in which plaintiff alleged that he ceased work because defendant notified him to do so, to instruct that if it became necessary to use casing in drilling the well, and defendant failed or refused for an unreasonable length of time to furnish it, plaintiff could recover. Lemaster v. Southern Missouri Ry. Co., 99 S. W. 500, 122 Mo. App. 313. Where a complaint was construed as stating a cause of action for defendant's failure to satisfactorily perform a service contract to locate plaintiff on certain public lands under the Stone and Timber Act, instructions that if defendant's representations were materially false, and plaintiff did not know and had no means of knowing that they were false, but relied on them as being true, and defendant knew this and plaintiff suffered damages thereby, it was immaterial whether defendant made the representations willfully or intentionally, or

[56] See note 56 on page 243.

tions to be confined to the issues raised by the pleadings, although

not, for he had no right to make even a mistake in facts so material to the contract except under the penalty of responding in damages, and also that plaintiff could not recover unless defendant or his agent made false representations to plaintiff, and plaintiff actually relied thereon, and that it must also be shown that plaintiff paid something to defendant or his agent which in equity and good conscience he ought to return, etc., were inappropriate and erroneous. Noble v. Libby, 129 N. W. 791, 144 Wis. 632. In personal injury action, an instruction stating that the jury should not be influenced by sympathy nor the relative financial condition of the parties is properly refused, where punitive damages are not claimed. Riverside & Dan River Cotton Mills Co. v. Carter, 74 S. E. 183, 113 Va. 346. Where, in an action on a bond for liquidated damages for breach of contract, the petition prayed for judgment for the amount of the bond, without praying in the alternative for the actual damages sustained by the breach, and without praying for general relief, it was error to give a charge permitting a recovery of actual damages. Work v. Cross (Tex. Civ. App.) 98 S. W. 208. Where the action was for brokers' commissions, and not for damages by reason of a revocation of their agency, instructions submitting the latter issue to the jury were erroneous. Knudson & Richardson v. Laurent, 140 N. W. 392, 159 Iowa, 189. In ejectment, alleging plaintiff's reliance on a demise from herself as sole heir of her father, who died in possession, and that defendant claimed under her father, and that his deed to defendant's remote grantor was a forgery, an instruction that fraud may not be presumed, but that slight circumstances may carry conviction thereof, was inapplicable to any issue. Cowart v. Strickland, 100 S. E. 447, 149 Ga. 397, 7 A. L. R. 1110. Where, in an action for the destruction of property by fire, plaintiff's statement alleged that the negligent throwing of sparks causing the fire occurred between 2:30 and 3:15 p. m., it was error to charge that the jury could find that the spark causing the fire might have fallen on the premises "at any time prior to 2 o'clock." Oakdale Baking Co. v. Philadelphia & R Ry. Co., 91 A. 358, 244 Pa. 463. In an action of deceit against a bank president for falsely representing the bank's condition, thereby inducing the plaintiff's acceptance of its stock, which defendant had purchased for him, it is error to instruct that if defendant made false representations concerning the institution's financial condition, "or" as to the real ownership of the stock, he would be liable; false representation as to ownership not being counted on in the declaration. Cahill v. Applegarth, 56 A. 794, 98 Md. 493. In suit by hotel guest for money deposited with hotel, where defendant, under general issue, set up no bailment and the case was tried on that theory, it was not error to refuse instruction on the theory of gratuitous bailment. Adler v. Planters' Hotel Co. (Mo. App.) 181 S. W. 1062. Where, in an action for rent under a lease for the time after defendants had abandoned the premises, there was no issue tendered in the answer that defendants had abandoned the property with plaintiff's consent, but the answer pleaded that the lease had been obtained by fraud, and the judge charged that, if the jury found the lease was valid, they were bound to find for plaintiff in the sum of $150 for rent, whereupon defendants' counsel asked the court if that would be true if defendants abandoned the premises by consent, to which the court replied in the negative, and added that, if there was an agreement for surrender, defendants were entitled to a deduction for the term for which the premises were abandoned by plaintiff's consent, it was held that such instruction was erroneous as not within the issues. Swayne v. Felici, 79 A. 62, 84 Conn. 147. Where, in slander, plaintiff's reputation was not attacked or involved, a charge that the jury would accept as true the allegation that he had the reputation of being an honest man, and had never been suspected of any

these be immaterial.[57] Such rule precludes the court from in-

dishonest practices, was properly refused. Lindsey v. St. Louis, I. M. & S. Ry. Co., 129 S. W. 807, 95 Ark. 534. An instruction as to the master's duty to furnish safe machinery and thereafter exercise care to ascertain its condition is outside the issue; the theory of the servant's complaint for injury being the master's unkept promise to repair. National Motor Vehicle Co. v. Pake, 109 N. E. 787, 60 Ind. App. 366. Where an employé suing for a personal injury did not claim that it was negligence for the employer to fail to do one of three things specified, provided one or two of the things were supplied, an instruction that a failure to do any one of the things was actionable negligence was erroneous. Burrows v. Likes, 166 S. W. 643, 180 Mo. App. 447. It is not error, in an action for the death of a servant, to refuse instructions on contributory negligence, where the complaint was based on the theory of last clear chance; that necessarily involving an admission of contributory negligence. Doichinoff v. Chicago, M. & St. P. Ry. Co., 154 P. 924, 51 Mont. 582. Where the cause of action pleaded was based on negligence, it was error to submit it to the jury on the theory that it was for a nuisance. Sandzig v. Eckstein (Sup.) 132 N. Y. S. 727. Instruction regarding imputed negligence was properly refused where that issue had been excluded for failure to plead it. Angell v. Chicago, R. I. & P. Ry. Co., 156 P. 763, 97 Kan. 688, rehearing denied 157 P. 1196, 98 Kan. 268. Where a mining company sued for injuries to an employé pleaded contributory negligence in general terms only, an instruction on contributory negligence based on the loading of a car in a particular manner was properly refused. Jellico Coal Mining Co. v. Lee, 151 S. W. 26, 151 Ky. 53. If plaintiff does not claim a right to recover because of the violation of an ordinance in evidence, it is not error to refuse an instruction to the effect that no recovery could be predicated upon a violation of such ordinance. Sehrt v. Sampsell, 167 Ill. App. 628. In an action for injuries to plaintiff by the use of pads, purchased from defendant and advertised as a cure for rupture, but containing injurious ingredients, an instruction predicated on the relation of physician and patient, and holding defendant responsible for failure to exercise the care and skill of average physicians, was erroneous, as not justified by the pleadings. Harmon v. Piapao Laboratories (Mo. App.) 218 S. W. 701. Where, in an action against a physician for malpractice, it was not suggested that plaintiff had suffered any injury to his general health, an instruction authorizing the jury, in fixing the damages, to take into consideration the impairment of plaintiff's health in addition to the injury sustained by him was erroneous, because foreign to the issues. Albertson v. Lewis, 109 N. W. 705, 132 Iowa, 243. In a suit against a railway company for a nuisance, counting on unnecessary noises made by passing locomotives, it was error to predicate plaintiff's right to recover on unusual noises. Passons v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 137 S. W. 435. In an action against a railroad to recover damages for a death caused by intestate being struck by a train while crossing the defendant's track, it is error for the court to instruct the jury on the theory of willful or wanton recklessness on part of defendant; it not being alleged in the pleadings that defendant was willfully or wantonly negligent. Wabash R. Co. v. Larrick, 84 Ill. App. 520. Where, in an action against a railway company for injury to a traction engine by a collision with a train, the declaration stated a cause of action based on noncompliance with a statute requiring every railroad to keep the engineer on the lookout ahead, and to sound the whistle, put the brakes down, etc., on an obstruction appearing on the track, an instruction defining the duty of the company, on seeing the traction engine approaching the track under such circumstances as to indicate that the

[57] Hooker v. Johnson, 6 Fla. 730.

structing on issues made by the pleadings, but which have been

driver thereof had not seen or heard the approach of the train, and that he would probably enter on the track just as if the train were not coming, was erroneous, because not justified by the pleadings. Chesapeake & N. Ry. v. Crews, 99 S. W. 368, 118 Tenn. 52. Where the petition in an action against a railroad company for the destruction of property by fire, set by sparks from an engine, merely alleged a failure to properly equip the engine with the best and most approved spark arresters in general use, and a failure to properly operate the engine, the court properly refused to charge that it was the duty of the company to exercise ordinary care to keep the spark arresters on its engines in good repair. Lam & Rogers v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 142 S. W. 977. Where the negligence alleged in an action against a railroad company for injuries by frightening a team engaged in grading the track and causing them to run into plaintiff was in permitting the engine to unnecessarily emit steam so as to cause a loud and unusual noise, it was error to submit the issue of negligence in failing to discontinue the noise by the steam, after the engineer saw, or by exercising reasonable care could have discovered, that it was frightening the horses. Maynard v. Chicago, B. & Q. R. Co., 137 S. W. 58, 155 Mo. App. 352. In an action for breach of an express warranty in a sale of personalty, the court should limit plaintiff's right to recovery to breach of the express warranty pleaded, and it was error to charge on an implied warranty not pleaded. Burgess v. Felix, 140 P. 1180, 42 Okl. 193. In action by buyer of lambs for seller's failure to perform, wherein the seller counterclaimed for the buyer's breach, the buyer was liable on the seller's counterclaim if the seller had in truth complied with the contract, even though the buyer honestly rejected the lambs offered as falling below his construction of the requirements of the contract, and instructions relative to the buyer's right to recover the part of the price paid in case of an honest rejection were not pertinent to the issues. Stanfield v. Arnwine, 185 P. 759, 94 Or. 381. Where, in an action for the price of a furnace and installation work, the sole issues were with reference to plaintiffs' performance and defendants' rescission because of the failure of the furnace to comply with the contract, defendants having interposed no counterclaim, instructions that, if the furnace did not comply with the contract, plaintiffs were entitled to recover the difference between the contract price, etc., and compensation for defendants' damages sustained, were erroneous, as not within the issues. Helm & Van Eman v. Loveland, 113 N. W. 1082, 136 Iowa, 504. Where, in an action for the value of certain potatoes, defendant, while admitting the order, denied that the potatoes shipped were of the quality specified, and alleged that, when received, they were so decayed as to be not marketable, and that plaintiff, on being notified, authorized defendant as their agent to sell the potatoes for their account for the best price obtainable and remit the proceeds, which defense was denied by reply, it was held that the pleadings raised no issue of fraud or misrepresentation inducing the subsequent contract alleged in the answer, and that the court erred in charging that, if such subsequent contract was made by defendant's deceit or fraudulent representations, the original contract must govern in the determination of the controversy. G. G. Liebhardt Produce Co. v. Gibbs, 106 P. 6, 46 Colo. 613. While it is a rule of grammatical construction that relative, qualifying, or limiting words or clauses are to be referred to the next preceding antecedent, where there is only one antecedent there is no reason for construction, as the words or clauses are of necessity referable to the only antecedent; and hence, where the several allegations of negligence in a petition are all predicated on a preceding allegation that plaintiff was injured by a street car while walking over and along a certain street, it is error to

withdrawn or abandoned by the parties,[58] and makes it proper to

give a charge based upon the hypothesis that plaintiff, when injured, was lying on the street with his feet on one of the rails of the car track. San Antonio Traction Co. v. Kelleher, 107 S. W. 64, 48 Tex. Civ. App. 421. The only negligence pleaded, in an action for collision of an automobile with a team on a highway being an unlawful rate of speed of the machine, submission of the questions of a vigilant watch being kept by defendant, and of failure to keep one having been the cause of the accident, was error. Raybourn v. Phillips, 140 S. W. 977, 160 Mo. App. 534. Where, in an action for damages from an error in a telegram, resulting in the plaintiff real estate brokers selling property at a sum which left them no commission, plaintiffs did not plead a binding contract of sale, it was error to instruct on what constitutes such a contract. Levy Bros. v. Western Union Telegraph Co., 135 P. 423, 39 Okl. 416. Where the complaint alleged a conversion of plaintiff's tools by defendant, and the conversion was the controlling issue presented, an instruction which assumed that plaintiff's cause of action was based on the neglect of defendant in breaking and leaving open plaintiff's tool chest was erroneous because not presented by the pleadings. Berman v. Kling, 71 A. 507, 81 Conn. 403. In an action to forfeit an option to purchase water rights, or in case a forfeiture cannot be had, for damages, an instruction proceeding on the theory that it is an action for the purchase price of the water rights is erroneous. Gard v. Thompson, 123 P. 497, 21 Idaho, 485. An instruction based on the theory of a waiver is erroneous when the waiver is not pleaded. Rawlings v. St. Louis & S. F. R. Co. (Mo.) 175 S. W. 935. In action on note given for bank stock, defended on the ground that it was obtained by fraud and was without consideration, where no waiver of defense of failure of consideration was pleaded, it was not error to refuse instruction on waiver. Atchison Savings Bank v. Potter, 164 P. 149, 100 Kan. 407.

After a cause has gone to the jury, a plaintiff cannot interpose and recover upon a new cause of action by means of an instruction. Lawson v. Van Auken, 6 Colo. 52.

Discovered peril. As plaintiff can recover only on the negligence alleged, it is error, where the petition does not state a cause of action under the humanitarian doctrine, to submit that question to the jury. Wilder v. Wabash R. Co., 146 S. W. 837, 164 Mo. App. 114; Knapp v. Dunham (Mo. App.) 195 S. W. 1062; Cleveland, P. & E. R. Co. v. Nixon, 21 Ohio Cir. Ct. R. 736, 12 O. C. D. 79; Texas & P. Ry. Co. v. Knox (Tex. Civ. App.) 75 S. W. 543; Rio Grande, S. M. & P. Ry. Co. v. Martinez, 87 S. W. 853, 39 Tex. Civ. App. 460.

Question of estoppel. The question of estoppel not being raised by the pleadings, an instruction thereon is properly refused. Bankers' Trust Co. of Amarillo v. Cooper, Merrill & Lumpkin (Tex. Civ. App.) 179 S. W.

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[58] **U. S.** (C. C. A. Ohio) Toledo, St. L. & W. R. Co. v. Kountz, 168 F. 832, 94 C. C. A. 244.

Ala. Louisville & N. R. Co. v. Hubbard, 41 So. 814, 148 Ala. 45.

Ga. McWhorter v. O'Neal, 51 S. E. 288, 123 Ga. 247.

Iowa. Hansen v. Kline, 113 N. W. 504, 136 Iowa, 101.

Kan. Cobe v. Coughlin Hardware Co., 112 P. 115, 83 Kan. 522, 31 L. R. A. (N. S.) 1126.

Ky. Sandy Valley & E. Ry. Co. v. Hughes, 194 S. W. 344, 175 Ky. 320, modifying opinion 188 S. W. 894, 172 Ky. 65; Purdom v. Brussells, 66 S. W. 22, 23 Ky. Law Rep. 1796.

Md. Dudderar v. Dudderar, 82 A. 453, 116 Md. 605; Dronenburg v. Harris, 71 A. 81, 108 Md. 597.

Mo. Buster Brown Co. v. North-Mehornay Furniture Co., 126 S. W. 988, 140 Mo. App. 707.

Neb. Gray v. Chicago, St. P., M. & O. R. Co., 134 N. W. 961, 90 Neb. 795; Columbus State Bank v. Crane Co., 76 N. W. 557, 56 Neb. 317.

Tex. Leland v. Chamberlin, 120 S. W. 1040, 56 Tex. Civ. App. 256.

refuse instructions on issues eliminated by the court,[59] or on issues raised by pleas or replications to which demurrers have been

541. In the absence of pleading of equitable estoppel in an action to enjoin and recover damages for trespass upon land, requested instruction on equitable estoppel was properly refused. Fort v. Wiser, 201 S. W. 7, 179 Ky. 706. In an action of trespass to try title, where the plaintiff in no way raised the issue in his pleadings that the defendant's grantor was estopped from conveying the land to the defendant, and the only issue was whether defendant's grantor had executed a prior conveyance, it was proper not to submit an issue of estoppel of the defendant's grantor to the jury. Hannay v. Harmon (Tex. Civ. App.) 137 S. W. 406.

Instructions not improper within rule. When the allegations showed that the earning capacity of the injured person was necessarily impaired, it is sufficient to justify a submission of the issue, even though it has not been alleged in terms that the earning capacity was impaired. San Antonio Traction Co. v. Cassanova (Tex. Civ. App.) 154 S. W. 1190. Instruction authorizing recovery on proof of one of two grounds of negligence averred, and making no reference to the other, is not open to criticism of broadening the issues. Kaenter v. Missouri Pac. Ry. Co. (Mo. App.) 218 S. W. 349. In an action against a street railway for injuries to a van driver in crossing its track, petition alleging the existence of an established custom to stop cars at a certain point, and then alleging that plaintiff started across the track before a car, in the exercise of due care, "relying upon said custom," sufficiently alleged knowledge of the custom by plaintiff to justify an instruction submitting the question of such knowledge. Harrington v. Kansas City Rys. Co. (Mo. App.) 217 S. W. 879. It was not error to submit whether the street car, on which a deceased passenger was injured, started "suddenly and with great force," though the petition alleged that the car started with "a jerk"; there being no practical difference in the expressions. Johnson v. Metropolitan St. Ry. Co., 164 S. W. 128, 177 Mo. App. 298.

[58] **U. S.** (C. C. A. Va.) J. W. Bishop Co. v. Dodson, 152 F. 128, 81 C. C. A. 346.

Ala. Duncan v. St. Louis & S. F. R. Co., 44 So. 418, 152 Ala. 118; Green v. Brady, 44 So. 408, 152 Ala. 507; Birmingham R., Light & Power Co. v. Moore, 43 So. 841, 151 Ala. 327; Woodstock Iron Works v. Kline, 43 So. 362, 149 Ala. 391; Central of Georgia Ry. Co. v. McNab, 43 So. 222, 150 Ala. 332; Alabama City, G. & A. Ry. Co. v. Bates, 43 So. 98, 149 Ala. 487.

Ariz. Ewing v. United States, 89 P. 593, 11 Ariz. 1.

Ark. Dunham v. H. D. Williams Cooperage Co., 103 S. W. 386, 83 Ark. 395; R. A. Faulkner & Co. v. Cook, 103 S. W. 384, 83 Ark. 205; St. Louis & S. F. Ry. Co. v. Crowder, 103 S. W. 172, 82 Ark. 562; Bagnell Tie & Timber Co. v. Goodrich, 102 S. W. 228, 82 Ark. 547.

Colo. Denver Consol. Electric Co. v. Walters, 89 P. 815, 39 Colo. 301; Id., 89 P. 820, 39 Colo. 318.

Conn. Joyce v. Joyce, 67 A. 374, 80 Conn. 88.

Ga. Coweta County v. Central of Georgia Ry. Co., 60 S. E. 1018, 4 Ga. App. 94; McGregor v. Battle, 58 S. E. 28, 128 Ga. 577, 13 L. R. A. (N. S.) 185; Humphreys v. Smith, 58 S. E. 26, 128 Ga. 549; Green v. Wright, 57 S. E. 965, 1 Ga. App. 194; Overstreet v. Nashville Lumber Co., 56 S. E. 650, 127 Ga. 458.

Idaho. Johnson v. Fraser, 2 Idaho (Hasb.) 404, 18 P. 48.

Ill. Hoffman v. Stephens, 109 N. E. 994, 269 Ill. 376; Cal. Hirsch & Sons Iron & Rail Co. v. Coleman, 81 N. E. 21, 227 Ill. 149, affirming judgment 128 Ill. App. 245; Commercial State Bank of Forreston v. Folkerts, 200 Ill. App. 385; Coal Belt Electric Ry. Co. v. Young, 126 Ill. App. 651;

[59] Rose v. Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487; Gulf, C. & S. F. Ry. Co. v. Warner, 54 S. W. 1064, 22 Tex. Civ. App. 167.

sustained,[60] or on issues raised by a count of a complaint which has been dismissed,[61] and it is proper to refuse instructions which would raise immaterial issues.[62] It is proper to refuse an instruc-

Quincy Horse Ry. & Carrying Co. v. Rankin, 123 Ill. App. 472.

Ind. Indianapolis Traction & Terminal Co. v. Beckman, 81 N. E. 82, 40 Ind. App. 100; Goodbar v. Lidikey, 35 N. E. 691, 136 Ind. 1, 43 Am. St. Rep. 296.

Ky. Spinks v. Turley, 103 S. W. 321, 31 Ky. Law Rep. 676; Hutchison v. City of Maysville, 100 S. W. 331, 30 Ky. Law Rep. 1173.

Md. Dick v. Biddle Bros., 66 A. 21, 105 Md. 308.

Mich. Pierson v. Illinois Cent. R. Co., 112 N. W. 923, 149 Mich. 167; Smitley v. Pinch, 112 N. W. 686, 148 Mich. 670.

Minn. Wilcox v. Chicago, M. & St. P. R. Co., 24 Minn. 269.

Mo. State ex rel. Shipman v. Allen, 103 S. W. 1090, 124 Mo. App. 465; Council v. St. Louis & S. F. R. Co., 100 S. W. 57, 123 Mo. App. 432; O'Gara v. St. Louis Transit Co., 103 S. W. 54, 204 Mo. 724, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850; Masterson v. St. Louis Transit Co., 103 S. W. 48, 204 Mo. 507.

Mont. First Nat. Bank v. Carroll, 88 P. 1012, 35 Mont. 302; Howie v. California Brewery Co., 88 P. 1007, 35 Mont. 264.

Okl. Williams v. Arends, 157 P. 313, 57 Okl. 556; Grosshart v. Shaffer, 152 P. 441, 52 Okl. 204.

Or. Robert v. Parrish, 17 Or. 583, 22 P. 136.

R. I. De Coursey v. Rhode Island Co., 67 A. 431.

Tex. Nash v. Noble, 102 S. W. 736, 46 Tex. Civ. App. 369; Prewitt v. Southwestern Telegraph & Telephone Co., 101 S. W. 812, 46 Tex. Civ. App. 123; Bell v. Keays (Civ. App.) 100 S. W. 813; Thompson v. Hicks (Civ. App.) 100 S. W. 357.

Vt. Smith v. Central Vermont Ry. Co., 67 A. 535, 80 Vt. 208.

Instructions properly refused within rule. In an action for injuries to a passenger, where the question whether plaintiff's damages should be abated because they had been negligently allowed to accumulate was not in issue, the refusal of a charge that it was plaintiff's duty not to aggravate his injuries by negligence, and to use reasonable care to cure his injuries, though correct in the abstract, was not error. Birmingham Ry., Light & Power Co. v. Anderson, 50 So. 1021, 163 Ala. 72. Where, in an action for the price of jewelry, the sole issue was whether defendants could reject the jewelry, and there was no issue before the jury as to their refusal to accept a show case, an instruction that the delivery of the case to a public carrier properly consigned to defendants constituted a delivery to them, while abstractly correct, was properly refused. American Standard Jewelry Co. v. R. J. Hill & Son, 117 S. W. 781, 90 Ark. 78.

[60] Southern Ry. Co. v. Bynum, 69 So. 820, 194 Ala. 190; Fike v. Stratton, 56 So. 929, 174 Ala. 541; Alabama Great Southern R. Co. v. Hanbury, 49 So. 467, 161 Ala. 358; Western Union Telegraph Co. v. Benson, 48 So. 712, 159 Ala. 254.

The court may, however, caution the jury not to consider matter stricken on demurrer. Georgia Ry. & Electric Co. v. Gatlin, 82 S. E. 888, 142 Ga. 293.

Plea erroneously sustained against demurrer. Where the court has erroneously sustained a plea against a demurrer, it is error, there being evidence to support the plea, to refuse to instruct that if the facts alleged in the plea are found to be true the verdict must be for the defendant, as the instructions may not change the issues as developed by the pleadings. Pratt Consol. Coal Co. v. Davidson, 55 So. 886, 173 Ala. 667.

[61] Hill v. Elmore, 79 So. 148, 16 Ala. App. 474; Merrielees v. Wabash R. Co., 163 Mo. 470, 63 S. W. 718; Jackson v. Southwest Missouri R. Co., 156 S. W. 1005, 171 Mo. App. 430.

[62] State v. Ewing, 121 P. 834, 67 Wash. 395; State v. Clark, 41 S. E. 204, 51 W. Va. 457.

tion which is not proper as to certain counts of a pleading, although proper as to other counts if the scope of the instruction is not limited to the latter counts,[63] and the court is not required to instruct on a plea which presents no defense, although not met with objection or demurrer.[64]

The above rule applies to instructions defining the liability of a party who has been dismissed from the case,[65] and the fact that the counsel for both parties have, in their arguments, treated the case as embracing certain issues, does not exempt them from the operation of such rule.[66]

A general denial is sufficient to require the submission of any defensive issue raised by the evidence, which is not required by statute or rules of pleading to be specifically pleaded;[67] but where a reply sets up new matter, which constitutes a departure from the original cause of action alleged in the complaint, the rule is that an instruction submitting such new matter to the jury is erroneous,[68] unless the trial proceeds without any objection being made on account of such departure, in which case instructions presenting the issues raised by the replication are proper.[69] In some jurisdictions a party is entitled to have the jury instructed that it should not consider any other matters than those alleged in the complaint.[70] Ordinarily a judgment will not be reversed

[63] Dudley v. Peoria Ry. Co., 153 Ill. App. 619.

Charge of both negligence and intentional wrong in separate counts. Where both negligence and wanton or intentional injury are charged in separate counts, a charge that plaintiff cannot recover unless wantonness and willfulness are shown is erroneous, unless confined to the count alleging wantonness. Birmingham Railway & Electric Co. v. Pinkard, 26 So. 880, 124 Ala. 372. Where both wanton or intentional wrong and negligence are alleged in separate counts of a petition, a charge as to contributory negligence, not confined to the count alleging negligence, is properly refused. Birmingham Railway & Electric Co. v. Pinkard, 26 So. 880, 124 Ala. 372.

[64] Newman v. McComb, 71 S. E. 624, 112 Va. 408.

[65] Ford v. Drake, 127 P. 1019, 46 Mont. 314.

[66] Martin v. Nichols, 56 S. E. 995, 127 Ga. 705.

[67] Galveston, H. & S. A. Ry. Co. v. Wilson (Tex. Civ. App.) 214 S. W. 773.

[68] Brasel v. W. T. Letts Box & Cooperage Co. (Mo. App.) 220 S. W. 984; Merrill v. Suing, 92 N. W. 618, 66 Neb. 404.

[69] Loucks v. Davies, 96 P. 191, 43 Colo. 490.

[70] Baltimore & O. R. Co. v. Lockwood, 74 N. E. 1071, 72 Ohio St. 586.

Circumstances under which such instruction required. Where, in an action by a servant to recover from his master for personal injuries, a failure to guard machinery was not alleged as negligence, and there was no evidence as to this being an element of negligence, but a juror questioned a witness as to the failure to guard the machine in question, and volunteered the information that it was practicable to guard it, the refusal of a requested charge that the jury could not consider such failure was held reversible error, as the court was not able to say that the verdict was not based on such extraneous

because of the giving of instructions on matters outside of the scope of the pleadings, if the jury has not been misled thereby or the complaining party has not been prejudiced.[71]

§ 127. Instructions on matters outside the pleadings, but shown by the evidence

The above rule[72] applies to an instruction submitting questions not within the issues raised by the pleadings, although evidence upon such questions has been admitted, but improperly so, and over objection,[73] and in a considerable number of the cases it is held without qualification that the instructions should not be broader than the pleadings, whatever be the scope of the evidence.[74]

matter. Hockaday v. Schloer, 94 A. 526, 125 Md. 677.

[71] Dunlap v. May, 42 Minn. 309, 44 N. W. 119; McClary v. Stull, 44 Neb. 175, 62 N. W. 501; Canfield v. Hard, 58 Vt. 217, 2 A. 136; Lemke v. Milwaukee Electric Ry. & Light Co., 136 N. W. 286, 149 Wis. 535.

Affirmative showing of no prejudice. Though the charge of the court may present issues not raised by the pleadings, yet, if it appears affirmatively from the record that the finding of the jury was not influenced thereby, the case will not ordinarily be reversed. Texas Cent. Ry. Co. v. Clifton, 2 Willson, Civ. Cas. Ct. App. § 490.

[72] Ante, § 125.

[73] Miller v. Prussian Nat. Ins. Co., 122 N. W. 1093, 158 Mich. 402; Bank of Commerce v. Broyles, 120 P. 670, 16 N. M. 414; Parrish v. Fishel, 139 N. Y. S. 1033, 155 App. Div. 911.

[74] **Ga.** Stanford v. Murphy, 63 Ga. 410.

Ill. Hackett v. Chicago City Ry. Co., 85 N. E. 320, 235 Ill. 116, reversing judgment Chicago City Ry. Co. v. Hackett, 136 Ill. App. 594.

Compare, Consolidated Coal Co. of St. Louis v. Bokamp, 54 N. E. 567, 181 Ill. 9, affirming judgment 75 Ill. App. 605.

Kan. Atchison, T. & S. F. R. Co. v. Miller, 39 Kan. 419, 18 Pac. 486.

Ky. O'Kain v. Davis, 216 S. W. 354, 186 Ky. 184.

Mo. Stumpf v. United Rys. Co. of St. Louis (Mo. App.) 227 S. W. 852; Simms v. Dunham (App.) 203 S. W. 652; Young v. Dunlap, 190 S. W. 1041, 195 Mo. App. 119; State ex rel. Central Coal & Coke Co. v. Ellison, 195 S. W. 722, 270 Mo. 645, quashing judgment (App.) Goode v. Central Coal & Coke Co., 186 S. W. 1122; Scrivner v. Missouri Pac. Ry. Co., 169 S. W. 83, 260 Mo. 421; Hufft v. St. Louis & S. F. R. Co., 121 S. W. 120, 222 Mo. 286; Matson v. Frazer, 48 Mo. App. 302.

N. D. Williams v. Beneke, 153 N. W. 411, 30 N. D. 538.

S. D. Smith v. Mutual Cash Guaranty Fire Ins. Co., 113 N. W. 94, 21 S. D. 433.

Tex. Miller v. Layne & Bowler Co. (Civ. App.) 151 S. W. 341; Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 147 S. W. 1177; Smith v. F. W. Heitman Co., 98 S. W. 1074, 44 Tex. Civ. App. 358.

Duty to amend. If the evidence shows a different state of facts from those contained in the pleadings, and a party to the suit desires instructions in accordance with those facts, he must first amend his pleadings by leave of court. Budd v. Hoffheimer, 52 Mo. 297.

§ 128. Declaring legal effect of evidence not pertinent to issues raised by the pleadings

As we have seen, it is generally true that the instructions should not be broader than the issues made by the pleadings, or present issues not raised thereby. Such general rule, however, has its qualifications. The jury is not supposed to know, and in practice does not in fact know, the issues raised by the pleadings, except in the most general way, when viewed from a legal standpoint. To them all the evidence introduced, unless excluded by the court, is to be considered as having a bearing on the case. It is therefore proper to limit, explain, and declare the legal effect of particular evidence by the instructions, although the issues to which such evidence is pertinent are not within the scope of the pleadings.[75]

§ 129. Effect of failure to object to evidence upon issues outside scope of pleadings

While there are conflicting authorities[76] in a considerable number of jurisdictions, an exception to the above rule exists in those cases where evidence is admitted without objection upon issues not within the scope of the pleadings, in which event the court may,[77] and should[78] in these jurisdictions, charge upon such is-

[75] Price v. St. Louis, I. M. & S. Ry. Co., 170 S. W. 925, 185 Mo. App. 432.

[76] Latourette v. Meldrum, 90 P. 503, 49 Or. 397; Coos Bay, R. & E. R. & Nav. Co. v. Siglin, 26 Or. 387, 38 Pac. 192; First Nat. Bank of Ogden v. Taylor, 114 P. 529, 38 Utah, 516.

Instruction not required. Though evidence of matters not in issue is admitted without objection, the court is not bound to instruct thereon. Baldwin v. Walker, 21 Conn. 168.

[77] **U. S.** (C. C. Iowa) Voelker v. Chicago, M. & St. P. Ry. Co., 116 F. 867, reversed Chicago, M. & St. P. Ry. Co. v. Voelker, 129 F. 522, 65 C. C. A. 226, 70 L. R. A. 264.

Colo. National Mut. Fire Ins. Co. v. Sprague, 92 P. 227, 40 Colo. 344.

Iowa. Andrews v. Chicago G. W. Ry. Co., 105 N. W. 404, 129 Iowa, 162; Noble v. White, 72 N. W. 556, 103 Iowa, 352; Rogers v. Millard, 44 Iowa, 466.

Ky. Louisville & N. R. Co. v. Walden, 74 S. W. 694.

La. Gayarre v. Tunnard, 9 La. Ann. 254.

Minn. Qualy v. Johnson, 83 N. W. 393, 80 Minn. 408.

Mo. Menefee v. Diggs, 172 S. W. 427, 186 Mo. App. 659.

Mont. McCabe v. City of Butte, 125 P. 133, 46 Mont. 65.

Neb. Herpolsheimer v. Acme Harvester Co., 119 N. W. 30, 83 Neb. 53.

N. Y. Brusie v. Peck Bros. & Co., 135 N. Y. 622, 32 N. E. 76; Phillips v. Lewis, 86 Hun, 241, 33 N. Y. Supp. 258.

S. C. Davis v. Atlanta & C. A. L.

[78] Hansen v. Kline, 113 N. W. 504, 136 Iowa, 101; Webb v. Missouri, O. & G. Ry. Co., 179 P. 17; Missouri, O. & G. Ry. Co. v. Parker, 151 P. 325, 50 Okl. 491; Missouri River Transp. Co. v. Minneapolis & St. L. Ry. Co., 147 N. W. 82, 34 S. D. 1; Sjong v. Occidental Fish Co., 138 P. 313, 78 Wash. 4.

Because of the state of the evidence it may be necessary for the court to disregard the issue as made by the pleading, and instruct according to the issue made by the evidence. Hansen v. Kline, 113 N. W. 504, 136 Iowa, 101.

sues. One who, over objection, introduces testimony upon an issue not raised by the pleadings, cannot object to the giving of a charge based upon such testimony.[79]

§ 130. Specific applications of rule against broadening issues

Under the above rule, in a common-law action for negligent delay in the shipment of live stock, an instruction based upon a cause of action given by a statute relating to the feeding and watering of stock while in transit is erroneous.[80] When the complaint only declares on an express contract, it is proper to refuse

Ry. Co., 41 S. E. 468, 63 S. C. 370; Id., 41 S. E. 892, 63 S. C. 577.

S. D. Totten v. Stevenson, 135 N. W. 715, 29 S. D. 71.

Tex. McKee v. Garner (Civ. App.) 168 S. W. 1031; see Galveston, H. & S. A. Ry. Co. v. Washington, 63 S. W. 534, 94 Tex. 510, affirming judgment 63 S. W. 538, 25 Tex. Civ. App. 600.

Wash. Zolawenski v. City of Aberdeen, 129 P. 1090, 72 Wash. 95; Williams v. Wurdemann, 128 P. 639, 71 Wash. 390; Johnson v. Caughren, 104 P. 170, 55 Wash. 125, 19 Ann. Cas. 1148; Schwaninger v. E. J. McNeeley & Co., 87 P. 514, 44 Wash. 447.

Instructions proper within rule. In an action for death by wrongful act, defendant cannot object that the petition does not authorize the submission to the jury of the question whether the engine which ran over deceased was so far distant when he stepped on the track that those in charge ought to have seen him, where it asked an instruction involving the same question, and both parties introduced evidence on that issue. Hilz v. Missouri Pac. Ry. Co., 101 Mo. 36, 13 S. W. 946. An instruction as to provocation or justification of slanderous words is proper where the evidence, admitted without objection, shows that the words were uttered in a street fight in response to a taunt by plaintiff, and the fact that the answer to the complaint consisted of denials only of the slanderous words alleged did not render the instruction outside the issue. Childs v. Childs, 94 P. 660, 49 Wash. 27.

Effect of examination of witnesses and oral argument. As understood by the jury, contentions can be presented outside of the pleadings, by the course of the examination of the witnesses and by oral argument, and if an instruction reciting such a contention is not harmful to the party complaining thereof, it will not be ground for new trial. Georgia S. & F. Ry. Co. v. Perry, 69 S. E. 493, 8 Ga. App. 427.

Testimony of party inconsistent with his pleadings. Instructions which adopt the theory of a party in his testimony on the trial are proper, though such testimony is inconsistent with his pleadings. Boerner Fry Co. v. Mucci, 138 N. W. 866, 158 Iowa, 315.

Amendment of pleadings. Where an instruction not authorized by the original petition is authorized by the evidence admitted without objection and by the petition as amended, the giving of such instruction is not error. St. Louis & S. F. R. Co. v. Davis, 132 P. 337, 37 Okl. 340.

Irrelevant testimony. It is held, however, that the rule that incompetent testimony, admitted without objection, becomes competent, does not apply to irrelevant evidence admitted without objection, and the court, notwithstanding the admission of irrelevant testimony, must confine the issues submitted to the jury to those made by the pleadings. Heiden v. Atlantic Coast Line R. Co., 65 S. E. 987, 84 S. C. 117.

In Texas, where the later decisions support the text, there are early decisions the other way. Farenthold v. Tell, 113 S. W. 635, 52 Tex. Civ. App. 110.

[79] Bowen v. Carolina, C. G. & C. Ry. Co., 34 S. C. 217, 13 S. E. 421.

[80] McFall v. Chicago, B. & Q. R. Co., 168 S. W. 341, 181 Mo. App. 142.

an instruction that there can be no recovery in this case on an implied contract.[81] So where, in an action for goods sold, the plea of the defendant is based solely on the breach by the plaintiff of certain alleged express warranties, it is error to instruct on the subject of implied warranties.[82] So when, in an action on a note given for the price of an article, the issue is whether the plaintiff is a bona fide holder, it will be error to authorize a recovery for the fair market value of the article.[83] So the court should not submit to the jury the question whether a defendant is negligent in a particular in which no negligence is alleged,[84] and where, in

[81] Cable Co. v. Shelby, 81 So. 818, 203 Ala. 28.

[82] Whitlock Printing Press Mfg. Co. v. Williams, 99 S. E. 312, 23 Ga. App. 761.

[83] Pratt v. Rounds, 169 S. W. 848, 160 Ky. 358.

[84] **Ill.** Guthorle v. Chicago Rys. Co., 211 Ill. App. 390; Wabash R. Co. v. Warren, 113 Ill. App. 172; Northern Milling Co. v. Mackey, 99 Ill. App. 57, affirmed Mackey v. Northern Milling Co., 71 N. E. 448, 210 Ill. 115; Chicago & A. R. Co. v. Gore, 96 Ill. App. 553; Illinois Cent. R. Co. v. Chicago Title & Trust Co., 79 Ill. App. 623; Lebanon Coal & Machine Ass'n v. Zerwick, 77 Ill. App. 486; Chicago, B. & Q. R. Co. v. Libey, 68 Ill. App. 144.

Ky. Ballard & Ballard Co. v. Durr, 177 S. W. 445, 165 Ky. 632; Proctor Coal Co. v. Beaver's Adm'r, 152 S. W. 965, 151 Ky. 839.

Mo. Walling v. Missouri Stair Co. (App.) 227 S. W. 879; Gibson v. City of St. Joseph (App.) 216 S. W. 50; Baldwin v. Kansas City Rys. Co. (App.) 214 S. W. 274; Oliver v. St. Louis-San Francisco Ry. Co. (App.) 211 S. W. 699; State ex rel. National Newspapers' Ass'n v. Ellison (Sup.) 176 S. W. 11; Gabriel v. Metropolitan St. Ry. Co., 148 S. W. 168, 164 Mo. App. 56; Craton v. Huntzinger, 147 S. W. 512, 163 Mo. App. 718; Green v. United Rys. Co. of St. Louis, 145 S. W. 861, 165 Mo. App. 14; Gibson v. Freygang, 87 S. W. 3, 112 Mo. App. 594; Schroeder v. St. Louis Transit Co., 85 S. W. 968, 111 Mo. App. 67.

N. Y. Stenger v. Buffalo Union Furnace Co., 95 N. Y. S. 793, 109 App. Div. 183.

Tex. Lancaster v. Tudor (Civ. App.) 222 S. W. 990; Galveston, H. & S. A. Ry. Co. v. Wilson (Civ. App.) 214 S. W. 773; Houston & T. C. R. Co. v. Crowder. (Civ. App.) 152 S. W. 183; Walker v. Metropolitan St. Ry. Co. (Civ. App.) 151 S. W. 1142; Kansas City M. & O. Ry. Co. of Texas v. Guinn (Civ. App.) 146 S. W. 959.

Illustrations of instructions improper within rule. Where plaintiff's statement of claim alleged that the negligence causing the accident was that of the conductor in starting the car, it was error to give an instruction authorizing a verdict for plaintiff if the motorman started the car suddenly. Lerch v. Hershey Transit Co., 92 A. 693, 246 Pa. 473. In an action for injuries to a passenger, where the only issue was as to negligence of a porter in closing the vestibule door, causing plaintiff's fall, an instruction, submitting an issue as to liability for misinformation by the conductor, for which plaintiff made no claim, was error. Smith v. Chicago, R. I. & P. Ry. Co., 159 N. W. 963, 134 Minn. 404. Where, in an action for injuries to a servant, the petition alleged negligence in ordering plaintiff to adjust a defective bolt on an angle bar on defendant's railroad track, and negligence on the part of the section boss in placing his weight on a bar being held by plaintiff, an instruction as to the bolt hole being too large for the bolt, was erroneous, as a departure from the petition. Browning v. Chicago, R. I. & P. Ry. Co., 94 S. W. 315, 118 Mo. App. 449. In an action for injuries to a pedestrian by being struck by an automobile, the acts of negligence being

an action for personal injuries, the only negligence alleged is the failure to do certain specified things, an instruction which refers merely to want of ordinary care and prudence is too general.[85] Under the above rule, where an action is based upon the theory of a wanton and willful act by the defendant, the court should not give instructions authorizng a recovery on proof merely of negligence,[86] nor, in such case, should it charge on contributory negligence.[87] So an instruction authorizing a recovery for fraud should be limited to the specific acts of fraud alleged.[88]

It is error to instruct, and proper to refuse to instruct, concern-

limited to improper speed and failure to warn, the court erred in authorizing a recovery for failure to exercise reasonable care to avoid injury to plaintiff, if it appeared to be imminent. Capell v. New York Transp. Co., 135 N. Y. S. 691, 150 App. Div. 723. Where a complaint for injuries to a pedestrian on a city street made no charge that defendant's wagon was being driven at improper speed, a requested charge, predicated in part on a finding of excessive speed, was properly refused. Delovage v. Old Oregon Creamery Co., 147 P. 392, 76 Or. 430, motion to retax costs denied 149 P. 317, 76 Or. 430. Where complaint alleged negligence solely in permitting hole in flooring, which caused plaintiff to trip and injure his thumb on a nail, an instruction that plaintiff should recover if either hole or nail caused accident is erroneous. Stutzman v. Sargent, 165 N. Y. S. 643. The answer in an action for collision pleading certain specific acts as contributory negligence, not having alleged that plaintiff could have stopped his team in time to avoid the collision after seeing the engine, a charge precluding recovery if he by care could have stopped it was properly refused. St. Louis Southwestern Ry. Co. of Texas v. Tarver (Tex. Civ. App.) 150 S. W. 958. Where a petition for an accident at crossing does not allege that certain obstructions to the view were negligently placed on the right of way, but were only set forth as a basis for avoiding imputation of contributory negligence, an instruction basing the liability of the company on its negligence in so obstructing the view is erroneous. Chicago, R. I. & P. Ry. Co. v. Assman, 83 P. 1091, 72 Kan. 378. Where plaintiff alleges, as ground of recovery for injuries at a crossing, specified acts of negligence of the railroad company in failing to give proper signals and the running at a reckless rate of speed, the court is not warranted in submitting, as an additional ground of recovery, negligence of the defendant in permitting obstructions to the view to remain on its right of way. Missouri Pac. Ry. Co. v. Griffith, 76 P. 436, 69 Kan. 130. In an action for injuries by a street car, an instruction is defective in referring to the failure to keep the car under control, when no such averment was made in the petition. Heinzle v. Metropolitan St. Ry. Co., 81 S. W. 848, 182 Mo. 528.

Rule where allegation of negligence general. If the allegation of negligence is general, it is permissible by instructions to authorize a recovery on the finding of any specific acts of negligence proven by the evidence and coming within the general statement. Bergfeld v. Kansas City Rys. Co. (Mo.) 227 S. W. 106.

[85] United Rys. & Electric Co. of Baltimore v. Crain, 91 A. 405, 123 Md. 332.

[86] Tognazzini v. Freeman, 123 P. 540, 18 Cal. App. 468; Southern Ry. Co. v. Wiley, 71 S. E. 11, 9 Ga. App. 249; Consolidated Coal Co. of St. Louis v. Stein, 122 Ill. App. 310; Union City v. Murphy, 96 N. E. 584, 176 Ind. 597; Chattaroi R. Co. v. Leftwich's Adm'r, 7 Ky. Law Rep. (abstract) 165.

[87] Southern Ry. Co. v. Fricks, 71 So. 701, 196 Ala. 61.

[88] Wells v. Houston, 57 S. W. 584, 23 Tex. Civ. App. 629.

ing defenses not pleaded.[89] Thus instructions as to the defense of contributory negligence should not be given, and are properly refused, where there is no plea of that defense,[90] and a charge on

[89] **Cal.** Peters v. McKay & Co., 68 P. 478, 136 Cal. 73.

Colo. Denver Auto Goods Co. v. Peerless Radiator Co., 163 P. 855, 62 Colo. 549.

Conn. Johnson County Sav. Bank v. Walker, 72 A. 579, 82 Conn. 24.

Ga. American Ins. Co. v. Bailey & Musgrove, 65 S. E. 160, 6 Ga. App. 424.

Ill. Cope v. Brentz, 190 Ill. App. 504.

Iowa. Vernon v. Iowa State Traveling Men's Ass'n, 138 N. W. 696, 158 Iowa, 597; Duffey v. Consolidated Block Coal Co., 124 N. W. 609, 147 Iowa, 225, 30 L. R. A. (N. S.) 1067.

Ky. Benge's Adm'r v. Creech, 192 S. W. 817, 175 Ky. 6; Chesapeake & O. Ry. Co. v. Vaughn, 115 S. W. 217.

Mass. Letchworth v. Boston & M. R. R., 108 N. E. 500, 220 Mass. 560.

Mo. Bauer v. Weber Implement Co., 129 S. W. 59, 148 Mo. App. 652; United Zinc Cos. v. General Accidents Assur. Corporation, Limited, of Perth, Scotland, 128 S. W. 836, 144 Mo. App. 380; Miller v. Missouri Fire Brick Co., 119 S. W. 976, 139 Mo. App. 25.

Ohio. Louisville & C. Packet Co. v. Long, 34 Ohio Cir. Ct. R. 72, judgment affirmed 106 N. E. 1066, 88 Ohio St. 569.

Or. Wolf v. Hougham, 125 P. 301, 62 Or. 264.

S. D. Williamson v. Aberdeen Automobile & Supply Co., 155 N. W. 2, 36 S. D. 387.

Tex. Texas & Pacific Coal Co. v. Ervin (Civ. App.) 212 S. W. 234; Sherman Ice Co. v. Klein (Civ. App.) 195 S. W. 918; Villareal v. Passmore (Civ. App.) 145 S. W. 1086; Galveston, H. & S. A. Ry. Co. v. Brown, 77 S. W. 832, 33 Tex. Civ. App. 589.

Instructions properly refused within rule. In an action against a railway for breach of contract to carry a dead body, an instruction that, if the body would not in any event have been shipped without provision for an attendant to accompany it, and plaintiff knew thereof and did not make any arrangements for an attendant, she could not recover was properly refused, where there was no pleading that failure to ship was due to such failure of plaintiff. Missouri, K. & T. Ry. Co. of Texas v. Linton, 141 S. W. 129. In an action for injuries to plaintiff in alighting from a train, where plaintiff's right to recover in the absence of a contract of carriage was not raised in the pleadings, a charge that if defendant was not bound to stop its train where plaintiff attempted to alight, to allow passengers to alight, in the absence of a contract to stop for that purpose, and if plaintiff was riding on the train from the point to which his ticket read to the place where he alighted without payment of fare, he took the risk of alighting safely, though defendant's agent permitted him to ride without payment of fare, was properly refused as tendering an issue not within the pleadings. Cornell v. Chicago, R. I. & P. Ry. Co., 128 S. W. 1021, 143 Mo. App. 598. In an action for breach of warranty that hogs were free from cholera, where the seller did not in his answer allege that there had been any want of care on the part of the buyers in treating the hogs after disease was discovered, such issue cannot be submitted to the jury. Stanley v. Day, 215 S. W. 175, 185 Ky. 362.

Defense inconsistent with theory of party. An instruction, based on a defense not pleaded, is properly overruled, where no amendment of the pleading to conform to proof was sought, and such defense was inconsistent with defendant's position throughout trial. Tuthill v. Sherman, 165 N. W. 4, 39 S. D. 464. A defendant cannot complain of a failure to charge on a theory inconsistent with his defense. Jenness v. Simpson, 78 A. 886, 84 Vt. 127.

[90] **Ala.** Adams v. Crim, 58 So. 442, 177 Ala. 279; Birmingham Ry., Light & Power Co. v. Demmins, 57 So. 404, 3 Ala. App. 359; Birmingham

contributory negligence should be confined to the specific acts of contributory negligence pleaded, and should not submit to the jury any other acts of negligence.[91] An instruction on the measure of damages should limit them to those alleged in the declaration.[92]

§ 131. Rule that instructions must not be narrower than the pleadings

An instruction which narrows the issues as presented by the pleadings, so as to not permit a party to take full advantage of them, is ordinarily erroneous,[93] and is properly refused;[94] and

Ry., Light & Power Co. v. Fisher, 55 So. 995, 173 Ala. 623; Louisville & N. R. Co. v. Mulder, 42 So. 742, 149 Ala. 676.

Ark. Western Union Telegraph Co. v. Wilson, 133 S. W. 845, 97 Ark. 198.

Ga. Southern Ry. Co. v. Weatherby, 93 S. E. 31, 20 Ga. App. 399.

Ky. Smith v. Paducah Traction Co., 200 S. W. 460, 179 Ky. 322; Louisville & N. R. Co. v. Mattingly, 57 S. W. 620, 22 Ky. Law Rep. 489.

Mich. Pruner v. Detroit United Ry., 154 N. W. 4, 187 Mich. 602.

Mo. Dignum v. Weaver (App.) 204 S. W. 566; Loomis v. Metropolitan St. Ry. Co., 175 S. W. 143, 188 Mo. App. 203; Zalotuchin v. Metropolitan St. Ry. Co., 106 S. W. 548, 127 Mo. App. 577.

N. C. Kivett v. Western Union Telegraph Co., 72 S. E. 388, 156 N. C. 296.

Ohio. Cincinnati Traction Co. v. Jamison, 32 Ohio Cir. Ct. R. 336.

Or. Adams v. Portland Ry., Light & Power Co., 171 P. 219, 87 Or. 602, L. R. A. 1918D, 526.

S. C. Moore v. Greenville Traction Co., 77 S. E. 928, 94 S. C. 249; Bolton v. Western Union Telegraph Co., 57 S. E. 543, 76 S. C. 529.

Tex. Ft. Worth & D. C. Ry. Co. v. Keeran (Civ. App.) 149 S. W. 355; Kansas City, M. & O. Ry. Co. of Texas v. Barnhart (Civ. App.) 145 S. W. 1049; Cox v. Steed, 131 S. W. 246, 62 Tex. Civ. App. 193.

Rule where plaintiff's own evidence shows his negligence. An instruction on contributory negligence may be given, though such negligence is not pleaded, where plaintiff's own evidence shows that he was guilty of negligence which contributed to his injury. Pim v. St. Louis Transit Co., 84 S. W. 155, 108 Mo. App. 713. It is held, however, that it is not incumbent on the court in such a case to instruct on contributory negligence. Bruenn v. North Yakima School Dist. No. 7, Yakima County, 172 P. 569, 101 Wash. 374.

Effect of general denial of allegations of freedom from fault. Where there is a general denial of allegations that plaintiff was free from fault or was in the exercise of due care, it is not essential that such defense be specifically pleaded to require proper instructions in regard thereto. Georgia Ry. & Power Co. v. Freeney, 96 S. E. 575, 22 Ga. App. 457.

[91] Birmingham Railway & Electric Co. v. City Stable Co., 24 So. 558, 119 Ala. 615, 72 Am. St. Rep. 955; Davis v. Paducah Ry. & Light Co., 68 S. W. 140, 24 Ky. Law Rep. 135, 113 Ky. 267; North Texas Gas Co. v. Meador (Tex. Civ. App.) 182 S. W. 708; Missouri, K. & T. Ry. Co. of Texas v. Foster (Tex. Civ. App.) 87 S. W. 879; Perez v. San Antonio & A. P. Ry. Co., 67 S. W. 137, 28 Tex. Civ. App. 255; International & G. N. R. Co. v. Locke (Tex. Civ. App.) 67 S. W. 1082.

[92] Metcalf v. Chicago Sandoval Coal Co., 211 Ill. App. 31; Haskell & Barker Car Co. v. Trzop (Ind. App.) 123 N. E. 182; Traw v. Heydt (Mo. App.) 216 S. W. 1009; Walker v. Kellar (Tex. Civ. App.) 218 S. W. 792.

[93] Krieger v. Aurora, E. & C. R. Co., 90 N. E. 266, 242 Ill. 544; Markiewitz v. Olds Motor Works, 115 N. W. 999, 152 Mich. 113.

[94] Kenyon v. Chicago City Ry. Co., 85 N. E. 660, 235 Ill. 406, affirming

when the court states to the jury all the issues raised by the pleadings, it must explicitly withdraw an issue, or direct that it shall not be considered, in order to justify its refusal to give a charge submitting that issue.[95]

Courts, however, have the undoubted right to narrow the issues presented to the jury to such as are contested, and it is eminently proper so to do.[96] Accordingly, where the parties have given to the pleadings a practical interpretation restrictive of their formal scope, an instruction conforming to such interpretation may be good,[97] and it may be error to refuse an instruction based upon such interpretation.[98] Where, in a negligence case, the proof is of separate specific acts of negligence, the instruction should be restricted to such specific acts, and should not submit general negligence in substantially the language of the complaint.[99]

§ 132. Instructions considered with reference to complaint containing more than one count

Ordinarily separate instructions for each count in a complaint are desirable.[1] But it is not incumbent on the court, in its charge to the jury, to deal separately with the several counts in the petition, as though distinct and independent cases were on trial, nor to instruct the jury to inform the court on which count they find in the event they return a verdict in favor of the plaintiff.[2] The failure of an instruction to direct on which count of the petition there may be a recovery, where such counts state the same cause of action, though in different forms,[3] and where there is evidence to support each of such counts, is not error.[4] But, where plain-

judgment Chicago City Ry. Co. v. Kenyon, 137 Ill. App. 126; Cleveland, C., C. & St. L. Ry. Co. v. Christie, 100 N. E. 299, 178 Ind. 691.

[95] Latman v. Douglas & Co., 127 N. W. 661, 149 Iowa, 699.

[96] Wood v. Wells, 61 N. W. 503, 103 Mich. 320.

[97] Legget v. Harding, 10 Ind. 414; Struebing v. Stevenson, 105 N. W. 341, 129 Iowa, 25; Reese v. Loose-Wiles Biscuit Co. (Mo. App.) 224 S. W. 68.

Ignoring defense not covered by the evidence. An instruction which ignores a particular matter which would have been a defense had evidence with respect thereto been introduced is not erroneous, where no such evidence was in fact introduced. Chicago, B. & Q. R. Co. v. Bautsch, 129 Ill. App. 23.

Pleadings loosely drawn or indefinite. - It is proper to instruct in accordance with the interpretation, put by the parties upon the pleadings, where the same are loosely drawn or indefinite. Hoyt v. Hoyt, 68 Iowa, 703, 28 N. W. 27.

[98] McBride v. Huckins, 81 A. 528, 76 N. H. 206.

[99] James v. Mott (Mo. App.) 215 S. W. 913.

[1] Arnold v. Lutz, 120 N. W. 121, 141 Iowa, 596.

[2] Gainesville & Dahlonega Electric R. Co. v. Austin, 56 S. E. 254, 127 Ga. 120.

[3] Maguire v. St. Louis Transit Co., 78 S. W. 838, 103 Mo. App. 459.

[4] Morris v. Bridgeport Hydraulic Co., 47 Conn. 279.

tiff states the same cause of action in different counts, the court should charge that, if the jury finds for him on one of the counts, it should find no damages, or at the most mere nominal damages, on the other counts.[5]

Where each of several counts in a complaint states a cause of action, an instruction which permits a recovery under any one of the counts is not improper,[6] and, on the other hand, it is error to instruct that the plaintiff must prove all the material allegations of each and every count in his complaint.[7]

2. In Criminal Cases

§ 133. Rule that instructions should conform to allegations of indictment or to issues raised by pleadings

In a criminal case the court should only submit to the jury the law applicable to a state of facts that is pertinent to the allegations of the indictment or information,[8] and instructions which authorize a conviction or an acquittal of an offense other than that charged in the indictment are erroneous, and are properly

[5] Blackmer & Post Pipe Co. v. Mobile & O. R. Co., 151 S. W. 164, 168 Mo. App. 22.

Joinder of count in contract with count in tort. Where plaintiff joins a count in contract with a count in tort, for the same cause of action, the court should instruct that he can recover only in one. Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442.

[6] Pittsburg, C., C. & St. L. Ry. Co. v. Robson, 68 N. E. 468, 204 Ill. 254; James S. Kirk & Co. v. Jajko, 79 N. E. 577, 224 Ill. 338.

Evidence not justifying recovery under some counts. An instruction that the plaintiff should recover, "if he has made out his case as set forth in his declaration," is objectionable, where there are several counts of the declaration, under two of which the evidence did not justify recovery. North Chicago St. R. Co. v. Polkey, 106 Ill. App. 98.

[7] Harvey v. Chicago & A. Ry. Co., 116 Ill. App. 507, judgment affirmed 77 N. E. 569, 221 Ill. 242; Gruenendahl v. Consolidated Coal Co., 108 Ill. App. 644; Chicago & A. R. Co. v. Eselin, 86 Ill. App. 94; Seltzer v. Saxton, 71 Ill. App. 229.

[8] **Ala.** Crittenden v. State, 32 So. 273, 134 Ala. 145.

Cal. People v. Barbera, 157 P. 532, 29 Cal. App. 604; People v. Cornell, 155 P. 1026, 29 Cal. App. 430; People v. Buckley, 77 P. 169, 143 Cal. 375.

Fla. Milligan v. State, 78 So. 535, 75 Fla. 815.

Okl. Anderson v. State, 164 P. 128, 13 Okl. Cr. 264.

Or. State v. Hamilton, 157 P. 796, 80 Or. 562.

Tex. Miller v. State, 195 S. W. 192, 81 Tex. Cr. App. 237; Price v. State, 194 S. W. 827, 81 Tex. Cr. App. 208; Collins v. State, 171 S. W. 729, 75 Tex. Cr. R. 534; Johnson v. State, 153 S. W. 875, 69 Tex. Cr. R. 107; Perkins v. State, 138 S. W. 133, 62 Tex. Cr. R. 508; Powell v. State, 131 S. W. 590, 60 Tex. Cr. R. 201.

Instructions improper within rule. In an arson trial, an instruction to acquit if the jury had reasonable doubt as to the identity of a corpse found in the fire as being that of a particular person named in the information was properly refused, where the information did not refer to such person. Goldberger v. People, 101 P. 407, 45 Colo. 327. An instruction in a prosecution for uttering a

refused,[9] although the evidence is such as would warrant the jury in finding the defendant guilty of another offense than that alleged.[10] Thus, under an information charging the defendant with only an assault, the case should not be submitted to the jury as assault and battery,[11] and where an information charges the defendant with keeping a disorderly house, the instructions must conform to the allegations of the information as to whether he is owner or merely a lessee of the house.[12] So where the indictment charges the commission of an offense in one of the several modes in which it could be committed, the inculpatory evidence and the instructions must be restricted to the particular mode alleged,[13] and where an information charges defendant with the commission of certain acts conjunctively, an instruction which authorizes a verdict of guilty if he did either one of them is erroneous.[14] When the defendant is indicted alone as the sole per-

fraudulent prospectus that defendant had the right to state that the land "contained oil and formation indicating oil" is properly modified by striking out such phrase where the pleadings based the fraud on a statement that "this land is made up of more certain indication of oil than any other oil field in California." People v. Merritt, 122 P. 839, 18 Cal. App. 58, rehearing denied 122 P. 844, 18 Cal. App. 58.

[9] **Ala.** Willis v. State, 33 So. 226, 134 Ala. 429; Jacobi v. State, 32 So. 158, 133 Ala. 1.

Ark. Kelly v. State, 145 S. W. 556, 102 Ark. 651.

Fla. Telfair v. State, 50 So. 573, 58 Fla. 110.

Miss. Waller v. State, 103 Miss. 635, 60 So. 725.

Mo. State v. Lehman, 75 S. W. 139, 175 Mo. 619; State v. Faulkner, 75 S. W. 116, 175 Mo. 546; State v. Robb, 90 Mo. 30, 2 S. W. 1.

Neb. Galloway v. State, 129 N. W. 987, 88 Neb. 447.

N. Y. People v. Wright, 117 N. Y. S. 441, 133 App. Div. 133.

Tex. Johnson v. State, 186 S. W. 841, 79 Tex. Cr. R. 544; Bodine v. State, 174 S. W. 609, 76 Tex. Cr. R. 314; Fox v. State, 135 S. W. 557, 61 Tex. Cr. R. 341; Emerson v. State, 114 S. W. 834, 54 Tex. Cr. R. 628; Maulding v. State, 108 S. W. 1182, 53 Tex. Cr. R. 220; Miller v. State (App.) 18 S. W. 197; Powell v. State, 12 Tex. App. 238.

Va. Lane v. Commonwealth, 95 S. E. 466, 122 Va. 916.

Wash. State v. Phillips, 67 P. 608, 27 Wash. 364.

[10] People v. Piercy, 116 P. 322, 16 Cal. App. 13.

[11] Johnson v. State, 200 S. W. 982, 132 Ark. 128; Shuffield v. State, 138 S. W. 402, 62 Tex. Cr. R. 556.

[12] Goosby v. State, 189 S. W. 143, 80 Tex. Cr. R. 136; Hall v. State, 161 S. W. 457, 72 Tex. Cr. R. 161.

[13] Gipe v. State, 75 N. E. 881, 165 Ind. 433, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238; Briscoe v. State, 196 S. W. 183, 81 Tex. Cr. R. 419; Maloney v. State, 125 S. W. 36, 57 Tex. Cr. R. 435; Randle v. State, 12 Tex. App. 250.

Instructions not improper within rule. An instruction that if accused, with a leather belt, being a deadly weapon, or a weapon calculated to produce death by the manner in which it was used, struck and killed deceased, the jury should find him guilty, was not rendered erroneous because there was no allegation in the indictment that the belt was a deadly weapon, or became such from the manner of its use. Lee v. State, 72 S. W. 195, 44 Tex. Cr. R. 460.

[14] State v. Brotzer, 150 S. W. 1078, 245 Mo. 499. Contra, Cabiness v. State, 146 S. W. 934, 66 Tex. Cr. R. 409.

petrator of a crime, an instruction permitting his conviction if he was the accomplice or aider or abettor of another is erroneous.[15]

When an information is insufficient to charge the offense intended, although it sufficiently charges a lesser included offense, an instruction which permits a conviction of the higher offense is reversible error, if the record leaves it uncertain of which offense the defendant has been found guilty.[16] An instruction that the defendant must be acquitted if the jury have a reasonable doubt arising from a consideration of all the evidence of the guilt of defendant of any offense is erroneous and misleading, as authorizing an acquittal on the existence of a reasonable doubt of guilt of a crime not charged in the indictment.[17]

The court cannot, however, be required to charge specifically that defendant cannot be convicted of a crime other than the one for which he is indicted, although there is evidence that he is guilty of another crime.[18]

§ 134. Limitations of rule

A violation of the rule that the instructions must not be broader that the indictment or information will not cause a reversal, where it appears from the record that the jury were not misled to the prejudice of the defendant,[19] as where the added words only impose a greater burden upon the state than it is required to sustain.[20] Where there is evidence to support an allegation of the indictment, that the victim of the crime was known and called by a certain name, and there is also evidence that he was sometimes called by another name than that alleged in the indictment, it is not improper to give an instruction predicated upon a finding of such other name.[21]

[15] Hollin v. Commonwealth, 165 S. W. 407, 158 Ky. 427, L. R. A. 1915E, 608; Terhune v. Commonwealth, 138 S. W. 274, 144 Ky. 370; Mulligan v. Commonwealth, 1 S. W. 417, 84 Ky. 229; Bean v. State, 17 Tex. App. 60. See State v. Morgan, 35 W. Va. 260, 13 S. E. 385.

Effect of statute abolishing distinction between principals and accessories. An instruction, on a trial for murder, that defendant, if present, aiding and abetting the killing of deceased, is as guilty as if he had done the killing himself, is proper, though the indictment charges defendant as principal, and not as accessory before the fact, since the statute abolishes all distinction between principals in the second degree, and accessories before the fact. State v. Orrick, 106 Mo. 111, 17 S. W. 176.

[16] Lomax v. State, 43 S. W. 92, 38 Tex. Cr. R. 318.

[17] Stewart v. State, 31 So. 944, 133 Ala. 105.

[18] State v. McLaughlin, 50 S. W. 315, 149 Mo. 19.

[19] State v. Bunyard, 161 S. W. 756, 253 Mo. 347.

[20] Thompkins v. Commonwealth, 90 S. W. 221, 28 Ky. Law Rep. 642; State v. Bunyard, 161 S. W. 756, 253 Mo. 347.

[21] Thomas v. State, 38 So. 516, 49 Fla. 123.

§ 135. Instructions on conspiracy, although not alleged in indictment

Two or more persons engaged in the commission of crime may be prosecuted jointly or severally. Where only one is prosecuted, it may be shown that others were present participating in the criminal act, although not included in the indictment or information, so that an instruction authorizing the jury to convict if they find that defendant committed the crime charged while acting alone or in company with others is not broader than an information charging defendant alone with the commission of the crime.[22] So on trial of two persons jointly indicted for crime, it is not inappropriate to charge on the law of conspiracy, where the evidence authorizes such an instruction, merely because the indictment does not in terms allege a conspiracy to commit the crime.[23]

§ 136. Instructions where indictment contains more than one count, or where several distinct criminal acts are proved

In a criminal case, where different counts in an indictment charge only a single offense and in one degree, merely varying the statement of the crime to conform to the evidence which may be given, the court need not charge separately as to each count, but may in one instruction refer to them all, and tell the jury to render a verdict of guilty if they find the defendant to have committed the crime in the manner charged in either count.[24] Where the evidence shows that the defendant is guilty, if at all, under one particular count of the indictment, it is proper for the court to confine its instruction to such count;[25] and where the state elects to go the jury on one of two counts only, instructions submitting the remaining count are erroneous, and properly refused.[26] Instructions based on a count of an indictment on which a nolle prosequi has been entered are properly refused.[27] So an instruction authorizing the jury to convict defendant on proof going to establish his guilt under an insufficient charge in the information is prejudicial error,[28] and it is, of course, proper for the court to ignore such a defective count in submitting the case to the

[22] State v. Scullin, 84 S. W. 862, 185 Mo. 709.

[23] Dixon v. State, 42 S. E. 357, 116 Ga. 186; McLeroy v. Same, 54 S. E. 125, 125 Ga. 240; Davis v. Same, 54 S. E. 126, 125 Ga. 299; Bradley v. State, 57 S. E. 237, 128 Ga. 20.

[24] State v. Hollenscheit, 61 Mo. 302.

[25] State v. Baker, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414.

[26] Johnson v. State, 75 So. 278, 16 Ala. App. 72; State v. Young, 183 S. W. 305, 266 Mo. 723; Williams v. State, 143 S. W. 634, 65 Tex. Cr. R. 82; Austin v. State, 124 S. W. 636, 57 Tex. Cr. R. 623; Ricks v. State, 87 S. W. 345, 48 Tex. Cr. R. 229.

[27] Oakley v. State, 33 So. 693, 135 Ala. 29.

[28] Emperly v. State, 41 N. E. 840, 13 Ind. App. 393.

jury,[29] and where counts in an indictment charging the accused as an accomplice and accessory are withdrawn, it is proper to refuse an instruction defining such terms.[30]

Where the indictment charges the defendant with but one criminal act, and the state gives evidence of several distinct criminal transactions, instructions which do not limit the jury to the consideration of but one of the offenses proven are erroneous.[31]

C. Applicability of Instructions to the Evidence

§ 137. Rule that instructions must be based on the evidence.

It is the general rule that instructions must be predicated upon the evidence in the case.[32] The propriety of an instruction is

[29] Shelton v. State, 39 So. 377, 143 Ala. 98; Butler v. State (Tex. Cr. App.) 43 S. W. 992.

[30] Collins v. State, 178 S. W. 345, 77 Tex. Cr. R. 156.

[31] People v. Hatch, 109 P. 1097, 13 Cal. App. 521.

[32] **U. S.** (Sup.) Wilmington Star Min. Co. v. Fulton, 27 S. Ct. 412, 205 U. S. 60, 51 L. Ed. 708.

Ala. Duncan v. St. Louis & S. F. R. Co., 44 So. 418, 152 Ala. 118.

Ark. Southern Hotel Co. v. Zimmerman, 105 S. W. 873, 84 Ark. 373.

Cal. Hamlin v. Pacific Electric Ry. Co., 89 P. 1109, 150 Cal. 776.

Colo. Conquerer Gold Min. & Mill Co. v. Ashton, 90 P. 1124, 39 Colo. 133.

D. C. Chapman v. Capital Traction Co., 37 App. D. C. 479.

Fla. Florida East Coast Ry. Co. v. Carter, 65 So. 254, 67 Fla. 335, Ann. Cas. 1916E, 1299; Mulliken v. Harrison, 44 So. 426, 53 Fla. 255; Griffing Bros. Co. v. Winfield, 43 So. 687, 53 Fla. 589.

Ga. Virginia Bridge & Iron Co. v. Crafts, 58 S. E. 322, 2 Ga. App. 126.

Ill. Norton v. Clark, 97 N. E. 1079, 253 Ill. 557; Kulvie v. Bunsen Coal Co., 97 N. E. 688, 253 Ill. 386, affirming judgment 161 Ill. App. 617; Owens v. City of Chicago, 162 Ill. App. 196; White v. St. Louis Transfer Co., 161 Ill. App. 133; King v. Gray, 160 Ill. App. 259; Hettinger v. Drew, 160 Ill. App. 204; Field v. Winheim, 123 Ill. App. 227.

Ind. City of Bloomington v. Woodworth, 81 N. E. 611, 40 Ind. App. 373.

Iowa. D. A. Enslow & Son v. Ennis, 135 N. W. 1105, 155 Iowa, 266.

Kan. Grubel v. Busche, 91 P. 73, 75 Kan. 820.

Ky. Klein v. Klein, 101 S. W. 382, 31 Ky. Law Rep. 28; Hollingsworth v. Barrett, 102 S. W. 330, 31 Ky. Law Rep. 428.

Md. Garrett County Com'rs v. Blackburn, 66 A. 31, 105 Md. 226.

Mass. Wood v. Skelley, 81 N. E. 872, 196 Mass. 114, 124 Am. St. Rep. 516.

Mo. Feddeck v. St. Louis Car Co., 102 S. W. 675, 125 Mo. App. 24.

Mont. Mason v. Northern Pac. Ry. Co., 124 P. 271, 45 Mont. 474.

Neb. Eisentraut v. Madden, 150 N. W. 627, 97 Neb. 466, L. R. A. 1915C, 893; Boesen v. Omaha St. Ry. Co., 112 N. W. 614, 79 Neb. 381.

N. D. McLain v. Nurnberg, 112 N. W. 243, 16 N. D. 144.

Okl. White v. Oliver, 122 P. 156, 32 Okl. 479.

S. C. Worthy v. Jonesville Oil Mill, 57 S. E. 634, 77 S. C. 69, 11 L. R. A. (N. S.) 690, 12 Ann. Cas. 688; Walker v. Western Union Telegraph Co., 56 S. E. 38, 75 S. C. 512.

Tenn. Three States Lumber Co. v. Blanks, 102 S. W. 79, 118 Tenn. 627.

Tex. Trinity & B. V. Ry. Co. v. Geary (Civ. App.) 144 S. W. 1045;

to be determined, not by whether it embodies a correct statement of the law upon a given state of facts, but by whether it states the law relevant to the issuable facts given in evidence on the trial,[33] and instructions which are not supported by the evidence, or which submit to the jury issues not raised by it, or which are contrary to the facts, are usually erroneous,[34] and are properly refused.[35]

Wichita Falls & W. Ry. Co. v. Wyrick (Civ. App.) 147 S. W. 694.

Utah. Smith v. Cannady, 147 P. 210, 45 Utah, 521; Jensen v. Utah Light & Ry. Co., 132 P. 8, 42 Utah, 415; Rogers v. Rio Grande Western Ry. Co., 90 P. 1075, 32 Utah, 367, 125 Am. St. Rep. 876; Belnap v. Widdison, 90 P. 393, 32 Utah, 246.

Va. Neal & Binford v. Taylor, 56 S. E. 590, 106 Va. 651; Norfolk & W. Ry. Co. v. Stegall's Adm'x, 57 S. E. 657, 107 Va. 231.

Wash. Brydges v. Cunningham, 124 P. 131, 69 Wash. 8.

W. Va. Wilhelm v. Parkersburg, M. & I. Ry. Co., 82 S. E. 1089, 74 W. Va. 678.

[33] Hatton v. Hodell Furniture Co. (Ind. App.) 125 N. E. 797.

[34] **U. S.** (C. C. A. Miss.) Postal Telegraph-Cable Co. v. Box, 185 F. 489, 107 C. C. A. 589; (C. C. A. N. J.) Pennsylvania R. Co. v. Buckley, 210 F. 268, 127 C. C. A. 86.

Ala. Alexander v. Smith, 61 So. 68, 180 Ala. 541.

Ark. Choctaw, O. & G. R. Co. v. Thompson, 100 S. W. 83, 82 Ark. 11.

Cal. Neher v. Hansen, 107 P. 565, 12 Cal. App. 370.

Conn. Kishalaski v. Sullivan, 108 A. 538, 94 Conn. 196; Carlson v. Connecticut Co., 108 A. 531, 94 Conn. 131, 8 A. L. R. 569; Board of Water Com'rs of City of New London v. Robbins & Potter, 74 A. 938, 82 Conn. 623; First Nat. Bank v. Brenner, 72 A. 582, 82 Conn. 29.

Fla. Farnsworth v. Tampa Electric Co., 57 So. 233, 62 Fla. 166.

Ga. Bank of Lavonia v. Bush, 79 S. E. 459, 140 Ga. 594; Savannah Electric Co. v. Jackson, 64 S. E. 680, 132 Ga. 559.

Idaho. Smith v. City of Rexburg, 132 P. 1153, 24 Idaho, 176, Ann. Cas. 1915B, 276.

Ill. Kalinski v. Williamson County Coal Co., 104 N. E. 1097, 263 Ill. 257, reversing judgment 183 Ill. App. 541; Loescher v. Consolidated Coal Co., 102 N. E. 196, 259 Ill. 126, affirming judgment 173 Ill. App. 526; Moreen v. Devillez, 212 Ill. App. 208; Kaufman v. Helmick, 212 Ill. App. 10; Koehn v. Tomlinson, 134 Ill. App. 256.

Ind. New York, C. & St. L. Ry. Co. v. Lind, 102 N. E. 449, 180 Ind. 38.

Iowa. Arnold v. Ft. Dodge, D. M. & S. R. Co., 173 N. W. 252, 186 Iowa, 538; Plantz v. Kreutzer & Wasem, 154 N. W. 785, 175 Iowa, 562; Owens v. Norwood White Coal Co., 138 N. W. 483, 157 Iowa, 389, reversing judgment on rehearing 133 N. W. 716.

Kan. Sly v. Powell, 123 P. 881, 87 Kan. 142.

Ky. Moors v. Kentucky Electrical Co., 208 S. W. 15, 182 Ky. 825; Stony Fork Coal Co., v. Lingar, 153 S. W. 6, 152 Ky. 87; Hartford Mill Co. v. Hartford Tobacco Warehouse Co., 121 S. W. 477.

Me. Lunge v. Abbott, 95 A. 942, 114 Me. 177.

Md. Fast v. Austin, 107 A. 540, 135 Md. 1; Anne Arundel County Com'rs v. Carr, 73 A. 668, 111 Md. 141.

Mass. Kerr v. Shurtleff, 105 N. E. 871, 218 Mass. 167.

Mich. Sorensen v. Sorensen, 179 N. W. 256, 211 Mich. 429; Lunde v. Detroit United Ry., 143 N. W. 45, 177 Mich. 374; Swift & Co. v. McMullen, 134 N. W. 1109, 169 Mich. 1; Reese v. Detroit United Ry., 124 N. W. 539, 159 Mich. 600.

Minn. Johnson v. Smith, 173 N. W. 675, 143 Minn. 350; Burmeister v. Giguere, 153 N. W. 134, 130 Minn.

[35] See note 35 on page 267.

As has already been indicated, this rule applies to instructions

28; Johnson v. Sartell Bros. Co., 150 N. W. 784, 128 Minn. 239.

Miss. Western Union Tel. Co. v. Robertson, 69 So. 680, 109 Miss. 775; McLeod Lumber Co. v. Anderson Mercantile Co., 62 So. 274, 105 Miss. 498.

Mo. Simon v. Metropolitan St. Ry. Co. (App.) 213 S. W. 147; Teter v. Central Coal & Coke Co., 213 S. W. 135, 201 Mo. App. 538; J. F. Meyer Mfg. Co. v. Sellers, 182 S. W. 789, 192 Mo. App. 489; Springfield Crystallized Egg Co. v. Springfield Ice & Refrigerating Co., 168 S. W. 772, 259 Mo. 664; Haas v. American Car & Foundry Co., 157 S. W. 1036, 176 Mo. App. 314.

Mont. Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63; Western Mining Supply Co. v. Melzner, 136 P. 44, 48 Mont. 174; T. C. Power & Bro. v. Turner, 97 P. 950, 37 Mont. 521.

Neb. Zancanella v. Omaha & C. B. St. R. Co., 142 N. W. 190, 93 Neb. 774; Clingan v. Dixon County, 118 N. W. 1082, 82 Neb. 808.

Nev. Zelavin v. Tonopah Belmont Development Co., 149 P. 188, 39 Nev. 1; Mirodias v. Southern Pac. Co., 145 P. 912, 38 Nev. 119.

N. H. Hobbs v. George v. Blanchard & Sons Co., 70 A. 1082, 75 N. H. 73, 18 L. R. A. (N. S.) 939.

N. M. Thayer v. Denver & R. G. R. Co., 154 P. 691, 21 N. M. 330.

N. Y. Geiger v. E. W. Emery Co. (Sup.) 180 N. Y. S. 550; Rosenberg v. Goldstein (Sup.) 146 N. Y. S. 1009.

N. C. Craig & Wilson v. Stewart, & Jones, 79 S. E. 1100, 163 N. C. 531.

Ohio. Cincinnati Traction Co. v. Jamison, 32 Ohio Cir. Ct. R. 336.

Okl. Bilby v. Owen (Sup.) 181 P. 724; Hurst v. Hill, 122 P. 513, 32 Okl. 532.

Or. State v. Stiles, 160 P. 126, 81 Or. 497; Schumacher v. Moffitt, 142 P. 353, 71 Or. 79; Pacific Ry. & Nav. Co. v. Elmore Packing Co., 120 P. 389, 60 Or. 534, Ann. Cas. 1914A, 371.

Pa. Rick v. New York, C. & St. L. R. Co., 81 A. 650, 232 Pa. 553.

R. I. Baran v. Silverman, 83 A. 263, 34 R. I. 279, Ann. Cas. 1914B, 997.

S. D. Pease v. Cochran, 173 N. W. 158, 42 S. D. 130, 5 A. L. R. 936; Larson v. Chicago, M. & P. S. Ry. Co., 141 N. W. 353, 31 S. D. 512.

Tex. Gulf, C. & S. F. Ry. Co. v. Helms Bros. (Civ. App.) 211 S. W. 597; Wells Fargo & Co. Express v. Gentry (Civ. App.) 154 S. W. 363; Dupree & McCutchan v. Texas & P. Ry. Co. (Civ. App.) 96 S. W. 647.

Utah. Bakka v. Kemmerer Coal Co., 134 P. 888, 43 Utah, 345.

Vt. Brown v. People's Gaslight Co., 71 A. 204, 81 Vt. 477, 22 L. R. A. (N. S.) 738.

Va. Whealton & Wisherd v. Doughty, 72 S. E. 112, 112 Va. 649.

Wash. Rastelli v. Henry, 131 P. 643, 73 Wash. 227; Gates v. Bekins, 87 P. 505, 44 Wash. 422.

W. Va. Blagg v. Baltimore & O. R. Co., 98 S. E. 526, 83 W. Va. 449; Gay v. Gay, 83 S. E. 75, 74 W. Va. 800; Greer v. Arrington, 79 S. E. 720, 72 W. Va. 693.

Wis. Speliopoulos v. Schlick, 109 N. W. 568, 129 Wis. 556.

Wyo. Justice v. Brock, 131 P. 38, 21 Wyo. 281.

Instructions improper within rule. In an action for assault and battery, where plaintiff testified to an assault amounting to rape and defendant denied having or soliciting sexual intercourse with her, or even having touched her person, a request for a charge on the question of consent was properly refused. Niebyski v. Welcome, 108 A. 341, 93 Vt. 418. Instruction authorizing jury to consider defendant's financial condition, business, or station in society, in assessing plaintiff's damages for assault, was unwarranted, where there was no competent evidence as to such facts. Traw v. Heydt (Mo. App.) 216 S. W. 1009. Where in an action for damages caused by the collapse of a building during alteration, plaintiff alleged noncompliance with an ordinance requiring the issuance of a building permit before the building altera-

which correctly declare the law as an abstract proposition,[36] and

tions were commenced, and defendant sought to prove what had been done with reference to securing a permit before the commencement of the work, but the court sustained plaintiff's objection, and stated that he did not see how the permit was material, as in the view he took of the case it would go to the jury on the single proposition whether the work was done in a negligent manner, and the matter was not again referred to, but the court charged that in determining whether defendants were negligent the jury might consider the fact that the city ordinances required a permit to be obtained, the fact that one was not obtained, and whether the omission contributed to the injury, it was held that such instruction submitted an issue on which defendant had not been heard, and was erroneous. Western Real Estate Trustees v. Hughes (C. C. A. Neb.) 153 F. 560, 82 C. C. A. 514. In an action against initial carrier and connecting carriers for loss of cattle, the court erred in submitting an issue as to the liability of the connecting carriers, where the evidence was undisputed that the cattle were lost while in the hands of the initial carrier. Panhandle & S. F. Ry. Co. v. Clarendon Grain Co. (Tex. Civ. App.) 215 S. W. 866. Where, in an action against a carrier for injuries received by a shipper of a horse in consequence of being kicked by the horse while in the car with it, there was no pleading nor evidence that the shipper agreed to ride in the car with the horse, with the door open and the horse untied, and the evidence showed that he protested against so riding and that he was forced to do so or take the chances of his horse being injured, an instruction that, if the shipper consented that the car might be moved to a railroad yard with the door open and the horse untied, he could not recover was properly refused. Houston & T. C. R. Co. v. Wilkins (Tex. Civ. App.) 98 S. W. 202. An instruction in an action against a carrier for injury to a passenger on a second passenger attempting to

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[36] **Colo.** Gray v. Sharpe, 67 P. 351, 17 Colo. App. 139.

Ga. Western & A. R. Co. v. Kinnamon, 67 S. E. 799, 134 Ga. 217; Bird v. Benton & Bros., 56 S. E. 450, 127 Ga. 371.

Ill. Lyons v. Joseph T. Ryerson & Son, 90 N. E. 288, 242 Ill. 409; Brennen v. Chicago & Carterville Coal Co., 89 N. E. 756, 241 Ill. 610.

Ind. Domestic Block Coal Co. v. De Armey, 100 N. E. 675, 179 Ind. 592; Indiana Union Traction Co. v. Ohne, 89 N. E. 507, 45 Ind. App. 632.

Iowa. Scurlock v. City of Boone, 121 N. W. 369, 142 Iowa, 684; Hetland v. Bilstad, 118 N. W. 422, 140 Iowa, 411.

Kan. Gregg v. George, 16 Kan. 546; Jaedicke v. Scrafford, 15 Kan. 120.

Mass. Beckles v. Boston Elevated Ry. Co., 101 N. E. 145, 214 Mass. 311.

Mo. Roberts v. City of Piedmont, 148 S. W. 119, 166 Mo. App. 1; Williamson v. St. Louis & M. R. R. Co., 113 S. W. 239, 133 Mo. App. 375; Franz v. Hilterbrand, 45 Mo. 121; Keithley v. Southworth, 75 Mo. App. 442.

Nev. Weck v. Reno Traction Co., 149 P. 65, 38 Nev. 285.

N. J. Ploeser v. Central R. Co. of New Jersey, 105 A. 228, 92 N. J. Law, 490.

N. Y. Hanlon v. Central R. Co. of New Jersey, 79 N. E. 846, 187 N. Y. 73, 10 L. R. A. (N. S.) 411, 116 Am. St. Rep. 591, 10 Ann. Cas. 366, affirming judgment 96 N. Y. S. 1127, 110 App. Div. 918.

N. C. Schloss-Bear-Davis Co. v. Louisville & N. R. Co., 88 S. E. 476, 171 N. C. 350.

Okl. Fowler v. Fowler, 161 P. 227, 61 Okl. 280, L. R. A. 1917C, 89.

S. D. Klink v. Quinn, 156 N. W. 797, 37 S. D. 83.

Tex. Stoker v. Fugitt (Civ. App.) 113 S. W. 310; Louisiana Western Extension Ry. Co. v. Carstens, 47 S. W. 36, 19 Tex. Civ. App. 190.

W. Va. Bond v. National Fire Ins. Co., 88 S. E. 389, 77 W. Va. 736.

the fact that instructions are applicable to the issues raised by

shoot a third, making the carrier liable if the baggage master lent a pistol to the third passenger, who provoked the shooting, knowing why he wanted the pistol, was error, where there was no evidence that the baggage master knew, or had reason to know, that the pistol was borrowed for an unlawful purpose. Penny v. Atlantic Coast Line R. Co., 68 S. E. 238, 153 N. C. 296, 32 L. R. A. (N. S.) 1209. Where a boy 12 years old boarded a street car with the permission of the motorman, who had no authority to permit him to do so, and the conductor, while the car was in motion, ordered the boy to leave, and seized a broom and advanced toward him in a threatening manner, repeating the order, and the boy dodged, lost his equilibrium, fell from the car, and was injured, it was held that the court properly refused to charge that, as the boy was not a passenger, it was the duty of the conductor to prohibit him from riding, and, if the boy stepped from the car at the command of the conductor, there could be no recovery; there being no evidence to support such instruction. Drogmund v. Metropolitan St. Ry. Co., 98 S. W. 1091, 122 Mo. App. 154. Where in an action by the owner of a parcel, which she gave to a messenger employed by defendant telegraph company for delivery within the city, for damages for its misdelivery, the court instructed that, if plaintiff delivered a package containing articles of great value, without notifying the messenger boy that it contained articles of great value, she was negligent, and could not recover, and further instructed that, if no notice of the contents of the package was given to the company, plaintiff could not recover, and that it was a matter of common knowledge that defendant's business included only the delivery of packages of small value, it was held that the instructions were erroneous and misleading, there being no evidence that the company had established any rules exempting it from liability if packages of ordinary merchandise which it engaged to deliver were lost, or of any general custom of companies engaged in a similar business accepting only packages of small value. Murray v. Postal Telegraph & Cable Co., 96 N. E. 316, 210 Mass. 188, Ann. Cas. 1913C, 1183. Instructions which predicate a right of recovery on an implied contract are erroneous, where the subject-matter of the plaintiff's claim was covered by an express contract and no implied contract has existed as a matter of law. Ballard v. Shea, 121 Ill. App. 135. An instruction in an action on a contract wherein defendants made counterclaim for taxes alleged to have been paid by them, that, if the jury found that the contention of defendants as to the nature of the contract was true and also their claim for taxes paid, they should allow the same, was erroneous, where plaintiffs on the undisputed evidence were not as a matter of law personally liable to defendants for the taxes paid. Stitt v. Rat Portage Lumber Co., 116 N. W. 643, 104 Minn. 347. In a personal injury action, it was error for the court to advise the jury that they might allow damages for permanent injury, where there was no sufficient evidence that the injuries were permanent. Fitzgerald v. Detroit United Ry., 172 N. W. 608, 206 Mich. 273. In an action for personal injuries, the charge of the court that, if the jury found that plaintiff had sustained injuries which made him the object of pity to his fellow men, and the object of ridicule to the thoughtless, and which deprived him of the comfort and companionship of his fellow men, the one causing the injury should respond in damages therefor, was held error, in the absence of evidence disclosing an injury which would shock the senses of fair-minded men, or invite the unfeeling to ridicule. Lynch v. Northern Pac. Ry. Co., 120 P. 882, 67 Wash. 113. In an action for injuries to a child caused by defendant's negligently leaving a live wire in a public place unguard-

the pleadings does not prevent the application of such rule to

ed, an instruction requested by defendant that, if the parents were negligent in failing to provide proper medical attention, and that this negligence contributed to the injury complained of, plaintiff could not recover was properly refused, where the proof showed that, on the day following the shock, and as soon as the serious nature of the injury was discovered, the parents called a competent physician who attended plaintiff until the day of the trial, and that another competent physician was called in consultation a few days after the accident and again later. Colorado Springs Electric Co. v. Soper, 88 P. 161, 38 Colo. 126. Where, in an action for the death of a child by an electric shock on seizing a hanger wire to light an electric street lamp, there could be no doubt that, if any negligence of the decedent was found, his negligence directly related to the injury and there was no room for any intervening cause, the refusal to charge that, if decedent was guilty of negligence, his negligence would not defeat a recovery unless the negligence contributed proximately to cause the death, was not erroneous. Charette v. Village of L'Anse, 117 N. W. 737, 154 Mich. 304. In an action against an electric light company to recover for the death of plaintiff's husband caused by contact with a live wire, where there is no evidence that the defendant maintained a common nuisance or was guilty of wanton negligence, it is error to refer to the negligence of decedent as "light," and that of defendant as "heavy." Weir v. Haverford Electric Light Co., 70 A. 874, 221 Pa. 611. In an action of attachment, based upon fraud, an instruction as to the necessity of the plaintiff acting promptly after discovery of the false representations and not sleeping on his rights was improper, as being inapplicable to the evidence, where plaintiff commenced suit within two days after discovery of the fraud. Lawler v. Herren, 210 Ill. App. 203. An instruction, in an action for alienation of a wife's affections, that the acts of the wife and daughter of one of the defendants in inducing plaintiff's wife to abandon him did not bind the defendants, unless they acted under defendants' directions, and the burden of proving that fact was on plaintiff, unless the jury found that either of the defendants was present aiding and abetting the wife and daughter, was erroneous as to a defendant who the undisputed evidence showed was not present aiding and abetting, as it virtually assumed that there was a conspiracy between him and such other defendant, who alone was present, so as to render him liable for acts done in his absence. Boland v. Stanley, 115 S. W. 163, 88 Ark. 562, 129 Am. St. Rep. 114. Where, in an action for injuries to a servant from alleged defective machinery, there was no evidence that machines like the one in suit were liable to often get out of order, and the evidence tended to show that with ordinary care and attention the machine in question was not liable to get out of order, a request to instruct that "machinery often gets out of order," etc., was properly refused. Nutt v. Isensee, 119 P. 722, 60 Or. 395. An instruction including the statement that a servant may become a vice principal by being placed in exclusive charge of the work, and that there is no evidence in the case that the servant whose negligence caused the injury was so placed in exclusive charge of the work, and hence he would not be a vice principal, was properly refused, where the evidence is conclusive that he was placed in exclusive charge of making a repair, though not in exclusive charge of the entire establishment. Mortenson v. Hotel Nicollet Co., 136 N. W. 306, 118 Minn. 29. Where there is no evidence that a servant injured by defects in the machinery knew of the same, it was not error to refuse to instruct on principles of law applicable to injuries received from defects in machinery which it was the servant's duty to report to his master. Mc-

them,[37] with the limitation that it is not error for the court to

Carley v. Glenn-Lowry Mfg. Co., 56 S. E. 1, 75 S. C. 390. Where, in a car repairer's action for injuries, there was no evidence that defendant's officers knew of any violation of its rule made for the protection of car repairers, it was error to instruct that plaintiff could recover if defendant had not enforced this rule. Garlinghouse v. Michigan Cent. R. Co., 140 N. W. 646, 174 Mich. 73. Where the undisputed evidence was that an employé had entire charge of the master's business at the place of injury, with authority to designate another servant to take charge of the work in which plaintiff was injured with as much authority as plaintiff claimed for the servant so designated, it was not error to refuse a charge that the jury must find that the employé in charge had authority to designate an overseer before they could find that a servant, so designated, had authority to act as foreman. Doyle v. Melendy, 75 A. 881, 83 Vt. 339. Where, in an action for injuries to an employé caused by a defective chisel, there was evidence that the employé had no knowledge or opportunity of knowledge of the condition of the chisel prior to the accident, an instruction that the employer was not required to inspect simple tools like a chisel, the condition of which is as obvious to one person as to another, was properly refused. Baltimore & O. S. W. R. Co. v. Walker, 84 N. E. 730, 41 Ind. App. 588. Where the appellee, a minor, was working in the yards of a railway company, and while carrying iron bars across the tracks under the direction of his foreman was struck by a car which was being switched, and in his complaint for the injuries received alleged the negligence of the company in making a "kicking" switch, and the court, at appellee's request, charged that it was the duty of the company to furnish a reasonably safe place to work and to warn him of any dangers not obvious to an ordinarily prudent person, and that the failure in such duty would entitle the plaintiff to a verdict, it was held that the company's liability, if any, arose from the negligence of its servants in switching cars on a track next to standing cars, and not to any failure of the company to furnish a safe place to work, and hence the instruction was erroneous as not having application to the facts. New Orleans & N. E. R. Co. v. Williams, 53 So. 619, 96 Miss. 373. The inapplicable instruction announcing the rule of the master's duty to furnish a safe place to work, in an action for a servant's death while running in front of a train far from his working place, is confusing, if not misleading. Melzner v. Chicago, M. & St. P. Ry. Co., 153 P. 1019, 51 Mont. 487. In an ac-

[37] **Ala.** Anniston Electric & Gas Co. v. Anderson, 66 So. 924, 11 Ala. App. 554.

Colo. Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 P. 513.

Ga. Bateman v. Cherokee Fertilizer Co., 93 S. E. 1021, 21 Ga. App. 158; City of Rome v. Ford, 79 S. E. 243, 13 Ga. App. 386.

Iowa. Ott v. Murphy, 141 N. W. 463, 160 Iowa, 730.

Ky. City of Campbellsville v. Morgan, 150 S. W. 521, 150 Ky. 417; Owensboro Wagon Co. v. Boling, 107 S. W. 264, 32 Ky. Law Rep. 816.

Mo. Ostopshook v. Cohen-Schwartz Rail & Steel Co. (App.) 227 S. W. 642; Riley v. City of Independence, 167 S. W. 1022, 258 Mo. 671, Ann. Cas. 1915D, 748.

Ohio. Boviard & Seyfang Mfg. Co. v. Maitland, 110 N. E. 749, 92 Ohio St. 201.

Okl. Missouri, K. & T. Ry. Co. v. Taylor (Sup.) 170 P. 1148; Miller Bros. v. McCall Co., 133 P. 183, 37 Okl. 634.

Tex. Norton v. Lea (Civ. App.) 170 S. W. 267; Thos. Goggan & Bro. v. Goggan (Civ. App.) 146 S. W. 968; National Biscuit Co. v. Scott (Civ. App.) 142 S. W. 65; Trinity & B. V. Ry. Co. v. Bradshaw, 107 S. W. 618; Graham v. Edwards (Civ. App.) 99 S. W. 436.

Va. Southern Ry. Co. v. Foster's Adm'r, 69 S. E. 972, 111 Va. 763.

state the contentions of the parties as presented by the pleadings,

tion to recover for injuries to a servant, an instruction that plaintiff could not recover unless there was a custom to give notice of danger, of which there was no evidence, was erroneous. Marshall v. Chicago, R. I. & P. Ry. Co., 149 N. W. 296, 127 Minn. 244. In an action by one injured in attempting to place an electric motor on a track, instruction that, if a sudden starting of the motor was ordered without warning to assist in getting it upon the track, etc., is erroneous, where there was nothing to show that such starting of the machine would have been of assistance. Carrington v. Holbrook, Cabot & Rollins (Sup.) 157 N. Y. S. 457. Where, in an action for injuries to an employé in consequence of a defective machine, there was no evidence that a defect in the lever attached to the machine contributed to the injury, an instruction authorizing a recovery if the lever was so defective that it could not be efficiently used was erroneous. Harris Lumber Co. v. Morris, 96 S. W. 1067, 80 Ark. 260. Where, on the trial of an action to recover damages for cutting trees, defendant admitted that the cutting was done by his servants and no claim was made that he was not liable for their acts beyond the scope of their employment, nor as to the distinction between the relation of master and servant and that of employer and contractor, there was no occasion to instruct that the acts of the servant beyond the scope of his employment are not the acts of the master, and to explain the distinction between the relation of master and servant and that of employer and contractor. Avery v. White, 66 A. 517, 79 Conn. 705. Where, in an action against the owner of a building for damages sustained in falling upon an icy sidewalk, it did not appear that there was any understanding that the occupants of the building were to have any care over the exterior of the building or even to report to the owner any defect which they might observe, a requested instruction that, if there was any understanding that the landlord should make repairs for the tenant, he would not be liable, until he had notice from the tenant, was properly refused. Smith v. Preston, 71 A. 653, 104 Me. 156. An instruction that a city is required to use ordinary care to keep its streets in a reasonably safe condition for travel, and that whether the streets are in such a condition is a question of fact to be determined in each case by the particular circumstances, correctly states an abstract proposition of law, applicable to a street the whole width of which has been opened and worked for public travel, but is inapplicable to a street only part of which has been prepared for public travel, and is misleading in such a case, as leading the jurors to assume that it is the duty of a city to make and keep all of its streets in a reasonably safe condition throughout their entire width at all times and under all circumstances. Herndon v. Salt Lake City, 95 P. 646, 34 Utah, 65, 131 Am. St. Rep. 827. In an action against an executrix for money lent by plaintiff to decedent, based on the theory that defendant was liable because a part payment was made by decedent under circumstances showing an intention of taking the debt out of the statute of limitations, and there was no evidence from which it could be inferred that the payment was not an acknowledgment of a balance due or promise to pay a balance, a requested charge that, unless the payment was made under circumstances such that it could be inferred that there was an acknowledgment of a larger sum and a promise to pay the balance thereof, defendant should recover, was properly refused. Gaffney v. Mentele, 119 N. W. 1030, 23 S. D. 38. Where, in an action for death of a traveler at a railroad crossing, the condition of the crossing was not shown to have had anything to do with the collision, and the passage of decedent's wagon over the crossing was not impeded, an instruction calling attention to the dangerous character of the crossing and charging that if it was of such a character as

ter in relation to which a dispute has arisen between counsel does not take them out of the scope of the above rule.[39]

The court, however, may submit a view of the evidence not presented by the parties,[40] and it is not improper to instruct the

& K. C. R. Co. v. Jackson, 46 So. 142, 92 Miss. 517.

Mo. Smith v. Sickinger (App.) 221 S. W. 779; Lawler v. Montgomery (App.) 217 S. W. 856; Booth v. Dougan (App.) 217 S. W. 326; Rearden v. St. Louis & S. F. Ry. Co., 114 S. W. 961, 215 Mo. 105.

Mont. McKim v. Beiseker, 185 P. 153, 56 Mont. 330; Heitman v. Chicago, M. & St. P. Ry. Co., 123 P. 401, 45 Mont. 406; Lindsay v. Kroeger, 95 P. 839, 37 Mont. 231.

Neb. Bethel v. Pawnee County, 145 N. W. 363, 95 Neb. 203; Odell v. Story, 118 N. W. 1103, 81 Neb. 442; Carlie v. Bentley, 116 N. W. 772, 81 Neb. 715.

N. J. Bodine v. Berg, 82 A. 901, 82 N. J. Law, 662, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913D, 721; Merklinger v. Lambert, 72 A. 119, 76 N. J. Law, 806.

N. M. Jackson v. Brower, 167 P. 6, 22 N. M. 615; Cowles v. Hagerman, 110 P. 843, 15 N. M. 600.

N. Y. Pulcino v. Long Island R. Co., 87 N. E. 1126, 194 N. Y. 526, affirming judgment 109 N. Y. S. 1076, 125 App. Div. 629; Sigel v. American Seating Co., 146 N. Y. S. 350, 161 App. Div. 54; Mitchell v. T. A. Gillespie Co., 137 N. Y. S. 550, 152 App. Div. 536.

N. C. Buchanan v. Cranberry Furnace Co., 101 S. E. 518, 178 N. C. 643; Kivett v. Western Union Telegraph Co., 72 S. E. 388, 156 N. C. 296; Revis v. City of Raleigh, 63 S. E. 1049, 150 N. C. 348.

Okl. St. Louis & S. F. Ry. Co. v. Henry, 149 P. 132, 46 Okl. 526; Kennedy v. Goodman, 135 P. 936, 39 Okl. 470.

Or. Haines v. First Nat. Bank, 172 P. 505, 89 Or. 42; Dunn v. Orchard Land & Timber Co., 136 P. 872, 68 Or. 97.

Pa. American Surety Co. of New York v. Vandegrift Const. Co., 107 A. 733, 264 Pa. 193; Littieri v. Freda, 88 A. 82, 241 Pa. 21.

R. I. King v. Providence Gas Co. 90 A. 4; Champlin v. Pawcatuck Valley St. Ry. Co., 82 A. 481, 33 R. I. 572.

S. C. Kramer v. Greenville, S. & A. Ry. Co., 77 S. E. 738, 94 S. C. 59; Cheek v. Seaboard Air Line Ry., 62 S. E. 402, 81 S. C. 348.

S. D. Braun v. Thuet, 174 N. W. 807, 42 S. D. 491; Grant v. Whorton, 134 N. W. 803, 28 S. D. 599.

Tex. Missouri Iron & Metal Co. v. Cartwright (Civ. App.) 207 S. W. 397; Marks v. Jones (Civ. App.) 154 S. W. 618; Missouri, K. & T. Ry. Co. of Texas v. Hagler (Civ. App.) 112 S. W. 783.

Utah. Urich v. Utah Apex Mining Co., 169 P. 263, 51 Utah, 206; Furkovich v. Bingham Coal & Lumber Co., 143 P. 121, 45 Utah, 89, L. R. A. 1915B, 426; Casady v. Casady, 88 P. 32, 31 Utah, 394.

Vt. Wiley v. Rutland R. Co., 86 A. 808, 86 Vt. 504; Jenness v. Simpson, 78 A. 886, 84 Vt. 127.

Va. Sands & Co. v. Norvell, 101 S. E. 569, 126 Va. 384; Virginian Ry. Co. v. Bell, 79 S. E. 396, 115 Va. 429, Ann. Cas. 1915A, 804; Norfolk & W. Ry. Co. v. Carr, 56 S. E. 276, 106 Va. 508.

Wash. Suell v. Jones, 96 P. 4, 49 Wash. 582; Harris v. Washington Portland Cement Co., 95 P. 84, 49 Wash. 345.

W. Va. Williams v. Schehl, 100 S. E. 280, 84 W. Va. 499; Sims v. Carpenter, Frazier & Co., 69 S. E. 794, 68 W. Va. 223.

Wis. Matthews v. Town of Sigel, 139 N. W. 721, 152 Wis. 123; Smith v. Goldberg, 121 N. W. 173, 139 Wis. 423; Kohl v. Bradley, Clark & Co., 110 N. W. 265, 130 Wis. 301.

[39] Carter v. Sioux City Service Co., 141 N. W. 26, 160 Iowa, 78.

[40] Dusopole v. Manos, 80 N. E. 481, 194 Mass. 355; People v. Wallin, 55 Mich. 497, 22 N. W. 15.

jury concerning mortality tables, although not introduced in evidence; the court being permitted to take judicial notice of them.[41]

§ 138. Rule in criminal cases

In criminal cases, in some jurisdictions, no instruction should ever be given, unless based upon a hypothesis supported by some evidence,[42] and it is generally held that instructions in such cases which have no support in the evidence are erroneous, and properly refused, as calculated to mislead and confuse the jury.[43] In-

[41] Warders v. Union Pac. R. Co., 181 P. 604, 105 Kan. 4.

[42] Cook v. Commonwealth, 8 S. W. 872, 10 Ky. Law Rep. 222.

[43] **U. S.** (Sup.) Bird v. United States, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100; (C. C. A. Cal.) Brown v. U. S., 260 F. 752, 171 C. C. A. 490; (C. C. A. Ind.) Brown v. United States, 142 F. 1, 73 C. C. A. 187; (C. C. A. Okl.) Chambliss v. United States, 218 F. 154, 132 C. C. A. 112; (C. C. A. Wash.) Taylor v. United States, 193 F. 968, 113 C. C. A. 543.

Ala. Smith v. State, 69 So. 402, 13 Ala. App. 399, certiorari denied Ex parte Smith, 69 So. 1020, 193 Ala. 680; Williams v. State, 69 So. 376, 13 Ala. App. 133; Davis v. State, 66 So. 67, 188 Ala. 59; Hudson v. State, 65 So. 732, 11 Ala. App. 116; Hooten v. State, 64 So. 200, 9 Ala. App. 9; Watson v. State, 62 So. 997, 8 Ala. App. 414; McClain v. State, 62 So. 241, 182 Ala. 67; Granberry v. State, 62 So. 52, 182 Ala. 4; Malchow v. State, 59 So. 342, 5 Ala. App. 99; Jackson v. State, 57 So. 594, 5 Ala. App. 306; Parker v. State, 51 So. 260, 165 Ala. 1; Phillips v. State, 50 So. 326, 162 Ala. 53; Guarreno v. State, 48 So. 65, 157 Ala. 17; Strickland v. State, 44 So. 90, 151 Ala. 31; Barber v. State, 43 So. 808, 151 Ala. 56; Thomas v. State, 43 So. 371, 150 Ala. 31; Plant v. State, 37 So. 159, 140 Ala. 52; Wildman v. State, 35 So. 995, 139 Ala. 125; Sherrill v. State, 35 So. 129, 138 Ala. 3; Maddox v. State, 26 So. 305, 122 Ala. 110; Thompson v. State, 26 So. 141, 122 Ala. 12; Handy v. State, 25 So. 1023, 121 Ala. 13; Taylor v. State, 25 So. 701, 121 Ala. 39; Crane v. State, 111 Ala. 45, 20 So. 590; Taylor v. State, 48 Ala. 157.

Ark. Diggs v. State, 190 S. W. 448, 126 Ark. 455; Brown v. State, 138 S. W. 633, 99 Ark. 648; Bell v. State, 104 S. W. 1108, 84 Ark. 128; Mitchell v. State, 101 S. W. 763, 82 Ark. 324.

Cal. People v. Northcott (App.) 189 P. 704; People v. Williams, 156 P. 882, 29 Cal. App. 552; People v. Lim Foon, 155 P. 477, 29 Cal. App. 270; People v. Whitlow, 139 P. 826, 24 Cal. App. 1; People v. Corey, 97 P. 907, 8 Cal. App. 720; People v. Trebilcox, 86 P. 684, 149 Cal. 307; People v. Stevens, 75 P. 62, 141 Cal. 488; People v. Morine, 72 P. 166, 138 Cal. 626; People v. Ross, 66 P. 229, 134 Cal. 256; People v. Matthews, 58 P. 371, 126 Cal. xvii; People v. Hurley, 57 Cal. 145; People v. Juarez, 28 Cal. 380; People v. Roberts, 6 Cal. 214.

Colo. Almond v. People, 135 P. 783, 55 Colo. 425; Reagan v. People, 112 P. 785, 49 Colo. 316; Van Wyk v. People, 99 P. 1009, 45 Colo. 1; Mow v. People, 72 P. 1069, 31 Colo. 351.

Conn. State v. Rackowski, 86 A. 606, 86 Conn. 677, 45 L. R. A. (N. S.) 580, Ann. Cas. 1914B, 410.

D. C. Hamilton v. United States, 26 App. D. C. 382; Norman v. United States, 20 App. D. C. 494.

Fla. Long v. State, 83 So. 293, 78 Fla. 464; Milligan v. State, 78 So. 535, 75 Fla. 815; Settles v. State, 78 So. 287, 75 Fla. 296; Wolf v. State, 73 So. 740, 72 Fla. 572; Davis v. State, 63 So. 847, 66 Fla. 349; Carlton v. State, 58 So. 486, 63 Fla. 1; Stokes v. State, 44 So. 759, 54 Fla. 109; Williams v. State, 43 So. 431, 53 Fla. 84; Hisler v. State, 42 So. 692, 52 Fla. 30; Melbourne v. State, 40 So. 189, 51 Fla. 69; Eatman v. State, 37 So. 576, 48 Fla. 21; Davis v. State, 35 So. 76, 46 Fla. 137; Kelly v.

structions in a criminal case are erroneous, and properly refused,

State, 33 So. 235, 44 Fla. 441; Green v. State, 30 So. 656, 43 Fla. 556; Richard v. State, 29 So. 413, 42 Fla. 528; Long v. State, 28 So. 775, 42 Fla. 509; Wallace v. State, 26 So. 713, 41 Fla. 547; Copeland v. State, 26 So. 319, 41 Fla. 320; Doyle v. State, 22 So. 272, 39 Fla. 155, 63 Am. St. Rep. 159.

Ga. Manuel v. State, 104 S. E. 447, 150 Ga. 611; Shannon v. State, 93 S. E. 86, 147 Ga. 172; Braxley v. State, 86 S. E. 425, 17 Ga. App. 196; Morgan v. State, 85 S. E. 254, 16 Ga. App. 267; Roberts v. State, 84 S. E. 122, 143 Ga. 71; Greer v. State, 82 S. E. 484, 142 Ga. 66; Wilson v. State, 70 S. E. 193, 8 Ga. App. 816; Renfroe v. State, 70 S. E. 70, 8 Ga. App. 676; Hill v. State, 66 S. E. 802, 7 Ga. App. 336; Loeb v. State, 64 S. E. 338, 6 Ga. App. 23; Branch v. State, 63 S. E. 714, 5 Ga. App. 651; Yopp v. State, 62 S. E. 1036, 131 Ga. 593; Lyles v. State, 60 S. E. 578, 130 Ga. 294; Toomer v. State, 60 S. E. 198, 130 Ga. 63; Baker v. State, 58 S. E. 1114, 2 Ga. App. 662; Harwell v. State, 58 S. E. 1111, 2 Ga. App. 613; Moody v. State, 58 S. E. 262, 1 Ga. App. 772; Rooks v. State, 46 S. E. 631, 119 Ga. 431; Echols v. State, 46 S. E. 409, 119 Ga. 307; Jordan v. State, 43 S. E. 747, 117 Ga. 405; Moore v. State, 40 S. E. 295, 114 Ga. 256; Gaines v. State, 26 S. E. 760, 90 Ga. 703; Minor v. State, 56 Ga. 630.

Idaho. People v. Ah Too, 2 Idaho, 47, 3 P. 10.

Ill. People v. Davis, 110 N. E. 9, 269 Ill. 256; People v. Fryer, 107 N. E. 134, 266 Ill. 216; People v. Rischo, 105 N. E. 8, 262 Ill. 596; People v. Gardt, 101 N. E. 687, 258 Ill. 468, affirming judgment 175 Ill. App. 80; People v. Johnson, 86 N. E. 676, 237 Ill. 237; Roberts v. People, 80 N. E. 776, 226 Ill. 296; Lyman v. State, 64 N. E. 974, 198 Ill. 544; Schintz v. People, 52 N. E. 903, 178 Ill. 320; Birr v. People, 113 Ill. 645; City of Centralia v. Knash, 183 Ill. App. 588; Houtz v. People, 123 Ill. App. 445.

Ind. Malone v. State, 96 N. E. 1, 176 Ind. 338; Rigsby v. State, 91 N. E. 925, 174 Ind. 284; Braxton v. State, 61 N. E. 195, 157 Ind. 213; Miller v. State, 43 N. E. 440, 144 Ind. 401; Reed v. State, 40 N. E. 525, 141 Ind. 116; Plummer v. State, 34 N. E. 968, 135 Ind. 308; Beaty v. State, 82 Ind. 228; Clem v. State, 31 Ind. 480.

Ind. T. Williams v. United States, 88 S. W. 334, 6 Ind. T. 1.

Iowa. State v. Harrison, 149 N. W. 452, 167 Iowa, 334; State v. Mullen, 131 N. W. 679, 151 Iowa, 392, Ann. Cas. 1913A, 399; State v. Denhardt, 105 N. W. 685, 129 Iowa, 135; State v. Swallum, 82 N. W. 439, 111 Iowa, 37; State v. Fraunberg, 40 Iowa, 555.

Kan. State v. Gaunt, 157 P. 447, 98 Kan. 186; State v. Van Sickle, 154 P. 1015, 97 Kan. 362; State v. Altemus, 92 P. 594, 76 Kan. 718; State v. Goff, 61 P. 680, 10 Kan. App. 286, judgment reversed 61 P. 683, 62 Kan. 104.

Ky. King v. Commonwealth, 220 S. W. 755, 187 Ky. 782; Wattles v. Commonwealth, 215 S. W. 291, 185 Ky. 486; Day v. Commonwealth, 191 S. W. 105, 173 Ky. 269; Anderson v. Commonwealth, 137 S. W. 1063, 144 Ky. 215; Middleton v. Commonwealth, 124 S. W. 355, 136 Ky. 354; Steely v. Commonwealth, 112 S. W. 655, 129 Ky. 524, 33 Ky. Law Rep. 1032; Commonwealth v. Thomas, 104 S. W. 326, 31 Ky. Law Rep. 899; Williamson v. Commonwealth, 101 S. W. 370, 31 Ky. Law Rep. 61; Quinn v. Commonwealth, 63 S. W. 792, 23 Ky. Law Rep. 1302; Commonwealth v. Rudert, 60 S. W. 489, 109 Ky. 653, 22 Ky. Law Rep. 1308; Mahan v. Commonwealth, 56 S. W. 529, 21 Ky. Law Rep. 1807; Costigan v. Commonwealth, 12 S. W. 629, 11 Ky. Law Rep. 617; McClernand v. Commonwealth, 12 S. W. 148, 11 Ky. Law Rep. 301; Ritte v. Commonwealth, 18 B. Mon. 35.

La. State v. McGuire, 83 So. 374, 146 La. 49; State v. Folden, 66 So. 223, 135 La. 791; State v. Robertson, 63 So. 363, 133 La. 806; State v. Ailes, 63 So. 172, 133 La. 563; State v. Langford, 62 So. 597, 133 La. 120; State v. Howard, 53 So. 677, 127 La. 435; State v. Kemp, 45 So. 283, 120 La. 378; State v. Anderson, 45 So.

which assume facts in opposition to the evidence in the case,[44]

267. 120 La. 331; State v. Pellerin, 43 So. 159, 118 La. 547; State v. Guidor, 37 So. 622, 113 La. 727; State v. Matthews, 36 So. 48, 111 La. 962; State v. Labuzan, 37 La. Ann. 489.

Mass. Commonwealth v. Pratt, 95 N. E. 105, 208 Mass. 553.

Mich. People v. Van Alstyne, 122 N. W. 193, 157 Mich. 366; People v. Hilliard, 77 N. W. 306, 119 Mich. 24; Brownell v. People, 38 Mich. 732; People v. Jones, 24 Mich. 215.

Minn. State v. Meyers, 155 N. W. 766, 132 Minn. 4; State v. Whitman, 114 N. W. 363, 103 Minn. 92, 14 Ann. Cas. 309.

Miss. Canterberry v. State, 43 So. 678, 90 Miss. 279; Saffold v. State, 26 So. 945; Wheeler v. State, 24 So. 310, 76 Miss. 265; Cothran v. State, 39 Miss. 541; Oliver v. State, 39 Miss. 526.

Mo. Interstate Coal Co. v. Gordon (App.) 216 S. W. 783; State v. Underwood, 173 S. W. 1059, 263 Mo. 677; State v. Westbrook, 171 S. W. 616, 186 Mo. App. 421; State v. Sykes, 154 S. W. 1130, 248 Mo. 708; State v. Swain, 144 S. W. 427, 239 Mo. 723; State v. Nord, 132 S. W. 239, 230 Mo. 655; State v. Green, 129 S. W. 700, 229 Mo. 642; State v. Rollins, 126 S. W. 478, 226 Mo. 524; State v. Clancy, 125 S. W. 458, 225 Mo. 654; State v. Edwards, 102 S. W. 520, 203 Mo. 528; State v. King, 102 S. W. 515, 203 Mo. 560; State v. Paulsgrove, 101 S. W. 27, 203 Mo. 193; State v. Tyree, 100 S. W. 645, 201 Mo. 574; State v. Zorn, 100 S. W. 591, 202 Mo. 12; State v. Oakes, 100 S. W. 434, 202 Mo. 86, 119 Am. St. Rep. 792; State v. Miller, 90 S. W. 767, 191 Mo. 587; State v. Brown, 181 Mo. 192, 79 S. W. 1111; State v. Rose, 76 S. W. 1003, 178 Mo. 25; State v. Caudle, 74 S. W. 641, 174 Mo. 388; State v. Gartrell, 171 Mo. 489, 71 S. W. 1045; State v. St. John, 68 S. W. 374, 94 Mo. App. 229; State v. Northway, 65 S. W. 331, 164 Mo. 513; State v. Weaver, 165 Mo. 1, 65 S. W. 308, 88 Am. St. Rep. 406; State v. Obuchon, 60 S. W. 85, 159 Mo. 256; State v. Hudspeth, 51 S. W. 483, 150 Mo. 12; State v. Lewis, 118 Mo. 79, 23 S. W. 1082; State v. Allen, 116 Mo. 548, 22 S. W. 792; State v. Johnson, 111 Mo. 578, 20 S. W. 302; State v. Turlington, 102 Mo. 642, 15 S. W. 141; State v. Riley, 100 Mo. 493, 13 S. W. 1063; State v. Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; State v. Tice, 90 Mo. 112, 2 S. W. 269; State v. Brady, 87 Mo. 142; State v. Little, 67 Mo. 624; State v. Harris, 59 Mo. 550; State v. Sayers, 58 Mo. 585; State v. Sturges, 48 Mo. App. 263.

Mont. State v. Sheldon, 169 P. 37, 54 Mont. 185.

Neb. Schultz v. State, 130 N. W. 972, 89 Neb. 34, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C, 495; Callahan v. State, 119 N. W. 467, 83 Neb. 246; Connelly v. State, 104 N. W. 754, 74 Neb. 340; Lamb v. State, 95 N. W. 1050, 69 Neb. 212; Rhea v. State, 88 N. W. 789, 63 Neb. 461; Spaulding v. State, 85 N. W. 80, 61 Neb. 289; Thompson v. State, 85 N. W. 62, 61 Neb. 210, 87 Am. St. Rep. 453; Strong v. State, 84 N. W. 410, 61 Neb. 35; Chezem v. State, 76 N. W. 1056, 56 Neb. 496; Kelly v. State, 71 N. W. 299, 51 Neb. 572; Morearty v. State, 46 Neb. 652, 65 N. W. 784; Walrath v. State, 8 Neb. 80.

N. J. State v. Lovell, 96 A. 38, 88 N. J. Law, 353, reversing judgment 92 A. 376, 86 N. J. Law, 509; State v. Diamond, 86 A. 57, 84 N. J. Law, 17.

N. M. State v. Moss, 172 P. 199, 24 N. M. 59.

N. Y. People v. Tirnauer, 136 N.

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[44] **Ala.** Ward v. State, 72 So. 754, 15 Ala. App. 174; Liner v. State, 27 So. 438, 124 Ala. 1.

Cal. People v. Clark, 79 P. 434, 145 Cal. 727; People v. Matthai, 67 P. 694, 135 Cal. 442; People v. Lem Deo, 64 P. 265, 132 Cal. 199.

Mass. Commonwealth v. Reid, 56 N. E. 617, 175 Mass. 325.

Miss. Cook v. State, 38 So. 110, 85 Miss. 738.

R. I. State v. Casasanta, 73 A. 312, 29 R. I. 587.

Tex. Wood v. State, 182 S. W. 1122, 78 Tex. Cr. R. 654.

Utah. State v. Marks, 51 P. 1089, 16 Utah, 204.

and although the court, in charging, presents facts hypothetically

Y. S. 833, 77 Misc. Rep. 387; People v. DeGraff, 6 N. Y. St. Rep. 412.

N. C. State v. Hinson, 64 S. E. 124, 150 N. C. 827; State v. Carrawan, 54 S. E. 1002, 142 N. C. 575; State v. Hicks, 41 S. E. 803, 130 N. C. 705; State v. Hicks, 34 S. E. 247, 125 N. C. 636; State v. Sizemore, 52 N. C. 206.

Ohio. State v. Linder, 81 N. E. 753. 76 Ohio St. 463.

Okl. Lamb v. State, 185 P. 1101, 16 Okl. Cr. 724; Yarbrough v. State, 162 P. 678, 13 Okl. Cr. 140; Perryman v. State, 159 P. 937, 12 Okl. Cr. 500; Duncan v. State, 144 P. 629, 11 Okl. Cr. 217; Ryan v. State, 129 P. 685, 8 Okl. Cr. 623; Mulkey v. State, 113 P. 532, 5 Okl. Cr. 75; Driggers v. United States, 95 P. 612, 21 Okl. 60, 1 Okl. Cr. 167, 129 Am. St. Rep. 823, 17 Ann. Cas. 66, reversing judgment 104 S. W. 1166, 7 Ind. T. 752; Robinson v. Territory, 85 P. 451, 16 Okl. 241, reversed 148 F. 830, 78 C. C. A. 520; New v. Territory, 70 P. 198, 12 Okl. 172, dismissed 25 S. Ct. 68, 195 U. S. 252, 49 L. Ed. 182.

Or. State v. Erickson, 110 P. 785, 57 Or. 262, rehearing denied 111 P. 17, 57 Or. 262; State v. Megorden, 88 P. 306, 49 Or. 259, 14 Ann. Cas. 130; State v. Miller, 74 P. 658, 43 Or. 325; State v. McCann, 72 P. 137, 43 Or. 155.

Pa. Commonwealth v. Calhoun, 86 A. 472, 238 Pa. 474; Commonwealth v. Palmer, 71 A. 100, 222 Pa. 299, 19 L. R. A. (N. S.) 483, 128 Am. St. Rep. 809; Commonwealth v. Danz, 60 A. 1070, 211 Pa. 507.

S. C. State v. Waldrop, 52 S. E. 793, 73 S. C. 60; State v. Hutto, 45 S. E. 13, 66 S. C. 449.

S. D. State v. James, 164 N. W. 91, 39 S. D. 263; State v. Donovan, 132 N. W. 698, 28 S. D. 136, 36 L. R. A. (N. S.) 167; State v. Landers, 114 N. W. 717, 21 S. D. 606.

Tenn. Cooper v. State, 138 S. W. 826, 123 Tenn. 37; Croft v. State, 6 Humph. 317.

Tex. Albrecht v. State, 215 S. W. 327, 85 Tex. Cr. R. 519; Flores v. State, 198 S. W. 575, 82 Tex. Cr. R. 107; Bega v. State, 197 S. W. 1109, 81 Tex. Cr. R. 635; Kelley v. State, 190 S. W. 173, 80 Tex. Cr. R. 249; Duhig v. State, 180 S. W. 252, 78 Tex. Cr. R. 125; Howard v. State, 178 S. W. 506, 77 Tex. Cr. R. 185; Hart v. State, 175 S. W. 436, 76 Tex. Cr. R. 339; Raleigh v. State, 168 S. W. 1050, 74 Tex. Cr. R. 484; Coulter v. State, 162 S. W. 885, 72 Tex. Cr. R. 602; Brice v. State, 162 S. W. 874, 72 Tex. Cr. R. 219; Elmore v. State, 162 S. W. 517, 72 Tex. Cr. R. 226; Cowley v. State, 161 S. W. 471, 72 Tex. Cr. R. 173; Grimes v. State, 160 S. W. 689, 71 Tex. Cr. R. 614; Templeton v. State, 158 S. W. 302, 71 Tex. Cr. R. 307; Corley v. State, 155 S. W. 227, 69 Tex. Cr. R. 626; Ellis v. State, 154 S. W. 1010, 69 Tex. Cr. R. 468; Stewart v. State, 153 S. W. 1151, 69 Tex. Cr. R. 384; Polk v. State, 152 S. W. 907, 69 Tex. Cr. R. 53; Bumgarner v. State, 142 S. W. 4, 64 Tex. Cr. R. 165; Diggs v. State, 141 S. W. 100, 64 Tex. Cr. R. 122; Alexander v. State, 138 S. W. 721, 63 Tex. Cr. R. 102; Taylor v. State, 138 S. W. 615, 62 Tex. Cr. R. 611; Jones v. State, 132 S. W. 476, 60 Tex. Cr. R. 426; Johnson v. State, 128 S. W. 614, 59 Tex. Cr. R. 263; Woodland v. State, 123 S. W. 141, 57 Tex. Cr. R. 352; Henderson v. State, 117 S. W. 825, 55 Tex. Cr. R. 640; Knight v. State, 116 S. W. 56, 55 Tex. Cr. R. 243; Blocker v. State, 114 S. W. 814, 55 Tex. Cr. R. 80, 131 Am. St. Rep. 772; Moore v. State, 114 S. W. 807, 55 Tex. Cr. R. 3; Brittain v. State, 105 S. W. 817, 52 Tex. Cr. R. 169; Adams v. State (Cr. App.) 105 S. W. 497; Trinkle v. State, 105 S. W. 201, 52 Tex. Cr. R. 42; Slaughter v. State, 105 S. W. 198, 199; Smith v. State, 104 S. W. 899, 51 Tex. Cr. R. 645; Rice v. State, 103 S. W. 1156, 51 Tex. Cr. R. 255; Jones v. State (Cr. R.) 101 S. W. 1012; Laws v. State (Cr. App.) 101 S. W. 987; Cross v. State (Cr. App.) 101 S. W. 213; Burnett v. State, 100 S. W. 381, 51 Tex. Cr. R. 20; Luck v. State (Cr. App.) 97 S. W. 1049; Arthur v. State, 80 S. W. 1017, 46 Tex. Cr. R. 477; Hjeronymus v. State, 79 S. W. 313, 46 Tex. Cr. R. 157; Reyna v. State (Cr. App.) 75 S. W. 25; Burns v. State (Cr. App.) 71 S. W. 965, 62 L. R. A. 427; Terry v.

and does not assume their existence, yet unless there is evidence

State, 66 S. W. 451, 43 Tex. Cr. R. 353; Taylor v. State (Cr. App.) 63 S. W. 330; Martinez v. State (Cr. App.) 57 S. W. 838; Bell v. State (Cr. R.) 56 S. W. 913; Ellers v. State (Cr. R.) 55 S. W. 813; Wilson v. State (Cr. R.) 55 S. W. 489; Nite v. State, 54 S. W. 763, 41 Tex. Cr. R. 340; Prewett v. State, 53 S. W. 879, 41 Tex. Cr. R. 262; Griffin v. State (Cr. App.) 53 S. W. 848; Johnson v. State (Cr. App.) 53 S. W. 105; Bruce v. State, 51 S. W. 954, 41 Tex. Cr. R. 27; Jackson v. State (Cr. App.) 51 S. W. 389; Ransom v. State (Cr. App.) 49 S. W. 582; Paderes v. State (Cr. App.) 45 S. W. 914; Unsell v. State (Cr. App.) 45 S. W. 902; Myers v. State, 39 S. W. 938, 37 Tex. Cr. R. 331; Tittle v. State, 35 Tex. Cr. R. 96, 31 S. W. 677; Burgess v. State, 33 Tex. Cr. R. 9, 24 S. W. 286; Chamberlain v. State, 25 Tex. App. 398, 8 S. W. 474; Hartwell v. State, 23 Tex. App. 88, 3 S. W. 715; Burney v. State, 21 Tex. App. 565, 1 S. W. 458; Boddy v. State, 14 Tex. App. 528; Behrens v. State, 14 Tex. App. 121; Johnson v. State, 13 Tex. App. 378; Pugh v. State, 2 Tex. App. 539; Haynes v. State, 40 Tex. 52; Bergstrom v. State, 36 Tex. 336.

Utah. State v. Kakarikos, 146 P. 750, 45 Utah, 470; State v. Gordon, 76 P. 882, 28 Utah, 15; State v. Evans, 73 P. 1047, 27 Utah, 12.

Va. Johnson v. Commonwealth, 46 S. E. 789, 102 Va. 927; Reed v. Commonwealth, 98 Va. 817, 36 S. E. 396; Hall v. Commonwealth, 89 Va. 171, 15 S. E. 517.

Wash. Miller v. Territory, 3 Wash. T. 554, 19 P. 50; State v. Harsted, 119 P. 24, 66 Wash. 158; State v. Johnson, 91 P. 949, 47 Wash. 227.

W. Va. State v. Lutz, 101 S. E. 434, 85 W. Va. 330; State v. Donahue, 90 S. E. 834, 79 W. Va. 260; State v. Sheppard, 39 S. E. 676, 49 W. Va. 582; State v. Dickey, 46 W. Va. 319, 33 S. E. 231; State v. Cross, 42 W. Va. 253, 24 S. E. 996; State v. Zeigler, 40 W. Va. 593, 21 S. E. 763; State v. Belknap, 39 W. Va. 427, 19 S. E. 507; State v. Poindexter, 23 W. Va. 805; State v. Abbott, 8 W. Va. 741.

Wis. Weisenbach v. State, 119 N. W. 843, 138 Wis. 152.

Instructions held objectionable under rule. In a prosecution against defendant for feloniously assaulting B., who was attempting to arrest him, where the prosecution attempted to show B.'s authority to make the arrest on the ground that defendant had cut a third person, but there was no evidence tending to show that he had committed such crime on the third person, or on any other party, or any ground for the slightest suspicion against him, a charge that, if B. had reason to believe that defendant had committed a felony, he had a right to arrest him, was erroneous because not applicable to the case. Spradley v. State, 31 So. 534, 80 Miss. 82. In a criminal prosecution, where the only evidence of defendant's action, when arrested, was the testimony of the sheriff, who stated that when he went to arrest defendant some days after the crime, defendant had a gun in his hand, and on being told that he was wanted said that the first man who came near he would kill, and that when the sheriff got hold of the gun, and told defendant to consider himself under arrest, defendant jerked the gun away, the court properly refused to instruct that in considering the weight to be given to this evidence the jury should take into consideration whether or not defendant had been drinking just prior to the arrest, his intelligence, his mental capacity, and the manner of making the arrest, the feeling existing between the persons making the arrest, and all surrounding circumstances. State v. Steidley, 113 N. W. 333, 135 Iowa, 512. A charge that if there had been trouble between defendant and deceased, and they agreed to face each other, and each armed himself with a pistol, and they did so face each other and, in the meeting, defendant killed deceased, defendant was guilty of murder, was erroneous, where there was no evidence that the parties had agreed to such a meeting, and the meeting had was for the purpose of adjusting a misunderstanding between the parties, and of removing, if possible, all stain from the character of a certain girl. Rogers v. State, 34 So.

tending to establish the circumstances recited as possible facts the charge is erroneous.[45]

320, 82 Miss. 479. Where the issues of self-defense, accidental shooting, and death resulting from the improper treatment of the wound are submitted to the jury on a trial for homicide, it was prejudicial error to instruct that where a person, inflicting an injury which makes it necessary to call aid to preserve life, willfully fails to call such aid, he is equally guilty as if the injury were one which would inevitably lead to death, without evidence that accused willfully neglected deceased. Ware v. State, 55 S. W. 342, 41 Tex. Cr. R. 415. In a murder case, where accused knew the officers pursuing him, one of whom he killed, and fired the first shots, charges that, if an officer is acting under a warrant, he must inform the person sought to be arrested before attempting such arrest, that he acts under the authority of the warrant, and must also show the warrant, if required, and that the law provides that if, after notice of intention to arrest the person sought to be arrested, he either flees or forcibly resists, the officer may use all necessary means to effect the arrest, were properly refused as inapplicable. Hunter v. State, 107 P. 444, 3 Okl. Cr. 533. Where, on the trial of a husband for neglecting to support his wife, the evidence showed that accused knew that his wife took but a small sum of money when she went to her sister's to live, and that the sum was entirely inadequate to provide for her wants in her feeble condition, and that she had applied for aid to a town as a pauper, and that when he was requested to provide for her he refused to do so, the refusal to charge that, if accused was not informed that his wife's means were exhausted, his refusal to support her would not be an unreasonable refusal, and he should be acquitted, was proper. Spencer v. State, 112 N. W. 462, 132 Wis. 509, 122 Am. St. Rep. 989, 13 Ann. Cas. 969. Where, on trial of defendant for incest with his stepdaughter, there was no evidence that her mother had a former husband, unless it be inferred from the fact that she had two children born before her marriage to defendant, it was not error to refuse to instruct the jury that defendant could not be convicted without proof of the death of such former husband, or that a divorce had been secured from him, since the evidence did not present any such issue. Stanford v. State, 60 S. W. 253, 42 Tex. Cr. R. 343. Where, in a prosecution for violating the local option law, the state did not claim that defendant was the agent of the purchaser of the liquor, and not of the seller, and defendant claimed that he did not sell the liquor to prosecutor, but that the latter stole it from him, it was not error to refuse a charge presenting the theory that defendant was the agent of the purchaser. Carter v. State (Tex. Cr. App.) 89 S. W. 835. Where, on a prosecution for the abatement of a public nuisance consisting of a milldam, there was no evidence tending to show that the health of any one traveling on the public highway was affected by the conditions alleged to have been caused by the existence of the dam, an instruction that, if the dam produced such conditions as caused people passing on the highway to become affected with certain diseases, the verdict should be for the commonwealth, was erroneous. Jeremy Imp. Co. v. Commonwealth, 56 S. E. 224, 106 Va. 482. Where a witness had testified that he had had intercourse with the prosecutrix several times prior and but a few months before her alleged seduction by defendant, and there was no evidence that she had reformed, an instruction that if prosecutrix had intercourse with the witness some months prior to her engagement, if any, with the defendant, but had reformed and was leading an absolutely virtuous life at the time defendant became engaged to her, and she had sexual intercourse with him solely because of his promise of marriage, defendant was guilty, was erroneous, as inapplicable to the case. Kerr v. United States, 104 S. W. 809, 7 Ind. T. 486.

[45] People v. Bird, 60 Cal. 7; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340.

The above rule has been applied to instructions on the issue of former jeopardy,[46] on the issue of insanity or intoxication as a defense in a criminal prosecution,[47] on the sufficiency and effect of the possession of stolen property,[48] on the right of the jury to consider the commission of another offense than that charged,[49] on the effect of the making of contradictory statements as impeaching dying declarations,[50] and on the duty of the jury not to allow themselves to be swayed by popular feeling.[51]

In a criminal prosecution, an instruction should not only embody principles of law applicable to the evidence, but it should apply these principles thereto in a concrete form, by appropriate words requiring the jury to find the necessary facts upon which it purports to be based,[52] and an instruction, although correct as

[46] Hartgraves v. State, 114 P. 343, 5 Okl. Cr. 266, 33 L. R. A. (N. S.) 568, Ann. Cas. 1912D, 180.

[47] **Ala.** Goodman v. State, 72 So. 687, 15 Ala. App. 161.

Cal. People v. Goodrum, 160 P. 690, 31 Cal. App. 430.

Idaho. State v. Gruber, 115 P. 1, 19 Idaho, 692.

Ky. Hobbs v. Commonwealth, 162 S. W. 104, 156 Ky. 847; Wilkerson v. Commonwealth, 88 Ky. 29, 9 S. W. 836, 10 Ky. Law Rep. 656.

Mo. State v. Berry, 78 S. W. 611, 179 Mo. 377.

N. M. State v. Orfanakis, 159 P. 674, 22 N. M. 107.

Okl. Hopkins v. State, 108 P. 420, 4 Okl. Cr. 194, rehearing denied 111 P. 947, 4 Okl. Cr. 194.

Pa. Commonwealth v. Henderson, 89 A. 567, 242 Pa. 372.

Tex. Johnson v. State, 193 S. W. 674, 81 Tex. Cr. R. 71; Marion v. State, 190 S. W. 499, 80 Tex. Cr. R. 478; Cozby v. State, 189 S. W. 957, 80 Tex. Cr. R. 323; Kelly v. State, 149 S. W. 110, 67 Tex. Cr. R. 72; Cross v. State (Cr. App.) 101 S. W. 213; Menach v. State (Cr. App.) 97 S. W. 503; Griffith v. State, 78 S. W. 347, 47 Tex. Cr. R. 64; Stokes v. State (Cr. App.) 70 S. W. 95.

W. Va. State v. Donahue, 90 S. E. 834, 79 W. Va. 260.

Wyo. Mortimore v. State, 161 P. 766, 24 Wyo. 452.

[48] Carson v. State, 86 S. W. 1011, 48 Tex. Cr. R. 157.

[49] Hayes v. State, 36 Tex. Cr. R. 146, 35 S. W. 983.

[50] State v. Johns, 182 N. W. 832, 152 Iowa, 383.

[51] People v. Yun Kee, 96 P. 95, 8 Cal. App. 82.

[52] **Ala.** Roberts v. State, 54 So. 993, 171 Ala. 12.

Ga. Hall v. State, 65 S. E. 400, 133 Ga. 177; Roberts v. State, 40 S. E. 297, 114 Ga. 450.

Ill. People v. Schallman, 113 N. E. 113, 273 Ill. 564; People v. Israel, 109 N. E. 969, 269 Ill. 284.

Ky. Ayers v. Commonwealth, 145 S. W. 1106, 147 Ky. 801; Id., 145 S. W. 1107, 147 Ky. 804.

Miss. Lamar v. State, 64 Miss. 428, 1 South. 354; Gerdine v. Same, 64 Miss. 798, 2 South. 313.

Mont. State v. Smith, 190 P. 107, 57 Mont. 563; Same v. Dunn, 190 P. 121, 57 Mont. 591.

N. J. State v. Rombolo, 103 A. 203, 91 N. J. Law, 560.

Tex. Le Master v. State, 196 S. W. 829, 81 Tex. Cr. R. 577; Smith v. State, 148 S. W. 699, 67 Tex. Cr. R. 27; Godsoe v. State, 108 S. W. 388, 52 Tex. Cr. R. 626; Brittain v. State, 105 S. W. 817, 52 Tex. Cr. R. 169; Puryear v. State, 28 Tex. App. 73, 11 S. W. 929; Knowles v. State, 27 Tex. App. 503, 11 S. W. 522; Riojas v. State, 9 Tex. App. 95; Berry v. State, 8 Tex. App. 515; Miles v. State, 1 Tex. App. 510.

W. Va. State v. Hertzog, 46 S. E. 792, 55 W. Va. 74; State v. Sheppard, 39 S. E. 676, 49 W. Va. 582.

Instructions held properly refused within rule. Where defendant went onto decedent's premises to set-

an abstract proposition of law, is error if it leaves the jury in doubt as to how it should be applied to the evidence.[53] Thus, where the defendant in a criminal case asks for an instruction which would be correct only under an exceptional state of facts, he must preface the instruction by a predicate which would bring it under the operation of such a state of facts.[54] So a charge on insanity as a defense should be applied to the particular facts of the case on trial.[55] So, if an issue is raised by the evidence as to whether a witness is an accomplice or not, and there is evidence that he did certain things, or omitted to do certain things, which in law would make him an accomplice, the jury should be told to find that he was an accomplice, if they believe from all the evidence that such things were done or omitted by him, and a mere abstract proposition of law as to what constitutes an accomplice is insufficient.[56] However, a charge stating the law in general terms, without stating the exceptions, is not improper, where there is no evidence tending to bring the case within such exceptions,[57] and it is not necessary that an instruction on circumstantial evidence should make an application of the law to the facts.[58]

Since the instructions should be applicable to the issues in the

tle a claim for damages resulting from the escape of defendant's hogs and an altercation ensued in which defendant killed deceased, it was not error to refuse to charge that defendant was entitled to go on decedent's premises to transact any legitimate business; such statement being a mere abstract assertion of one of defendant's legal rights. Robinson v. Commonwealth, 148 S. W. 45, 149 Ky. 291.

Instructions held not objectionable within rule. Where, in a prosecution for manslaughter the court instructed that the instrument used was to be considered in judging intent, and if it were one not likely to produce death the intent to kill was not to be presumed unless it evidently appeared from the manner of use; also, that where homicide occurred under the influence of sudden passion, by means not in their nature calculated to produce death, the person doing the killing was not guilty of homicide, unless the intent to kill appeared, but he might be prosecuted for any grade of assault and battery, and then instructed that if the jury found defendant struck decedent and killed him, but did not find that he intended to do so, they might find defendant guilty of aggravated assault and battery, after which followed a number of definitions relative to assault and battery, and an instruction that if defendant struck decedent with a stick with no intention of killing, and he was not justified on the grounds of self-defense, etc., they might find defendant guilty of assault and battery, it was held that the first two instructions were not objectionable on account of failure to apply the principles therein enunciated to the facts of the case. Perrin v. State, 78 S. W. 930, 45 Tex. Cr. R. 560.

[53] Davis v. State, 51 N. E. 928, 152 Ind. 34. 71 Am. St. Rep. 322.

[54] State v. Collette, 31 So. 73, 106 La. 423.

[55] Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Stewart v. State (Tex. Cr. App.) 77 S. W. 791.

[56] Armstrong v. State, 33 Tex. Cr. R. 417, 26 S. W. 829.

[57] State v. Downer, 21 Wis. 274.

[58] Grimsinger v. State, 69 S. W. 583, 44 Tex. Cr. R. 1.

case, the court need not and should not instruct on matters not in dispute between the parties.[59]

§ 139. Evidence excluded or withdrawn, or improperly admitted

Instructions based on evidence which the court has properly excluded,[60] or which has been withdrawn by the party introducing it,[61] or which has been improperly admitted by the court,[62] or which has been withdrawn from the jury because illegally ad-

[59] **Ala.** Watts v. State, 63 So. 18, 8 Ala. App. 264; Mitchell v. State, 30 So. 348, 129 Ala. 23; McLeroy v. State, 25 So. 247, 120 Ala. 274; Scroggins v. State, 25 So. 180, 120 Ala. 369; Gafford v. State, 25 So. 10, 122 Ala. 54; Rose v. State, 23 So. 638, 117 Ala. 77.

Ark. Lowery v. State, 203 S. W. 838, 135 Ark. 159.

Ill. People v. Lehr, 63 N. E. 725, 196 Ill. 361, affirming judgment 93 Ill. App. 505.

Iowa. State v. Sparegrove, 112 N. W. 83, 134 Iowa, 599.

Kan. State v. Loomer, 184 P. 723, 105 Kan. 410.

Ky. Southern Express Co. v. Commonwealth, 198 S. W. 207, 177 Ky. 767.

Mo. State v. Atchley, 84 S. W. 984, 186 Mo. 174.

S. C. State v. Thrailkill, 50 S. E. 551, 71 S. C. 136.

S. D. State v. Johnson, 149 N. W. 730, 34 S. D. 601.

Tex. Mosley v. State, 198 S. W. 146, 82 Tex. Cr. R. 16; Loggins v. State, 149 S. W. 170, 67 Tex. Cr. R. 438; Bailey v. State, 144 S. W. 996, 65 Tex. Cr. R. 1; Trinkle v. State, 131 S. W. 583, 60 Tex. Cr. R. 187; Moore v. State, 114 S. W. 807, 55 Tex. Cr. R. 3; McKinzie v. State (Cr. App.) 102 S. W. 414; Williams v. State (Cr. App.) 51 S. W. 904; Sanders v. State, 42 S. W. 983, 38 Tex. Cr. R. 343.

[60] **Ala.** Birmingham Ry., Light & Power Co. v. Moseley, 51 So. 424, 164 Ala. 111; Rarden v. Cunningham, 34 So. 26, 136 Ala. 263.

Ark. Pleasants v. Scott, 21 Ark. 370, 76 Am. Dec. 403.

Ga. Whitehead v. Pitts, 56 S. E. 1004, 127 Ga. 774.

Ill. People v. Johns, 190 Ill. App. 367.

Md. Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co., 82 A. 372, 116 Md. 422; Morrison v. Welty, 18 Md. 169.

Mass. Commonwealth v. Cosseboom, 155 Mass. 298, 29 N. E. 463.

Mich. Township School Dist. of Wakefield v. MacRae, 165 N. W. 618, 198 Mich. 693.

Mo. Nafziger v. Mahan (App.) 191 S. W. 1080; Lattimore v. Union Electric Light & Power Co., 106 S. W. 543, 128 Mo. App. 37.

Neb. Mefford v. Sell, 92 N. W. 148, 3 Neb. (Unof.) 566; Pease Piano Co. v. Cameron, 76 N. W. 1053, 56 Neb. 561.

N. Y. Atlantic Communication Co. v. Zimmermann, 170 N. Y. S. 275, 182 App. Div. 862; Foley v. Xavier, 93 N. Y. S. 289, 104 App. Div. 1.

S. D. Sheffield v. Eveleth, 97 N. W. 367, 17 S. D. 461.

Tex. Cosgrove v. Smith (Civ. App.) 183 S. W. 109; International & G. N. R. Co. v. Moynahan, 76 S. W. 803, 33 Tex. Civ. App. 302.

Wash. Rich v. Ryan, 175 P. 32, 103 Wash. 474; Nye v. Kelly, 52 P. 528, 19 Wash. 73.

[61] Hayes v. Kelley, 116 Mass. 300.

[62] **Conn.** St. Martin v. New York, N. H. & H. R. Co., 94 A. 279, 89 Conn. 405, L. R. A. 1916D, 1035.

Ga. American Harrow Co. v. Dolvin, 45 S. E. 983, 119 Ga. 186.

Ill. Republic Iron & Steel Co. v. Radis, 106 Ill. App. 530.

Ind. Williams v. Atkinson, 52 N. E. 603, 152 Ind. 98.

Iowa. Conger v. Bean, 58 Iowa, 321, 12 N. W. 284.

Mich. Molyneaux v. Bradley Miller & Co., 132 N. W. 1013, 167 Mich. 278.

Mo. Weaver v. Hendrick, 30 Mo. 502.

Mont. Ford v. Drake, 127 P. 1019, 46 Mont. 314.

N. J. O. J. Gude Co., New York v.

mitted,[63] are erroneous, and properly refused, and a party on whose motion evidence has been stricken out is not entitled to an instruction based thereon.[64]

§ 140. Sufficiency of evidence to support instructions

Sufficiency of evidence as predicate for instruction on confessions, see post, § 221.

Sufficiency of evidence to authorize or require instructions on alibi, see post, § 331.

Sufficiency of evidence to sustain instructions on credibility of witnesses, see post, § 149.

Sufficiency of evidence to sustain instructions on grade of degree of offense, see post, § 316.

Courts have expressed themselves in varying phraseology with respect to the amount of evidence required to support an instruction. In some jurisdictions it has been said that if the evidence tends to prove the facts upon which an instruction is based,[65] or tends to prove such facts in an appreciable degree,[66] the instruction will be justified. In other jurisdictions it is held that slight evidence of the facts upon which an instruction is predicated will preclude the objection that it is abstract, and warrant the giving of it.[67] In still other jurisdictions the rule is that it is proper to

Newark Sign Co., 101 A. 392, 90 N. J. Law, 686.

N. Y. Finck v. Schaubacher, 69 N. Y. S. 977, 34 Misc. Rep. 547.

Tex. Lipscomb v. Adamson Lumber Co. (Civ. App.) 217 S. W. 228; Rotan Grocery Co. v. Martin (Civ. App.) 57 S. W. 706.

Va. Carlin & Co. v. Fraser, 53 S. E. 145, 105 Va. 216; Norfolk & W. Ry. Co. v. Stevens, 34 S. E. 525, 97 Va. 631, 46 L. R. A. 367.

W. Va. Anderson v. Lewis, 61 S. E. 160, 64 W. Va. 297.

Wis. Coman v. Wunderlich, 99 N. W. 612, 122 Wis. 138.

Compare Leary v. State, 117 S. W. 822, 55 Tex. Cr. R. 547.

[63] Salter v. Williams, 10 Ga. 186.

[64] Bluefield Produce & Commission Co. v. City of Bluefield, 77 S. E. 277, 71 W. Va. 696.

[65] **Ind.** Harris v. State, 58 N. E. 75, 155 Ind. 265.

Tenn. Goodall v. Thurman, 1 Head, 209.

Va. Dingee v. Unrue's Adm'x, 35 S. E. 794, 98 Va. 247; Carpenter v. Virginia-Carolina Chemical Co., 35 S. E. 358, 98 Va. 177; Tyson v. Williamson, 32 S. E. 42, 96 Va. 636; Reusens v. Lawson, 31 S. E. 528, 96 Va. 285; Washington Southern Ry. Co. v. Lacey, 94 Va. 460, 26 S. E. 834; Early v. Garland's Lessee, 13 Grat. 1.

W. Va. Carrico v. West Virginia C. & P. Ry. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50; State v. Betsall, 11 W. Va. 703.

Evidence not such as should convince a jury. Where there is testimony tending to establish a particular result, a prayer for instructions affirming an admitted legal proposition, and which involves the consideration of this testimony, cannot be denied on the ground that it is abstract, because the evidence is not such as should convince the jury. Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238.

[66] Lyons v. Fairmont Real Estate Co., 77 S. E. 525, 71 W. Va. 754.

[67] **Ala.** Knowles v. Ogletree, 96 Ala. 555, 12 So. 397; Miller v. State, 54 Ala. 155; Hair v. Little, 28 Ala. 236; Bradford v. Marbury, 12 Ala. 520, 46 Am. Dec. 264.

Ark. Goodell v. Bluff City Lumber Co., 57 Ark. 203, 21 S. W. 104; McNeill v. Arnold, 22 Ark. 477.

refuse an instruction not supported by some substantial evidence.[68]

Whether any real conflict of authority is indicated by the above difference in phrasing is doubtful. The courts are agreed that it is proper to refuse an instruction supported by a mere scintilla of evidence,[69] and the modern doctrine is that evidence which is insufficient to sustain a finding upon a particular issue will be insufficient to support an instruction upon such issue.[70] The court should not give an instruction embodying a proposition which the

Cal. Perlberg v. Gorham, 10 Cal. 120.

Conn. Rumberg v. Cutler, 84 A. 107, 86 Conn. 8.

Fla. Florida Ry. & Navigation Co. v. Webster, 25 Fla. 394, 5 So. 714.

Ga. Camp v. Phillips, 42 Ga. 289.

Ill. Thompson v. Duff, 119 Ill. 226, 10 N. E. 399; Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226, 4 N. E. 840; Eames v. Rend, 105 Ill. 506; Kane v. Torbit, 23 Ill. App. 311.

Ind. Brunaugh v. State, 90 N. E. 1019, 173 Ind. 483; State v. Carey, 55 N. E. 261, 23 Ind. App. 378; Reed v. State, 40 N. E. 525, 141 Ind. 116.

Kan. McKnight v. Strasburger Bldg. Co., 150 P. 542, 96 Kan. 118.

Ky. Minor v. Gordon, 188 S. W. 768, 171 Ky. 790, modifying judgment on rehearing 186 S. W. 480, 170 Ky. 609; Lischy v. Schrader, 47 S. W. 611, 104 Ky. 657, 20 Ky. Law Rep. 843.

Mich. Carrell v. Kalamazoo Cold-Storage Co., 70 N. W. 323, 112 Mich. 34.

Mo. Hofelman v. Valentine, 26 Mo. 393.

S. C. Brucke v. Hubbard, 54 S. E. 249, 74 S. C. 144.

W. Va. Snedeker v. Rulong, 71 S. E. 180, 69 W. Va. 223.

[68] Bagdad Land & Lumber Co. v. Poston, 68 So. 180, 69 Fla. 340; Miller v. Neale, 119 N. W. 94, 137 Wis. 426, 129 Am. St. Rep. 1077.

In Wisconsin an early decision held that, where a requested instruction covers a point material to the issue, and there is some evidence tending to support it, its refusal is error; whether the facts stated therein are true or not being a question for the jury, not for the court. Sailer v. Barnousky, 60 Wis. 169, 18 N. W. 763.

[69] Leverich v. Danville Collieries Coal Co., 193 Ill. App. 627; Gould v. Gilligan, 64 N. E. 409, 181 Mass. 600; Chesapeake & O. Ry. Co. v. F. W. Stock & Sons, 51 S. E. 161, 104 Va. 97.

[70] **U. S.** (C. C. A. Ark.) American Surety Co. v. Choctaw Const. Co., 135 F. 487, 68 C. C. A. 199.

Minn. Knapp v. Northern Pac. R. Co., 166 N. W. 409, 139 Minn. 338.

Tex. International & G. N. R. Co. v. Hall, 12 Tex. Civ. App. 11, 33 S. W. 127; Odle v. State, 13 Tex. App. 612.

Va. Upton & Walker v. R. D. Holloway & Co., 102 S. E. 54, 126 Va. 657; American Locomotive Co. v. Whitlock, 63 S. E. 991, 109 Va. 238.

W. Va. McDonald v. Cole, 32 S. E. 1033, 46 W. Va. 186.

Evidence on issue considered in connection with evidence on correlative issues. To justify an instruction upon an issue of fact, there should not only be evidence tending to establish that fact, but it should be sufficient, either alone or in connection with other evidence upon correlative issues, to sustain the finding. Antone v. Miles, 105 S. W. 39, 47 Tex. Civ. App. 289.

In Virginia, where the courts now support the rule stated in the text, some of the earlier cases held that evidence tending to prove a fact was sufficient to justify an instruction applicable thereto, if requested, though the evidence was insufficient to support a verdict founded thereon. Jones v. Morris, 33 S. E. 377, 97 Va. 43; Richmond Passenger & Power Co. v. Allen, 43 S. E. 356, 101 Va. 200; Southern Ry. Co. v. Wilcox, 39 S. E. 144, 99 Va. 394.

evidence does not tend in an appreciable degree to support,[71] and it is proper to refuse an instruction whose only basis is evidence which amounts to mere conjecture, or merely affords the possibility of an inference,[72] or an instruction based upon immaterial and nonprobative facts incidentally revealed on the trial of an issue,[73] or an instruction predicated upon isolated portions of the testimony in support of the theory of a party and assuming the truth of controverted facts.[74] An instruction based upon a hypothesis which is contrary to the physical facts is erroneous, and is properly refused.[75]

On the other hand, an instruction will not constitute reversible error, if there is any appreciable evidence tending to support it, although, on the final test, such evidence is not sufficient to support the verdict.[76] Evidence which will justify an instruction may be either direct, or founded on reasonable inference from other evidence,[77] and it is not error to give an instruction based on a theory of the facts which may reasonably be argued from

[71] Diddle v. Continental Casualty Co., 63 S. E. 962, 65 W. Va. 170, 22 L. R. A. (N. S.) 779.

[72] Commonwealth v. Boutwell, 162 Mass. 230, 38 N. E. 441; Kopacin v. Crown-Columbia Pulp & Paper Co., 125 P. 281, 62 Or. 291; Reynolds v. State, 8 Tex. App. 493.

[73] Palmer v. Magers, 102 S. E. 100, 85 W. Va. 415.

[74] Foley v. Riverside Storage & Cartage Co., 48 N. W. 154, 85 Mich. 7.

[75] Colorado & S. Ry. Co. v. Davis, 127 P. 249, 23 Colo. App. 41; State v. Vaughan, 98 S. W. 2, 200 Mo. 1; Curtis v. Hudson Valley Ry. Co., 143 N. Y. S. 383, 158 App. Div. 373.

[76] Barna v. Gleason Coal & Coke Co., 98 S. E. 158, 83 W. Va. 216; Myers v. Cook (W. Va.) 104 S. E. 593.

[77] Sovereign Camp, Woodmen of the World, v. McDaniel, 93 S. E. 105, 20 Ga. App. 430; Peoria Marine & Fire Ins. Co. v. Anapow, 45 Ill. 86; Stephan v. Metzger, 69 S. W. 625, 95 Mo. App. 609; Maes v. Texas & N. O. Ry. Co. (Tex. Civ. App.) 23 S. W. 725.

Implied warranty. Where defendant, in an action by a purchaser of corn to rescind the sale, counterclaims, and testifies that the purchaser informed him that he intended to use the corn for seed, an instruction on the subject of implied warranty was properly given. Totten v. Stevenson, 135 N. W. 715, 29 S. D. 71.

Inference of knowledge of ordinance. Where the evidence showed that a street car was operated at a speed in excess of that fixed by a municipal ordinance, the court properly charged that a pedestrian could presume that the ordinance was not being violated, and that the pedestrian knew of the ordinance, though there was no evidence of such knowledge. Richmond v. Tacoma Ry. & Power Co., 122 P. 351, 67 Wash. 444.

Justification for use of particular words. An objection to the use of the word "compelling," in an instruction that, if defendant and his brother armed themselves with the intention of compelling decedent to apologize, and upon his failing to do so shot and killed him, they would both be guilty of murder, was not tenable, though no witness had used the word "compel," and though defendant testified that his brother said he was going to "ask" decedent to apologize; it appearing that the mother of defendant stated that defendant's brother said he would "make" decedent apologize. Pipkin v. State, 97 S. W. 61, 80 Ark. 617.

the evidence.[78] It is not necessary that the trial court should be entirely satisfied of the existence of the facts upon which an instruction is founded in order to be justified in giving it,[79] or that the jury might not conceivably have found the nonexistence of such facts,[80] and an instruction should not be refused merely because the court may believe that the weight of the evidence does not support it,[81] or because the evidence on which it is based appears improbable[82] or inconclusive, or unsatisfactory,[83] or because the preponderance of the evidence is against the theory of the existence of the facts upon which it is based.[84] A theory of the case supported by the testimony of but one witness may be submitted to the jury.[85]

In a criminal case the testimony of defendant must be taken as true for the purpose of determining whether there is evidence on which to base an instruction asked by him,[86] and an instruction based on an hypothesis which is supported by the congruous parts of the testimony of several witnesses is not objectionable, as not justified by the evidence.[87]

A conflict in the evidence on a particular issue will warrant the court in instructing thereon,[88] or will make it error for the court to refuse an instruction on such issue,[89] or will make it proper to refuse an instruction ignoring such issue;[90] and, conversely, the fact that the evidence is conflicting with respect to the exist-

[78] Wahlgren v. Market St. Ry. Co., 62 P. 308, 132 Cal. 656, judgment affirmed on rehearing 64 P. 993, 132 Cal. 656.

[79] Flourney v. Andrews, 5 Mo. 518.

[80] McDonald v. New World Life Ins. Co., 136 P. 702, 76 Wash. 488.

[81] Peoria, D. & E. Ry. Co. v. Puckett, 42 Ill. App. 642; De Camp v. Mississippi & M. R. Co., 12 Iowa, 348; State v. Wright, 40 La. Ann. 589, 4 South. 486, reaffirming Same v. Tucker (1886) 38 La. Ann. 536; Washington v. State, 110 S. W. 751, 53 Tex. Cr. R. 480, 126 Am. St. Rep. 800, Stuart v. Smith-Courtney Co., 96 S. E. 241, 123 Va. 231.

[82] Gilliam v. State, 50 Ala. 145; State v. Thompson, 45 La. Ann. 969, 13 South. 392; Jones v. State, 33 Tex. Cr. R. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; Parker v. State (Tex. Cr. App.) 34 S. W. 265.

[83] Rutherford v. State, 15 Tex. App. 236; Laurence v. State, 10 Tex. App. 495; Scott v. Same, 10 Tex. App. 112; Davis v. Same, 10 Tex. App. 31; Whaley v. Same, 9 Tex. App. 305; Sisk v. State, 9 Tex. App. 246; Brown v. State, 9 Tex. App. 81; Heath v. State, 7 Tex. App. 464.

[84] Newbury v. Getchell & Martin Lumber & Manufacturing Co., 69 N. W. 743, 100 Iowa, 441, 62 Am. St. Rep. 582.

[85] Christy v. Des Moines City Ry. Co., 102 N. W. 194, 126 Iowa, 428.

[86] Dial v. State, 49 So. 230, 159 Ala. 66, 133 Am. St. Rep. 19; People v. Williamson, 92 P. 313, 6 Cal. App. 336; McCampbell v. State, 174 S. W. 345, 76 Tex. Cr. R. 245.

[87] Root v. Quincy, O. & K. C. R. Co., 141 S. W. 610, 237 Mo. 640.

[88] Byrne v. Doughty, 13 Ga. 46; Lee v. Conrad, 117 N. W. 1096, 140 Iowa, 16.

[89] Hart v. Buckley, 128 P. 29, 164 Cal. 160.

[90] Trinity & B. V. Ry. Co. v. Doke (Tex. Civ. App.) 152 S. W. 1174.

ence of the facts upon which an instruction is based does not make the giving of it erroneous, as not supported by the evidence.[91]

The request of a party for instructions should not be refused because they are based upon the evidence of his adversary,[92] and the substance of an issue need only be proved to authorize the presentation of it to the jury.[93]

§ 141. Who to determine question of sufficiency of evidence

The trial court must determine whether there is any proper evidence on which the jury may find a fact in relation to which an instruction is sought or proposed to be given,[94] and it is improper for the court to give an instruction and make its consideration by the jury dependent upon whether they find that there is or is not evidence on which to base it.[95]

§ 142. Effect of violation of rule

An instruction which violates the above rule[96] will constitute reversible error, if it is prejudicial to the party complaining thereof or is calculated to mislead the jury,[97] or, as some courts hold,

[91] **Fla.** Walker v. Lee, 40 So. 881, 51 Fla. 360.

Ill. Gibson v. Lafferty, 180 Ill. App. 629.

Iowa. Waltham Piano Co. v. Lindholm Furniture Co., 150 N. W. 1040, 168 Iowa, 728.

Mo. Darr v. Gratiot Bldg. Co. (App.) 198 S. W. 481.

Neb. Atkins v. Gladwish, 27 Neb. 841, 44 N. W. 37.

Tex. Hayes v. State (Tex. Cr. App.) 39 S. W. 106; Wasson v. State, 3 Tex. App. 474.

Instruction based on contradictory testimony of single witness. A request to charge the legal effect of a portion of the testimony of the sole witness for the plaintiff is properly refused, where the same witness on cross-examination contradicts the matters to which the request relates. Hardeman v. Bell, 47 S. E. 919, 120 Ga. 342.

[92] Hedges v. Metropolitan St. Ry. Co., 102 S. W. 1086, 125 Mo. App. 583.

[93] Texas & N. O. R. Co. v. Scarborough (Tex. Civ. App.) 104 S. W. 408, judgment affirmed 108 S. W. 804, 101 Tex. 436.

[94] Parkinson v. Kortum, 127 N. W. 208, 148 Iowa, 217.

[95] John L. Rowan & Co. v. Hull, 47 S. E. 92, 55 W. Va. 335, 104 Am. St. Rep. 998.

[96] Ante, § 137.

[97] **U. S.** (C. C. N. Y.) Brixey v. City of New York, 145 F. 1016.

Ark. El Dorado & B. R. Co. v. Whatley, 114 S. W. 234, 88 Ark. 20, 129 Am. St. Rep. 93.

Ga. Fruit Dispatch Co. v. Roughton-Halliburton Co., 70 S. E. 356, 9 Ga. App. 108; Mendel v. Miller & Sons, 56 S. E. 88, 126 Ga. 834, 7 L. R. A. (N. S.) 1184.

Ill. Cox v. Cleveland, C., C. & St. L. Ry. Co., 151 Ill. App. 473; McFall v. Smith, 32 Ill. App. 463.

Iowa. Morton v. Woods, 135 N. W. 400, 154 Iowa, 728; Yeager v. Chicago, R. I. & P. Ry. Co., 123 N. W. 974, 148 Iowa, 231; Burke v. Mally, 120 N. W. 305, 141 Iowa, 555.

Ky. Louisville Ry. Co. v. Buckner's Adm'r, 113 S. W. 90.

Mich. James v. Shores, 151 N. W. 558, 184 Mich. 460.

Minn. Lacey v. Minneapolis St. Ry. Co., 136 N. W. 878, 118 Minn. 301.

Mo. Crumley v. Western Tie & Timber Co., 129 S. W. 46, 144 Mo. App. 528.

Neb. Hutchinson v. Western Bridge

unless it is clearly shown not to be harmful.[98] On the other hand, a judgment will not be reversed because of the giving of instructions not based upon the evidence, if the party complaining is not prejudiced thereby or the jury is not misled.[99]

& Construction Co., 150 N. W. 198, 97 Neb. 439.

N. J. Baker v. North Jersey St. Ry. Co., 72 A. 434, 77 N. J. Law, 336.

N. Y. Wells v. Baker, 126 N. Y. S. 923, 141 App. Div. 717; McDonnell v. Andrew J. Robinson Co., 100 N. E. 45, 206 N. Y. 489, reversing judgment 127 N. Y. S. 1130, 143 App. Div. 905.

Okl. Continental Supply Co. v. Patrick, 168 P. 996.

R. I. Di Sandro v. Providence Gas Co., 102 A. 617, 40 R. I. 551.

Tex. Crawford v. Thos. Goggan & Bros. (Civ. App.) 217 S. W. 1106; Texas & P. Ry. Co. v. White (Civ. App.) 174 S. W. 953; San Antonio & A. P. Ry. Co. v. Weigers, 54 S. W. 910, 22 Tex. Civ. App. 344.

Va. Newport News & O. P. Ry. & Electric Co. v. McCormick, 56 S. E. 281, 106 Va. 517.

Wis. Ward v. Henry, 19 Wis. 76, 88 Am. Dec. 672.

[98] Baltimore & O. R. Co. v. Peck, 101 N. E. 674, 53 Ind. App. 281.

[99] **Ala.** Carrington v. Odom, 27 So. 510, 124 Ala. 529; Towns v. Riddle, 2 Ala. 694.

Ark. McNeill v. Arnold, 22 Ark. 477.

Cal. Renfro v. Fresno City Ry. Co., 84 P. 357, 2 Cal. App. 317.

Colo. Houck v. Williams, 81 P. 800, 34 Colo. 138.

Ga. Conley v. Buck, 28 S. E. 97, 100 Ga. 187.

Ill. Chicago & A. Ry. Co. v. Walters, 75 N. E. 441, 217 Ill. 87; Blatchford v. Boyden, 122 Ill. 657, 13 N. E. 801; Corbin v. Sheerer, 3 Gilman, 482.

Ind. Indianapolis St. Ry. Co. v. Hackney, 77 N. E. 1048, 39 Ind. App. 372; Boltz v. Smith, 3 Ind. App. 43, 29 N. E. 155.

Iowa. Camp v. Chicago Great Western Ry. Co., 99 N. W. 735, 124 Iowa, 238.

Kan. Hackler v. Evans, 79 P. 669, 70 Kan. 896.

Ky. Louisville & N. R. Co. v. Guttman, 146 S. W. 731, 148 Ky. 235; Savage v. Bulger, 77 S. W. 717, 25 Ky. Law Rep. 1269.

Md. Coffin v. Brown, 50 A. 567, 94 Md. 190, 55 L. R. A. 732, 89 Am. St. Rep. 422.

Mich. Tobin v. Modern Woodmen of America, 85 N. W. 472, 126 Mich. 161.

Mo. Murphy v. Metropolitan St. Ry. Co., 102 S. W. 64, 125 Mo. App. 269; Sack v. St. Louis Car Co., 87 S. W. 79, 112 Mo. App. 476; Claflin v. Sommers, 39 Mo. App. 419.

Mont. Thornton-Thomas Mercantile Co. v. Bretherton, 80 P. 10, 32 Mont. 80.

Neb. Clark v. Folkers, 95 N. W. 328, 1 Neb. (Unof.) 96.

N. Y. Goodstein v. Brooklyn Heights R. Co., 74 N. Y. S. 1017, 69 App. Div. 617.

N. C. Eubanks v. Alspaugh, 52 S. E. 207, 139 N. C. 520.

Ohio. French v. Millard, 2 Ohio St. 44.

Pa. Kramer v. Winslow, 154 Pa. 637, 25 A. 766.

S. C. Burns v. Goddard, 51 S. E. 915, 72 S. C. 355.

Tenn. Southern Oil Works v. Bickford, 14 Lea, 651; Hatfield v. Griffith, 1 Lea, 300.

Tex. Sheldon Canal Co. v. Miller, 90 S. W. 206, 40 Tex. Civ. App. 460.

Va. Poore v. Magruder, 24 Grat. 197.

Wash. Irwin v. Buffalo Pitts Co., 81 P. 849, 39 Wash. 346; Martin v. Union Mut. Life Ins. Co., 13 Wash. 275, 43 Pac. 53.

W. Va. Maxwell v. Kent, 39 S. E. 174, 49 W. Va. 542.

Wis. Barker v. Knickerbocker Life Ins. Co., 24 Wis. 630.

D. Instructions Excluding or Ignoring Issues, Defenses, or Evidence

§ 143. General rule

As a general rule, instructions which exclude or ignore issues or defenses upon which there is some evidence, or having support in the evidence, are erroneous,[1] and are properly refused;[2]

[1] **U. S.** (C. C. A. Alaska) Dome City Bank v. Barnett, 184 F. 607, 106 C. C. A. 611.

Ala. Mann v. Darden, 60 So. 454, 6 Ala. App. 555; Woodward Iron Co. v. Brown, 52 So. 829, 167 Ala. 316; Hyde v. Cain, 47 So. 1014, 159 Ala. 364; Davis v. Miller Brent Lumber Co., 44 So. 639, 151 Ala. 580; Duncan v. St. Louis & S. F. R. Co., 44 So. 418, 152 Ala. 118; Sherrell v. Louisville & N. R. Co., 44 So. 153, 148 Ala. 1; C. N. Robinson Co. v. Green, 43 So. 797, 148 Ala. 434; Loveman v. Birmingham Ry., L. & P. Co., 43 So. 411, 149 Ala. 515.

Ark. W. A. Smith & Bro. v. Spinnenweber & Peters, 170 S. W. 84, 114 Ark. 384; Richardson v. Cohen, 150 S. W. 574, 105 Ark. 697; St. Louis & S. F. R. Co. v. Van Zant, 142 S. W. 1144, 101 Ark. 586; Rector v. Robins, 102 S. W. 209; 82 Ark. 424; Southern Express Co. v. Hill, 98 S. W. 371, 81 Ark. 1; Bayles v. Daugherty, 91 S. W. 304, 77 Ark. 201.

Cal. Quackenbush v. Los Angeles Ry. Corporation, 151 P. 755, 28 Cal. App. 173; Waterman v. Visalia Electric R. Co., 137 P. 1096, 23 Cal. App. 350.

Colo. King Solomon Tunnel & Development Co. v. Mary Verna Mining Co., 127 P. 129, 22 Colo. App. 528; Kent Mfg. Co. v. Zimmerman, 110 P. 187, 48 Colo. 388.

Conn. Newell v. Roberts, 13 Conn. 63.

Fla. Mulliken v. Harrison, 44 So. 426, 53 Fla. 255.

Ga. Purvis v. Atlanta Northern Ry. Co., 72 S. E. 343, 136 Ga. 852; Wadsworth v. Wadsworth, 68 S. E. 649, 134 Ga. 816; Susong v. McKenna, 55 S. E. 236, 126 Ga. 433.

Idaho. Soule v. First Nat. Bank of Ashton, 140 P. 1098, 26 Idaho, 66.

Ill. Costly v. McGowan, 50 N. E. 1047, 174 Ill. 76; Lockett v. Zimmermann, 185 Ill. App. 58; Connor v. American Spirits Mfg. Co., 175 Ill. App. 159; Tate v. Cleveland, C., C. & St. L. Ry. Co., 147 Ill. App. 155; Springfield Consol. Ry. Co. v. Gregory, 122 Ill. App. 607; Merry v. Calvin, 122 Ill. App. 459; George E. Lloyd & Co. v. Matthews, 119 Ill. App. 546, affirmed Same v. Matthews & Rice (1906) 79 N. E. 172, 223 Ill. 477, 7 L. R. A. (N. S.) 376; (1906) Morris v. Chicago Union Traction Co., 119 Ill. App. 527; St. Louis & B. Electric Ry. Co. v. Erlinger, 112 Ill. App. 506; Schnellbacher v. Frank McLaughlin Plumbing Co., 108 Ill. App. 486; Union Stockyard & Transit Co. v. Goodman, 91 Ill. App. 426.

Ind. Julius Keller Const. Co. v. Herkless, 109 N. E. 797, 59 Ind. App. 472; Neeley v. Louisville & S. I. Traction Co., 102 N. E. 455, 53 Ind. App. 659.

Iowa. Boone v. Lohr, 154 N. W. 591, 172 Iowa, 440; First Nat. Bank of Shenandoah v. Cook, 153 N. W. 169, 171 Iowa, 41; Schlichting v. Rowell, 119 N. W. 151, 140 Iowa, 731; Lauer v. Banning, 118 N. W. 446, 140 Iowa, 319.

Kan. Bartholomew v. Fell, 139 P. 1016, 92 Kan. 64; Taggart v. Chicago, R. I. & P. Ry. Co., 115 P. 534, 84 Kan. 671; Nash v. Barton Salt Co., 111 P. 462, 83 Kan. 447.

Ky. South Covington & C. St. Ry. Co. v. Barr, 144 S. W. 755, 147 Ky. 549; Baker v. Crescent Coal Co., 133 S. W. 1146, 142 Ky. 191.

Md. Anne Arundel County Com'rs v. Carr, 73 A. 668, 111 Md. 141; Adams v. Commissioners of Somerset County, 66 A. 695, 106 Md. 197; Singer

[2] See note 2 on page 288.

this rule applying to instructions ignoring issues and defenses in

Sewing Mach. Co. v. Lee, 66 A. 628, 105 Md. 663.

Mich. Parmalee v. Wigent's Estate, 155 N. W. 577, 189 Mich. 507; Karwick v. Pickands, 137 N. W. 219, 171 Mich. 463; Commercial Bank v. Chatfield, 80 N. W. 712, 121 Mich. 641.

Miss. Yazoo & M. V. R. Co. v. Bruce, 54 So. 241, 98 Miss. 727.

Mo. Botts v. Chicago, B. & Q. R. Co., 167 S. W. 1154, 180 Mo. App. 368; Roberts v. Wabash R. Co., 134 S. W. 89, 153 Mo. App. 638; Phelan v. Granite Bituminous Paving Co., 127 S. W. 318, 227 Mo. 666, 137 Am. St. Rep. 582; Cytron v. St. Louis Transit Co., 104 S. W. 109, 205 Mo. 692; Zeis v. St. Louis Brewing Ass'n, 104 S. W. 99, 205 Mo. 638; State ex rel. Shipman v. Allen, 103 S. W. 1090, 124 Mo. App. 465; Trimble v. Moore, 102 S. W. 1057, 125 Mo. App. 601; Ern v. Rubinstein, 72 Mo. App. 337.

Mont. Lynes v. Northern Pac. Ry. Co., 117 P. 81, 43 Mont. 317, Ann. Cas. 1912C, 183.

Neb. Tillson v. Holloway, 134 N. W. 232, 90 Neb. 481, Ann. Cas. 1913B, 78; Bryant v. Modern Woodmen of America, 125 N. W. 621, 86 Neb. 372, 27 L. R. A. (N. S.) 326, 21 Ann. Cas. 365.

Nev. Zelavin v. Tonopah Belmont Development Co., 149 P. 188, 39 Nev. 1.

N. Y. Salowich v. National Lead Co., 143 N. Y. S. 606, 158 App. Div. 445; Barry v. Interborough Rapid Transit Co. (Sup.) 140 N. Y. S. 1054.

N. C. Robinson v. Huffstetler, 81 S. E. 753, 165 N. C. 459; Gore v. McPherson, 77 S. E. 835, 161 N. C. 638.

Okl. Brooks v. Reynolds, 132 P. 1091, 37 Okl. 767; Leach v. Hepler, 124 P. 68, 32 Okl. 729.

Or. McGee v. Beckley, 102 P. 303, 54 Or. 250, motion to retax costs denied 103 P. 61, 54 Or. 250.

Pa. Scott v. Pennsylvania Casualty Co., 87 A. 963, 240 Pa. 341; Geiger v. Pittsburgh Rys. Co., 83 A. 367, 234 Pa. 545; Kennedy v. Forest Oil Co., 49 A. 133, 199 Pa. 644; Stukey v. Rissinger, 31 Pa. Super. Ct. 3.

S. C. Hiller v. Bank of Columbia, 79 S. E. 899, 96 S. C. 74; Scarborough v. Woodley, 62 S. E. 405, 81 S. C. 329.

S. D. Karsten v. Root, 153 N. W. 932, 36 S. D. 111; Roper v. Noel, 143 N. W. 130, 32 S. D. 405.

Tex. Galveston, H. & S. A. Ry. Co. v. Templeton (Civ. App.) 175 S. W. 504; Wilkinson v. Fralin (Civ. App.) 149 S. W. 548; Precker v. Slayton (Civ. App.) 138 S. W. 1160; Cage & Crow v. Owens (Civ. App.) 103 S. W. 1191, judgment reversed Owens v. Cage & Crow, 106 S. W. 880, 101 Tex. 286; Missouri, K. & T. Ry. Co. of Texas v. Barnes, 95 S. W. 714, 42 Tex. Civ. App. 626; Kosminsky v. Hamburger, 51 S. W. 53, 21 Tex. Civ. App. 341; Eppstein v. Thomas, 44 S. W. 893, 16 Tex. Civ. App. 619; Pope v. Riggs (Civ. App.) 43 S. W. 306.

Va. Hawkins & Buford v. Edwards, 84 S. E. 654, 117 Va. 311; Hawse v. First Nat. Bank of Piedmont, W. Va., 75 S. E. 127, 113 Va. 588.

Wash. McDonald v. McDougall, 150 P. 625, 86 Wash. 339; King v. King, 145 P. 971, 83 Wash. 615; Campbell v. Order of Washington, 102 P. 410, 53 Wash. 398.

W. Va. Frank v. Monongahela Valley Traction Co., 83 S. E. 1009, 75 W. Va. 364; Shires v. Boggess, 77 S. E. 542, 72 W. Va. 109; Mylius v. Raine-Andrew Lumber Co., 71 S. E. 404, 69 W. Va. 346.

Illustrations of instructions erroneous within rule. An instruction, in an action on notes given to the president of a bank, ignoring the issue of plaintiff's good faith in making the loan to enable the borrower to pay a usurious debt to the bank, Snead v. Groover, 74 So. 81, 15 Ala. App. 515. In action for false imprisonment and malicious prosecution against defendant, owner of public bathing establishment on seashore, who had caused plaintiff's arrest for trespassing upon and erecting tent on land in front of defendant's bathhouse, instruction that plaintiff had a right to erect and maintain tent against defendant's protest, which instruction lost sight of defendant's paramount right, as riparian owner, of

a criminal prosecution.[3] No instruction can be said to be, merely

access to and from sea was erroneous. Johnson v. May, 178 N. Y. S. 742, 189 App. Div. 196. An instruction in an action for damages for removal of a alleged partition fence, which ignored the statutory requisites of partition fences. Jones v. Derosset (Mo. App.) 185 S. W. 239. An instruction on fraud and deceit, interposed as a defense to an action on a note, not submitting in connection with theory of alleged fraudulent representations, the question whether defendants relied thereon and were misled to their injury was erroneous. Ohio Valley Bank v. Berry, 100 S. E. 875, 85 W. Va. 95. An instruction, in an action on guaranty, pretermitting question whether guaranty was executed before or after principal contract was delivered. Dillworth v. Holmes Furniture & Vehicle Co., 73 So. 288, 15 Ala. App. 340. An instruction covering the whole case, in action for slander, authorizing recovery without finding of publication.

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[3] **U. S.** (C. C. A. Mo.) Gardner v. United States, 230 F. 575, 144 C. C. A. 629.

Ala. Fealy v. City of Birmingham, 73 So. 296, 15 Ala. App. 367; Walling v. State, 73 So. 216, 15 Ala. App. 275, certiorari denied Ex parte Walling, 73 So. 1003, 198 Ala. 696; Wright v. State, 72 So. 564, 15 Ala. App. 91; Blankenship v. State, 65 So. 860, 11 Ala. App. 125; Sanderson v. State, 53 So. 109, 168 Ala. 109; Moore v. State, 40 So. 345, 146 Ala. 687.

Ala. White v. State, 32 So. 139, 133 Ala. 122.

Cal. People v. Scott, 133 P. 496, 22 Cal. App. 54; People v. Wright, 122 P. 835, 18 Cal. App. 171; People v. Crosby, 120 P. 441, 17 Cal. App. 518; People v. Overacker, 115 P. 756, 15 Cal. App. 620.

Colo. Martin v. People, 155 P. 318, 60 Colo. 575.

Ga. Baker v. State, 91 S. E. 785, 19 Ga. App. 451; Mason v. State, 58 S. E. 139, 1 Ga. App. 534; Hall v. State, 47 S. E. 519, 120 Ga. 142.

Ill. Lane v. People, 142 Ill. App. 571; People v. Simmons, 113 N. E. 887, 274 Ill. 528; People v. Duncan, 103 N. E. 1043, 261 Ill. 339; Koser v. People, 79 N. E. 615, 224 Ill. 201.

Iowa. State v. Chambers, 161 N. W. 470, 179 Iowa, 436.

Kan. State v. Abbott, 69 P. 160, 65 Kan. 139.

Mich. Maillet v. People, 3 N. W. 854, 42 Mich. 262.

Mo. State v. Stike, 129 S. W. 1024, 149 Mo. App. 104; State v. Bobbitt, 146 S. W. 799, 242 Mo. 273.

Okl. Courtney v. State, 140 P. 163, 10 Okl. Cr. 589.

Tenn. Chapple v. State, 135 S. W. 321, 124 Tenn. 105; Frazier v. State, 100 S. W. 94, 117 Tenn. 430.

Tex. Rose v. State, 186 S. W. 202, 79 Tex. Cr. R. 413; Dawson v. State, 185 S. W. 875, 79 Tex. Cr. R. 371; Robinson v. State, 160 S. W. 456, 71 Tex. Cr. R. 561; Morgan v. State, 136 S. W. 445, 62 Tex. Cr. R. 39; Pickrell v. State, 132 S. W. 938, 60 Tex. Cr. 572; Jacobs v. State, 115 S. W. 581, 55 Tex. Cr. R. 149; Beckham v. State, 8 Tex. App. 52.

Wis. State v. Helden, 121 N. W. 138, 139 Wis. 519; Duthey v. State, 111 N. W. 222, 131 Wis. 178, 10 L. R. A. (N. S.) 1032.

Ignoring defense of insanity. In a prosecution for murder, an instruction that, the killing being proved, the burden of producing sufficient evidence to raise a reasonable doubt in the defendant's favor of the existence of facts or circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that accused was justified or excused in committing the homicide, did not ignore the defense of insanity, since it was included in the language used. People v. Casey, 83 N. E. 278, 231 Ill. 261.

Instructions ignoring issue of conspiracy. Lane v. State, 70 So. 982, 14 Ala. App. 40; Morris v. State, 41 So. 274, 146 Ala. 66; Crittenden v. State, 32 So. 273, 134 Ala. 145; McLeroy v. State, 25 So. 247, 120 Ala. 274.

calculated to mislead the jury, if its necessary effect is to exclude

Boomshaft v. Klauber, 190 S. W. 616, 196 Mo. App. 222. In action for malicious prosecution, where it was alleged that defendant testified falsely before the grand jury, and thereby obtained a return of indictment, defendant's requested instruction as to plaintiff's right to recover, which did not include the element of wrongfully continuing proceeding already begun, was properly refused. Johnson v. Brady (Ind. App.) 126 N. E. 250. In a physician's action for services furnished a wife, defendant husband's request that, if the husband furnishes the wife with sufficient means to provide her with what is reasonably necessary for her support and comfort, he is not liable for necessaries, unless he gives consent, was objectionable, as not including any statement as to the effect of knowledge on the part of the husband, or as to the right of the wife to contract for the services. Vaughan v. Mansfield, 126 N. E. 376, 235 Mass. 147. An instruction, in an action on running account for photographs furnished, declaring absolutely liability for reasonable value of pictures, without regard to whether account was barred by limitation, statute having been pleaded by defendant. Kansas City Photo Co. v. Kansas City Bridge Co. (Mo. App.) 195 S. W. 1051. An instruction permitting recovery in an action for injuries to land, by alleged insufficient opening for water course in railway embankment, which disregards the issues whether a flood was so great that no negligence arose in failing to anticipate that opening would be insufficient, and whether injury would have occurred regardless of size of opening. Sherwood v. St. Louis, S. W. Ry. Co., (Mo. App.) 187 S. W. 260. Instruction in crossing accident case, stating that, if the railroad company by compliance with its duty of constant lookout could have discovered plaintiff's auto in time to avoid the accident, verdict should be for plaintiff, is bad in ignoring the defense of contributory negligence, pleaded and supported by evidence. Morenci Southern Ry. Co. v. Monsour, 185 P. 938, 21 Ariz. 148. An instruction, in replevin of automobile, directing a verdict for defendant, which omitted reference to the alleged removal of a prestolite tank of small value. Stoecker & Price Storage & Auction Co. v. Erving (Mo. App.) 204 S. W. 29. An instruction in an action for damages to an automobile by collision with a street car, which ignored the defense of contributory negligence. Adams & Washam v. Southern Traction Co. (Tex. Civ. App.) 188 S. W. 275. A requested instruction in a will contest case, which ignored the issues of undue influence. Thomas v. Thomas (Mo.) 186 S. W. 993. In action on award of arbitrators requiring plaintiff to clear land remaining to be cleared under contract, but not requiring cultivation thereof, though award included amount promised plaintiff as bonus for cultivating land in addition to clearing it, instruction to find amount due plaintiff if plaintiff had cleared land and defendant had agreed to pay him therefor was error, in ignoring fact that part of amount sued for was bonus for cultivation. Nave v. Dieckman (Mo. App.) 208 S. W. 273.

Omission of element of ordinary care. An instruction that, if plaintiff saw or heard a train, or by exercising his sense of sight and hearing could have seen or heard it moving towards a crossing in time to have avoided injury, and was injured in attempting to cross ahead of it he could not recover, was properly refused, as it omitted the element of ordinary care. Lake Erie & W. R. Co. v. Sanders (Ind. App.) 125 N. E. 793. In action for damages to plaintiff's car from a collision with defendant's car, a charge that if plaintiff contributed to the injury he could not recover, and that contributory negligence was any act of plaintiff helping to produce the damages, and that he might recover if he did nothing wrong, was erroneous, as omitting element of want of ordinary care. Harnden v. Miller, 175 N. W. 891, 145 Minn. 483. Where plaintiff was injured by the use of pads purchased as a cure for rupture, because of injurious substances contained therein, an instruc-

from their consideration a material issue raised by the pleading

tion attempting to cover the whole case, but omitting the elements that the pads contained injurious ingredients, which caused plaintiff's injuries, and that defendant knew or should have known the character of the pads by the exercise of ordinary care, was erroneous, and could not be cured by any subsequent instruction. Harmon v. Plapao Laboratories (Mo. App.) 218 S. W. 701.

Omission of issue of proximate cause. In an action against a city for injuries occasioned by fall on defective walk, a requested instruction stating that plaintiff should recover if the work was defective, etc., was properly refused, where it did not embody the rule relating to proximate causes. Kansler v. City of Billings, 184 P. 630, 56 Mont. 250.

2 **Ala.** Southern Ry. Co. v. Stollenwerck, 52 So. 204, 166 Ala. 556; Birmingham Ry., Light & Power Co. v. Williams, 48 So. 93, 158 Ala. 381; Anniston Electric & Gas Co. v. Elwell, 42 So. 45, 144 Ala. 317.

Ark. St. Louis, I. M. & S. Ry. Co. v. Aiken, 140 S. W. 698, 100 Ark. 437; A. L. Clark Lumber Co. v. St. Coner, 133 S. W. 1132, 97 Ark. 358.

Cal. Weik v. Southern Pac. Co., 132 P. 775, 21 Cal. App. 711; Roberts v. Sierra R. Co. of California, 111 P. 519, 14 Cal. App. 180, rehearing denied (Sup.) 111 P. 527, 14 Cal. App. 180.

Colo. Coors v. Brock, 125 P. 599, 22 Colo. App. 470.

Conn. Church v. Spicer, 83 A. 1115, 85 Conn. 579.

Fla. Seaboard Air Line Ry. v. Smith, 43 So. 235, 53 Fla. 375.

Idaho. Gard v. Thompson, 123 P. 497, 21 Idaho, 485.

Ill. Cummins v. Sanitary Dist. of Chicago, 185 Ill. App. 639; Swanson v. Chicago City Ry. Co., 148 Ill. App. 135, judgment affirmed 90 N. E. 210, 242 Ill. 388.

Ind. Vandalia R. Co. v. Holland, 108 N. E. 580, 183 Ind. 438; Chicago, I. & L. Ry. Co. v. Pritchard, 81 N. E. 78, 168 Ind. 398, 9 L. R. A. (N. S.) 857, denying rehearing 79 N. E. 508, 168 Ind. 398, 9 L. R. A. (N. S.) 857.

Iowa. Carpenter v. Campbell Automobile Co., 140 N. W. 225, 159 Iowa. 52.

Kan. Jones v. Joplin & P. R. Co., 137 P. 796, 91 Kan. 282.

Ky. South Covington & C. St. Ry. Co. v. Hardy, 153 S. W. 474, 152 Ky. 374. 44 L. R. A. (N. S.) 32.

Md. Shoop v. Fidelity & Deposit Co. of Maryland, 91 A. 753. 124 Md. 130, Ann. Cas. 1916D. 954; Baltimore & O. R. Co. v. Wilson, 83 A. 248, 117 Md. 198; McCarthy v. Clarke, 81 A. 12, 115 Md. 454.

Mass. Monjeau v. Metropolitan Life Ins. Co., 94 N. E. 302. 208 Mass. 1.

Mich. Plowaty v. Sheldon, 132 N. W. 517, 167 Mich. 218, Ann. Cas. 1913A, 610; Larned v Vanderlinde, 131 N. W. 165, 165 Mich. 464; Muir v. Kalamazoo Corset Co., 119 N. W. 589, 155 Mich. 441; Logan v. Lake Shore & M. S. R. Co., 112 N. W. 506, 148 Mich. 603.

Minn. Campbell v. Duluth & N. E. R. Co., 127 N. W. 413, 111 Minn. 410.

Mo. Aronson v. Ricker, 172 S. W. 641, 185 Mo. App. 528; St. Louis Maple & Oak Flooring Co. v. Knost, 128 S. W. 532, 148 Mo. App. 563.

N. M. Brobst v. El Paso & S. W. Co., 145 P. 258, 19 N. M. 609.

N. Y. Kimball v. Uppercu (Sup.) 129 N. Y. S. 33.

N. C. Alford v. Moore, 77 S. E. 343, 161 N. C. 382; Harmon v. Ferguson Contracting Co., 74 S. E. 632, 159 N. C. 22.

Or. Cerrano v. Portland Ry., Light & Power Co., 126 P. 37, 62 Or. 421.

R. I. Clark v. New York, N. H. & H. R. Co., 87 A. 206, 35 R. I. 479.

S. C. Kennedy v. Kennedy, 68 S. E. 664, 86 S. C. 483; Napier v. Matheson, 68 S. E. 673, 86 S. C. 428; Langston v. Cothran, 58 S. E. 956, 78 S. C. 23.

Tex. Missouri, K. & T. R. Co. of Texas v. Middleton (Civ. App.) 172 S. W. 1114; Dallas Consol. Electric St. Ry. Co. v. Kelley (Civ. App.) 142 S. W. 1005; St. Louis Southwestern Ry. Co. of Texas v. McCauley (Civ. App.) 134 S. W. 798; Keahey v. Bryant (Civ.

and evidence.[4] The above rule frequently has been applied to instructions purporting to cover the whole case, and directing a verdict for one party or the other, if certain facts are found,[5] unless such theory or defense omitted is included in other qualifying instructions,[6] and in some jurisdictions, as is shown in another place,[7] such an omission cannot be cured by other instructions.

§ 144. Ignoring evidence

Instructions should cover the whole case and take in all the material evidence.[8] Instructions which ignore evidence in the

App.) 134 S. W. 409; Gulf & I. Ry. Co. of Texas v. Campbell (Civ. App.) 108 S. W. 972; Western Union Telegraph Co. v. Landry (Civ. App.) 108 S. W. 461, judgment reversed Landry v. Western Union Telegraph Co., 113 S. W. 10, 102 Tex. 67.

Vt. Douglass & Varnum v. Village of Morrisville, 93 A. 810, 89 Vt. 393; Losasso v. Jones Bros. Co., 93 A. 266, 88 Vt. 526.

Va. Norfolk Southern R. Co. v. Crocker, 84 S. E. 681, 117 Va. 327; J. B. King & Co. v. C. W. Hancock & Sons, 77 S. E. 510, 114 Va. 596.

Wash. Tooker v. Perkins, 150 P. 1138, 86 Wash. 567.

W. Va. Griffith v. American Coal Co., 84 S. E. 621, 75 W. Va. 686, L. R. A. 1915F, 803; American Canning Co. v. Flat Top Grocery Co., 70 S. E. 756, 68 W. Va. 698.

[4] O'Brien v. Birmingham Ry., Light & Power Co., 72 So. 343, 197 Ala. 97; Oil-Well Supply Co. v. West Huntsville Cotton Mills Co., 73 So. 899, 198 Ala. 501.

[5] **Ark.** Des Arc Oil Mill v. McLeod, 206 S. W. 655, 137 Ark. 615.

Ill. Gibson v. Lafferty, 180 Ill. App. 629; Christensen v. Oscar Daniels Co., 170 Ill. App. 59; Grannemann v. Meyer, 169 Ill. App. 291; Martini v. Donk Bros. Coal & Coke Co., 169 Ill. App. 139; St. John v. Illinois Cent. R. Co., 168 Ill. App. 599; Baker v. Taylorville Ry., Light, Heat & Power Co., 164 Ill. App. 232; Hill v. Dougherty, 161 Ill. App. 553; Geary v. City of Chicago, 161 Ill. App. 461; Cole v. City of East St. Louis 158 Ill. App. 494; Plopper v. St. Louis & N. E. Ry. Co., 158 Ill. App. 196; Spenler v. Turley, 158 Ill. App. 146; Downs v. Michigan Commercial Ins. Co., 157 Ill. App. 32; Voudrie v. Southern Ry. Co., 155 Ill. App. 279.

Ind. Goldsmith v. First Nat. Bank, 96 N. E. 503, 50 Ind. App. 11.

Mo. Stofer v. Harvey (App.) 204 S. W. 587; Kelley v. City of St. Joseph, 156 S. W. 804, 170 Mo. App. 358; Beggs v. Shelton, 155 S. W. 885, 173 Mo. App. 127.

Mo. Johnson v. Stewart & Hay Bldg. Co., 153 S. W. 511, 171 Mo. App. 543.

Or. Buhl Malleable Co. v. Cronan. 59 Or. 242, 117 P. 317.

Utah. Morgan v. Child, Cole & Co., 135 P. 451, 47 Utah, 417.

Va. E. I. Du Pont de Nemours & Co. v. Hipp, 96 S. E. 280, 123 Va. 49.

W. Va. Wiggin v. Marsh Lumber Co., 87 S. E. 194, 77 W. Va. 7.

Including theory of opposite party. Instruction purporting to cover whole case must be framed so as not to exclude theory raised by evidence of adversary party, but it is not required to include such theory. Lawbaugh v. McDonald Mining Co. (Mo. App.) 202 S. W. 617.

[6] Carroll v. People's Ry. Co., 60 Mo. App. 465; Carder v. Primm, 60 Mo. App. 423; Evers v. Shumaker, 57 Mo. App. 454; Hayner v. Churchill, 29 Mo. App. 676; Minick v. Gring, 1 Pa. Super. Ct. 484; Jones v. Rex (Tex. Civ. App.) 31 S. W. 1077.

[7] Lifschitz v. City of Chicago, 150 Ill. App. 201.

[8] **U. S.** Greenleaf v. Birth, 6 Pet. 292. 9 L. Ed. 132.

Ala. Elliott v. Howison, 40 So. 1018, 146 Ala. 568; Central of Georgia Ry. Co. v. Larkins, 37 So. 660, 142 Ala. 375; Austill v. Heironymus, 23

case are properly refused,[9] and instructions which single out par-

So. 660, 117 Ala. 620; Highland Ave. & B. R. Co. v. Sampson, 112 Ala. 425, 20 So. 566; Scarborough v. Blackman, 108 Ala. 656, 18 So. 735; Griel v. Lomax, 94 Ala. 641, 10 So. 232.

Ga. Wylly v. Gazan, 69 Ga. 506.

Ill. People v. Gardt, 101 N. E. 687, 258 Ill. 468, affirming judgment 175 Ill. App. 80; George E. Lloyd & Co. v. Matthews, 119 Ill. App. 546, affirmed George E. Lloyd & Co. v. Matthews & Rice, 79 N. E. 172, 223 Ill. 477, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346; Geringer v. Novak, 117 Ill. App. 160; Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322; Felver v. Judd, 81 Ill. App. 529.

Ind. Roots v. Tyner, 10 Ind. 87.

Md. Miller v. Mantik, 81 A. 797, 116 Md. 279; Cover v. Myers, 75 Md. 406, 23 A. 850, 32 Am. St. Rep. 394; Thomas v. Sternheimer, 29 Md. 268; Cook v. Carr, 20 Md. 403.

Mass. Tashjian v. Worcester Consol. St. R. Co., 58 N. E. 281, 177 Mass. 75; Dolphin v. Plumley, 56 N. E. 281, 175 Mass. 304; Graves v. Dill, 159 Mass. 74, 34 N. E. 336; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353.

Mich. Ludlow v. Pearl's Estate, 55 Mich. 312, 21 N. W. 315.

Mo. Norton v. Kowazek (Sup.) 193 S. W. 556; Edger v. Kupper, 85 S. W. 949, 110 Mo. App. 280; Deitring v. St. Louis Transit Co., 85 S. W. 140, 109 Mo. App. 524; Maxwell v. Hannibal & St. J. R. Co., 85 Mo. 95; Raysdon v. Trumbo, 52 Mo. 35; Ellis v. McPike, 50 Mo. 574; Fitzgerald v. Hayward, 50 Mo. 516; First Nat. Bank v. Currie, 44 Mo. 91; Chappell v. Allen, 38 Mo. 213; Brownlow v. Woolard, 66 Mo. App. 636; Brown v. McCormick, 23 Mo. App. 181; Barnes v. Fisher, 9 Mo. App. 574, memorandum.

N. J. Blackmore v. Ellis, 57 A. 1047, 70 N. J. Law, 264.

N. Y. Ward v. Forrest, 20 How. Prac. 465; Fitzgerald v. Long Island R. Co., 50 Hun, 605, 3 N. Y. Supp. 230, judgment affirmed 22 N. E. 1133, 117 N. Y. 653.

N. C. Morse & Rodgers v. Schultz, 72 S. E. 218, 156 N. C. 165; Newby v. Edwards, 68 S. E. 1062, 153 N. C. 110.

Tenn. James v. Drake, 35 Tenn. (3 Sneed) 340.

Tex. Panhandle & S. F. Ry. Co. v. Bell (Civ. App.) 189 S. W. 1097; De Rossett v. State, 168 S. W. 531, 74 Tex. Cr. R. 235; Gulf, C. & S. F. Ry. Co. v. Warner, 54 S. W. 1064, 22 Tex. Civ. App. 167; Jacobs v. Crum, 62 Tex. 401.

Va. Vaughan Mach. Co. v. Stanton Tanning Co., 56 S. E. 140, 106 Va. 445; Haney v. Breeden, 42 S. E. 916, 100 Va. 781; Brown v. Rice's Adm'r, 76 Va. 629.

W. Va. Johnson v. Bank, 55 S. E. 394, 60 W. Va. 320, 9 Ann. Cas. 893; Robinson v. Lowe, 40 S. E. 454, 50 W. Va. 75.

Instructions not erroneous within rule. It is not error for the court, in commenting on the evidence, to state that the evidence on a subject rested "mainly" on the testimony of certain persons, without referring to a certain person, whose testimony related to a subordinate matter, which was conceded. McQuillan v. Willimantic Electric Light Co., 40 A. 928, 70 Conn. 715.

[9] **U.S.** Grand Trunk Ry. Co. of Canada v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; (C. C. A. Kan.) Manchester Mill & Elevator Co. v. Strong, 231 F. 876, 146 C. C. A. 72; (C. C. A. W. Va.) Wheeling Terminal Ry. Co. v. Russell, 209 F. 795, 126 C. C. A. 519.

Ala. Shelby Iron Co. v. Bean, 82 So. 92, 203 Ala. 78; Meyrovitz v. Levy, 63 So. 963, 184 Ala. 293; Prattville Cotton Mills Co. v. McKinney, 59 So. 498, 178 Ala. 554; Hudson Ice & Machine Works v. Bland & Chambers, 52 So. 445, 167 Ala. 391; Gulsby v. Louisville & N. R. Co., 52 So. 392, 167 Ala. 122; Alabama Steel & Wire Co. v. Thompson, 52 So. 75, 166 Ala. 460; R. D. Burnett Cigar Co. v. Art Wall Paper Co., 51 So. 263, 164 Ala. 547; Anniston Lime & Coal Co. v. Lewis, 107 Ala. 535, 18 So. 326; Upson v. Raiford, 29 Ala. 188; Reese v. Beck, 24 Ala. 651.

Cal. Matteson v. Southern Pac. Co., 92 P. 101, 6 Cal. App. 318.

Colo. Stratton Cripple Creek Min-

ticular facts bearing on a point, and ignore other facts having

ing & Development Co. v. Ellison, 94 P. 303, 42 Colo. 498.

Conn. Harris v. City of Ansonia, 47 A. 672, 73 Conn. 359.

Ga. Johnson v. Kinsey, 7 Ga. 428.

Ill. Concord Apartment House Co. v. O'Brien, 81 N. E. 1038, 228 Ill. 360; Chicago Union Traction Co. v. Ertrachter, 130 Ill. App. 602, judgment affirmed (1907) 81 N. E. 816, 228 Ill. 114; Swift & Co. v. O'Brien, 127 Ill. App. 26; Phenix Ins. Co. v. Woland, 48 Ill. App. 535.

Ind. Kelly Atkinson Const. Co. v. Munson, 101 N. E. 510, 53 Ind. App. 619; Baltimore & O. S. W. R. Co. v. Walker, 84 N. E. 730, 41 Ind. App. 583; Todd v. Danner, 46 N. E. 829, 17 Ind. App. 368.

Me. Hunter v. Randall, 69 Me. 183.

Mass. American Tubeworks v. Tucker, 70 N. E. 59, 185 Mass. 236; Lufkin v. Lufkin, 182 Mass. 476, 65 N. E. 840, dismissed 192 U. S. 601, 24 S. Ct. 849, 48 L. Ed. 583; Murphy v. Boston & A. R. Co., 133 Mass. 121; Bugbee v. Kendricken, 132 Mass. 349; Delaney v. Hall, 130 Mass. 524; Green v. Boston & L. R. Co., 128 Mass. 221, 35 Am. Rep. 370; Tatterson v. Suffolk Mfg. Co., 106 Mass. 56.

Mo. Barr & Martin v. Johnson, 155 S. W. 459, 170 Mo. App. 394; Lemmons v. Robertson, 148 S. W. 189, 164 Mo. App. 85; Lucks v. Northwestern Sav. Bank, 128 S. W. 19, 148 Mo. App. 376; Saller v. Friedman Bros. Shoe Co., 109 S. W. 794, 130 Mo. App. 712; Cobb v. Holloway, 108 S. W. 109, 129 Mo. App. 212; Gibler v. Quincy, O. & K. C. R. Co., 107 S. W. 1021, 129 Mo. App. 93; Carder v. Primm, 60 Mo. App. 423; Jones v. Jones, 57 Mo. 138; Anderson v. Kincheloe, 30 Mo. 520; Fine v. St. Louis Public Schools, 30 Mo. 166.

Neb. Atchison & N. R. R. v. Jones, 9 Neb. 67, 2 N. W. 363.

N. Y. Stevens v. Gilbert (Sup.) 120 N. Y. S. 114.

Or. Pfeiffer v. Oregon-Washington R. & Nav. Co., 144 P. 762, 74 Or. 307.

Pa. Hall v. Vanderpool, 156 Pa. 152, 26 A. 1069; Gratz v. Beates, 45 Pa. (9 Wright) 495; Nieman v. Ward, 1 Watts & S. 68.

R. I. Tucker v. Rhode Island Co., 69 A. 850.

Tex. Southern Traction Co. v. Regan (Civ. App.) 199 S. W. 1135; Hawkins v. Western Nat. Bank of Hereford (Civ. App.) 146 S. W. 1191; Ft. Worth & R. G. Ry. Co. v. Bailey (Civ. App.) 136 S. W. 822; Cleburne Electric & Gas Co. v. McCoy (Civ. App.) 128 S. W. 457; Western Union Telegraph Co. v. Rabon, 127 S. W. 580, 60 Tex. Civ. App. 88; Gulf, C. & S. F. Ry. Co. v. Bagby (Civ. App.) 127 S. W. 254; Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84; Galveston, H. & S. A. R. Co. v. Riggs, 109 S. W. 864, 101 Tex. 522, affirming judgment (Civ. App.) 107 S. W. 589; Cowans v. Ft. Worth & D. C. Ry. Co., 109 S. W. 403, 49 Tex. Civ. App. 463; St. Louis, I. M. & S. Ry. Co. v. Boshear (Civ. App.) 108 S. W. 1032, judgment affirmed 113 S. W. 6, 102 Tex. 76; Orient Ins. Co. v. Wingfield, 108 S. W. 788, 49 Tex. Civ. App. 202; St. Louis Southwestern Ry. Co. of Texas v. Thompson (Civ. App.) 108 S. W. 453, judgment reversed St. Louis S. W. Ry. Co. of Texas v. Thompson, 113 S. W. 144, 102 Tex. 89, 19 Ann. Cas. 1250; International & G. N. R. Co. v. Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58.

Va. Shiveley's Adm'r v. Norfolk & W. Ry. Co., 99 S. E. 650, 125 Va. 384; City of Richmond v. Gentry, 68 S. E. 274, 111 Va. 160; Life Ins. Co. of Virginia v. Hairston, 62 S. E. 1057, 108 Va. 832; Douglas Land Co. v. T. W. Thayer Co., 58 S. E. 1101, 107 Va. 292.

W. Va. Diddle v. Continental Casualty Co., 63 S. E. 962, 65 W. Va. 170, 22 L. R. A. (N. S.) 779; Parkersburg Nat. Bank v. Hannaman, 60 S. E. 242, 63 W. Va. 358; Delmar Oil Co. v. Bartlett, 59 S. E. 634, 62 W. Va. 700.

Wyo. Mutual Life Ins. Co. v. Summers, 120 P. 185, 19 Wyo. 441.

Instructions held improper within rule. In an action by the second purchasers of a soda fountain from the company which had leased or sold it conditionally to one who defaulted in the payment of installment notes and assigned for creditors, brought against the assignee, defend-

some tendency to resolve the disputed issue are erroneous, as calculated to mislead the jury.[10] Thus, where there is documentary evidence in the case, it is error to instruct that the evidence is what the witnesses swear before the jury on the stand,[11] and an instruction which directs a finding for either the plaintiff or the defendant must cover all the material facts which the evidence proves or tends to prove.[12]

An instruction in a criminal case, which ignores a part of the evidence bearing on the issue sought to be presented to the jury by the instruction, is properly refused, and should not be given.[13]

ant's requested ruling that the rights of the parties were to be determined solely by the contract contained in the lease (or conditional sale) and lien notes was properly refused, as the rights of the parties were vitally affected by facts occurring subsequent to the execution of the lease and notes. Treeful v. Mills, 125 N. E. 183, 234 Mass. 141.

[10] **U. S.** (C. C. A. Pa.) Weiss v. Bethlehem Iron Co., 88 F. 23, 31 C. C. A. 363.

Ala. Mobile Light & R. Co. v. Walsh, 40 So. 560, 146 Ala. 295; Louisville & N. R. Co. v. Webb, 97 Ala. 308, 12 So. 374; Jordan v. Pickett, 78 Ala. 331.

Cal. Berliner v. Travelers' Ins. Co., 53 P. 922, 121 Cal. 451.

Fla. Florida Ry. & Navigation Co. v. Webster, 25 Fla. 394, 5 So. 714.

Ga. Wright v. Central R. & Banking Co., 16 Ga. 38.

Ill. Town of Evans v. Dickey, 117 Ill. 291, 7 N. E. 263; Crain v. First Nat. Bank, 114 Ill. 516, 2 N. E. 486; Pennsylvania Co. v. Stoelke, 104 Ill. 201; Evans v. George, 80 Ill. 51; Pittsburgh, C., C. & St. L. R. Co. v. Dahlin, 67 Ill. App. 99; Kankakee & S. R. Co. v. Horan, 22 Ill. App. 145; Blunt v. Ashurst, 14 Ill. App. (14 Bradw.) 385.

Ind. Smith v. Hunt, 98 N. E. 841, 50 Ind. App. 592.

Md. Robinson v. Silver, 87 A. 699, 120 Md. 41; Seaboard Air Line Ry. Co. v. Phillips, 70 A. 232, 108 Md. 285.

Mass. Gardner v. Boston Elevated R. Co., 90 N. E. 534, 204 Mass. 213.

Miss. Reed v. Yazoo & M. V. R. Co., 47 So. 670, 94 Miss. 639; Colored Knights of Pythias v. Tucker, 46 So. 51, 92 Miss. 501.

Mo. Ellis v. Wagner, 24 Mo. App. 407; Maack v. Schneider, 57 Mo. App. 431.

N. C. Currie v. Gilchrist, 61 S. E. 581, 147 N. C. 648.

Pa. Young v. Merkel, 163 Pa. 513, 30 A. 196, 35 Wkly. Notes Cas. 303; Parker v. Donaldson, 6 Watts & S. 132.

Tex. Gulf, C. & S. F. Ry. Co. v. Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133.

[11] Bowden v. Achor, 95 Ga. 243, 22 S. E. 254; Byrd v. Byrd, 96 S. E. 10, 22 Ga. App. 354.

[12] Darrell v. Mutual Ben. Life Ins. Co. (Cal. App.) 186 P. 620; Shaw v. City of Greensboro, 101 S. E. 27, 178 N. C. 426; Chesapeake & O. Ry. Co. v. Arrington, 101 S. E. 415, 126 Va. 194.

[13] **Ala.** Minor v. State, 74 So. 98, 15 Ala. App. 556; Herring v. State, 71 So. 974, 14 Ala. App. 93; Norman v. State, 69 So. 362, 13 Ala. App. 337; Campbell v. State, 69 So. 322, 13 Ala. App. 70; Bullington v. State, 69 So. 319, 13 Ala. App. 61; Harwell v. State, 68 So. 500, 12 Ala. App. 265, certiorari denied 68 So. 1019, 192 Ala. 689; Howerton v. State, 67 So. 979, 191 Ala. 13; James v. State, 67 So. 773, 12 Ala. App. 16; Clayton v. State, 64 So. 76, 185 Ala. 13; Brooks v. State, 62 So. 569, 8 Ala. App. 277, judgment reversed 64 So. 295, 185 Ala. 1; McKinstry v. City of Tuscaloosa, 54 So. 629, 172 Ala. 344; Steele v. State, 52 So. 907, 168 Ala. 25; Payne v. State, 42 So. 988, 148 Ala. 609; Hanners v. State, 41 So. 973, 147 Ala. 27; Morris v. State, 41 So.

Thus instructions, directing an acquittal of the defendant, which are based upon certain evidence, and which ignore other evidence tending to show his guilt, are erroneous.[14] So an instruction

274, 146 Ala. 66; Ferguson v. State, 37 So. 448, 141 Ala. 20; Stewart v. State, 34 So. 818, 137 Ala. 33.

Cal. People v. Liera, 149 P. 1004, 27 Cal. App. 346; People v. Smith, 110 P. 333, 13 Cal. App. 627; People v. Hartman, 62 P. 823, 130 Cal. 487.

D. C. Partridge v. United States, 39 App. D. C. 571, Ann. Cas. 1917D, 622.

Fla. Mims v. State, 27 So. 865, 42 Fla. 199; Barker v. State, 24 So. 69, 40 Fla. 178.

Ga. Rouse v. State, 71 S. E. 667, 136 Ga. 356.

Ill. People v. Tielke, 102 N. E. 229, 259 Ill. 88; People v. Gardt, 175 Ill. App. 80, judgment affirmed 101 N. E. 687, 258 Ill. 468.

Iowa. State v. Cameron, 158 N. W. 563, 177 Iowa, 379; State v. Rutledge, 113 N. W. 461, 135 Iowa, 581.

Mass. Commonwealth v. Turner, 112 N. E. 864, 224 Mass. 229; Commonwealth v. Gavin, 148 Mass. 449, 18 N. E. 675, 19 N. E. 554; Commonwealth v. Este, 140 Mass. 279, 2 N. E. 769; Commonwealth v. Broadbeck, 124 Mass. 319; Bailey v. Bailey, 97 Mass. 373.

Mich. People v. Leonzo, 147 N. W. 543, 181 Mich. 41.

Miss. Cumberland v. State, 70 So. 695, 110 Miss. 521; Fore v. State, 23 So. 710, 75 Miss. 727.

Okl. Gransden v. State, 158 P. 157, 12 Okl. Cr. R. 417.

Or. State v. Deal, 70 P. 534, 43 Or. 17.

Pa. Commonwealth v. Ronello, 96 A. 826, 251 Pa. 329; Commonwealth v. Meyers, 62 Pa. Super. Ct. 223.

Tex. Reed v. State, 183 S. W. 1168, 79 Tex. Cr. R. 222; Caples v. State, 167 S. W. 730, 74 Tex. Cr. R. 127; Qualls v. State, 165 S. W. 202, 73 Tex. Cr. R. 212; McKnight v. State, 156 S. W. 1188, 70 Tex. Cr. R. 470; Blocker v. State, 135 S. W. 130, 61 Tex. Cr. R. 413; Lemons v. State, 128 S. W. 416, 59 Tex. Cr. R. 299; Bennett v. State, 50 S. W. 946, 40 Tex. Cr. R. 445.

Vt. State v. Bolton, 102 A. 489, 92 Vt. 157.

W. Va. State v. Clark, 63 S. E. 402, 64 W. Va. 625; State v. Grove, 57 S. E. 296, 61 W. Va. 697.

Ignoring proof of venue. A charge which ignores proof of venue in a criminal prosecution is erroneous only when there has been no proof of venue. Ragsdale v. State, 32 So. 674, 134 Ala. 24.

Ignoring evidence of good character. Instructions which state that evidence of good character of accused may raise a doubt in a doubtful case, and which call the jury's attention to the evidence of accused, and which direct the jury to give all the testimony of the defense careful consideration, and to determine therefrom, in connection with the state's evidence, the truth, do not withdraw any evidence of accused from the jury, and are not objectionable as withdrawing from consideration evidence of good character, which in a sense must be considered by itself to determine whether accused bore the good character claimed, and when proved, considered with the other facts established. State v. McGuire, 80 A. 761, 84 Conn. 470, 38 L. R. A. (N. S.) 1045.

[14] **Ala.** Wiggins v. State, 78 So. 413, 16 Ala. App. 419; Brown v. State, 72 So. 757, 15 Ala. App. 180, writ of certiorari denied 73 So. 999, 198 Ala. 689; Hauser v. State, 60 So. 549, 6 Ala. App. 31; Davis v. State, 51 So. 239, 165 Ala. 93; Morris v. State, 41 So. 274, 146 Ala. 66; Holmes v. State, 34 So. 180, 136 Ala. 80; Frost v. State, 27 So. 251, 124 Ala. 85; Suther v. State, 24 So. 43, 118 Ala. 88; Hughes v. State, 23 So. 677, 117 Ala. 25.

Cal. People v. Clark, 79 P. 434, 145 Cal. 727; People v. Luchetti, 51 P. 707, 119 Cal. 501.

Conn. State v. Tobin, 96 A. 312, 90 Conn. 58.

Fla. Kennard v. State, 28 So. 858, 42 Fla. 581.

N. J. State v. Harrington, 94 A. 623, 87 N. J. Law, 713.

N. Y. People v. Benham, 55 N. E. 11, 160 N. Y. 402.

which asserts the right of the defendant to an acquittal if the state fails to prove his guilt beyond a reasonable doubt is improper, when incriminating circumstances are developed by the evidence for the defendant,[15] as is an instruction which ignores the testimony of the defendant in submitting the question of his guilt to the jury.[16] An instruction, intended to present the theory of the prosecution as to the motive which induced the commission of the crime charged, which is so framed as to exclude from the consideration of the jury the evidence of the accused tending to show a different state of facts, is erroneous.[17]

§ 145. Limitations of rule

As is implied in the above statement of the general rule, it is not error to fail to submit to the jury an issue concerning which there is no evidence,[18] or a matter about which there is no dis-

N. C. State v. Johnson, 90 S. E. 426, 172 N. C. 920.

Tenn. Cooper v. State, 138 S. W. 826, 123 Tenn. 37.

[15] Davis v. State, 62 So. 1027, 8 Ala. App. 147, certiorari denied Ex parte Davis, 63 So. 1010, 184 Ala. 26; Williams v. State, 50 So. 59, 161 Ala. 52; Stallworth v. State, 46 So. 518, 155 Ala. 14; Wilson v. State, 37 So. 93, 140 Ala. 43; Sanders v. State, 32 So. 654, 134 Ala. 74; Johnson v. State, 31 So. 951, 133 Ala. 38.

[16] **U. S.** Bird v. United States, 21 S. Ct. 403, 180 U. S. 356, 45 L. Ed. 570.

Ala. Barker v. State, 28 So. 589, 126 Ala. 83.

Ariz. Barrow v. Territory, 114 P. 975, 13 Ariz. 302.

Ill. People v. Pezutto, 99 N. E. 677, 255 Ill. 583.

Pa. Commonwealth v. Stovas, 45 Pa. Super. Ct. 43.

Tex. Palmer v. State, 160 S. W. 349, 71 Tex. Cr. R. 335; Buckley v. State, 157 S. W. 765, 70 Tex. Cr. R. 550.

Ignoring unsworn statement of the accused. Where the statement of accused suggested no theory favorable to him which was in conflict with, or in explanation of, the evidence, it was not reversible error to charge, without mentioning the statement, that in determining the guilt or innocence of accused the jury should look to the "evidence." Burney v. State, 25 S. E. 911, 100 Ga. 65. A charge that the issues are to be determined "by looking to the testimony of the witnesses that have been sworn in the case" is not error, even though defendant has made a statement giving his version of the transaction and denying his guilt; but it is the better practice, in such a case, to authorize the jury to consider such statement, in connection with the evidence, and to give to it such force as they think it is entitled to receive. Sledge v. State. 26 S. E. 756, 99 Ga. 684.

[17] Bowles v. Commonwealth, 48 S. E. 527, 103 Va. 816.

[18] **U. S.** Crosby v. Cuba R. Co. (C. C.) 158 F. 144.

Cal. Valente v. Sierra Ry. Co., 111 P. 95, 158 Cal. 412.

Ga. American Ins. Co. v. Bailey & Musgrove, 65 S. E. 160, 6 Ga. App. 424; Grimsley v. Singletary, 65 S. E. 92. 133 Ga. 56, 134 Am. St. Rep. 196.

Ill. Graham v. Mattoon City Ry. Co., 84 N. E. 1070, 234 Ill. 483, 14 Ann. Cas. 853, affirming judgment Mattoon City Ry. Co. v. Graham, 138 Ill. App. 70; Crain v. First Nat. Bank, 114 Ill. 516, 2 N. E. 486.

Ind. City of Bloomington v. Woodworth, 81 N. E. 611, 40 Ind. App. 373; Browning v. Hight, 78 Ind. 257.

Iowa. Sieberts v. Spangler, 118 N. W. 292, 140 Iowa, 236; Willson v.

pute.[19] As has been indicated elsewhere, the court cannot be required to cover every phase of a case in a single instruction,[20] and an instruction cannot be regarded as erroneous, as ignoring issues, if such issues are adequately dealt with in other instructions.[21]

The rule that an instruction, stating the issues and directing a verdict for one party or the other in the event of a favorable finding for him on the issues, must state all the issues, does not apply to an instruction merely covering the measure of damages.[22] An instruction based on a theory supported by evidence which would entitle the plaintiff to recover, regardless of some distinct and independent theory of the defendant, also supported by some evidence, is not erroneous as ignoring the defendant's theory,[23] and an instruction which does not conclude with a direction to the jury need not anticipate and negative every defense.[24]

Only where an instruction assumes to set out all the elements essential to a recovery will the omission of any element necessary to a recovery condemn it.[25] The court need submit to the jury only enough issues to dispose of all the controverted questions and to give each party fair and full opportunity to present his case in every aspect.[26] An instruction that contributory negligence is a defense, and that the burden is on the defendant to establish it,

Phelps, 86 Iowa, 735, 53 N. W. 115; McDermott v. Iowa Falls & S. C. Ry. Co., 47 N. W. 1037.

Ky. Louisville & N. R. Co. v. Greenwell's Adm'r, 160 S. W. 479, 155 Ky. 799.

Mo. Brinkman v. Gottenstroeter, 134 S. W. 584, 153 Mo. App. 351; Till v. St. Louis & S. F. R. Co., 101 S. W. 624, 124 Mo. App. 281.

Neb. Wherry v. Pawnee County, 129 N. W. 1013, 88 Neb. 503.

Tex. Blackwell v. Hunnicutt, 69 Tex. 273, 9 S. W. 317.

Vt. Mack v. Snider, 1 Aikens, 104.

Wash. Gabrielson v. Hague Box & Lumber Co., 104 P. 635, 55 Wash. 342, 33 Am. St. Rep. 1032.

[19] Montgomery v. Hammond Packing Co. (Mo. App.) 217 S. W. 867.

[20] American Hardwood Lumber Co. v. Milliken-James Hardwood Lumber Co., 216 S. W. 23, 140 Ark. 544; Black v. Chicago Great Western R. Co., 174 N. W. 774, 187 Iowa, 904.

[21] Walrod v. Webster County, 81 N. W. 598, 110 Iowa, 349, 47 L. R. A. 480; Farmers' Cotton Oil Co. v. Barnes (Tex. Civ. App.) 134 S. W. 369.

[22] Stauffer v. Metropolitan St. Ry. Co., 147 S. W. 1032, 243 Mo. 305.

[23] Given v. Diamond Shoe & Garment Co., 101 S. E. 153, 84 W. Va. 631. Compare Palmer v. Magers, 102 S. E. 100, 85 W. Va. 415.

[24] Kulvie v. Bunsen Coal Co., 161 Ill. App. 617, judgment affirmed 97 N. E. 688, 253 Ill. 386.

[25] Public Utilities Co. v. Handorf, 112 N. E. 775, 185 Ind. 254; Terre Haute Traction & Light Co. v. Payne, 89 N. E. 413, 45 Ind. App. 132; Chickasaw Compress Co. v. Bow, 149 P. 1166, 47 Okl. 576.

[26] Barefoot v. Lee, 83 S. E. 247, 168 N. C. 89.

is not improper, as taking from the defendant other defenses than that of contributory negligence.[27]

The court may,[28] and should,[29] refuse to submit immaterial issues to the jury, or issues raised by counts of the pleadings which have been dismissed, stricken out, or otherwise disposed of by rulings of the court during the progress of the trial.[30] The court should eliminate issues which have been abandoned,[31] and may properly refuse instructions on such issues.[32]

[27] Bradford v. City of St. Joseph (Mo. App.) 214 S. W. 281.

[28] **Ill.** Wettrick v. Martin, 164 Ill. App. 273; Stern v. Bradner Smith & Co., 127 Ill. App. 640, judgment affirmed 80 N. E. 307, 225 Ill. 430, 116 Am. St. Rep. 151.

Kan. McKnight v. Strasburger Bldg. Co., 150 P. 542, 96 Kan. 118.

Ky. Ross v. Commonwealth, 59 S. W. 28, 24 Ky. Law Rep. 1621.

Minn. Matz v. Martinson, 149 N. W. 370, 127 Minn. 262, L. R. A. 1915B, 1121.

N. Y. Hesse v. Gude Bros.-Kieffer Co. (Sup.) 170 N. Y. S. 211.

Wis. Gist v. Johnson-Carey Co., 147 N. W. 1079, 158 Wis. 188, Ann. Cas. 1916E, 460.

[29] Cowie v. Kinser, 138 Ill. App. 143, judgment affirmed Kinser v. Cowie, 85 N. E. 623, 235 Ill. 383, 126 Am. St. Rep. 221; Penney v. Johnston, 142 Ill. App. 634; Scherrer v. City of Seattle, 100 P. 144, 52 Wash. 4.

[30] Hahn v. Lumpa, 138 N. W. 492, 158 Iowa, 560; Wells v. Kavanagh, 74 Iowa, 372, 37 N. W. 780; Fry v. Leslie, 87 Va. 269, 12 S. E. 671.

See, also, supra, § 126.

[31] Heller v. Chicago & G. T. Ry. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541.

See, also, supra, § 126.

[32] **Ga.** Seaboard Air Line Ry. v. Gnann & De Loach, 82 S. E. 1066, 142 Ga. 381; Crawford v. Georgia Pac. Ry. Co., 86 Ga. 5, 12 S. E. 176.

Ill. Kellogg v. Boyden, 126 Ill. 378, 18 N. E. 770.

Ind. Crum v. Yundt, 12 Ind. App. 308, 40 N. E. 79.

Iowa. Struebing v. Stevenson, 105 N. W. 341, 129 Iowa, 25.

Mo. Leabo v. Goode, 67 Mo. 126.

Tex. Wright v. Hardie (Civ. App.) 30 S. W. 675.

Issues not deemed abandoned within rule. Where, in an action for agent's compensation, the answer, independent of a counterclaim, alleged that plaintiff wrongfully procured the issuance to himself of a large amount of the stock of his employer; that he made false entries in the books of the company and appropriated its moneys to his own use, the fact that during the trial defendant dismissed a counterclaim for damages based on the same facts did not justify the court in refusing to submit to the jury evidence sustaining the defense of unfaithfulness. Steele v. Crabtree, 106 N. W. 753, 130 Iowa, 313.

CHAPTER XI

NECESSITY, PROPRIETY, AND SUFFICIENCY OF INSTRUCTIONS ON CREDIBILITY OF WITNESSES

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183. Rule that such instructions are improper.
184. Rule that such instructions may be given.

Instructions as invading province of jury, see ante, §§ 6–27.

A. IN GENERAL

§ 146. Credibility in general

As we have seen in a preceding chapter, the credibility of witnesses is almost invariably for the jury, but the court may lay down general rules for testing such credibility, or as to the right to believe or disbelieve a witness; the giving of such instructions resting largely in the discretion of the trial court.[1] Where there is a conflict in the evidence upon a material point,[2] which is not reasonably attributable to mistake, inadvertence, or lapse of memory,[3] it will be proper to give such an instruction. In some jurisdictions, on request, such an instruction should be given.[4] The general rule is that a party desiring instructions as to the credibility or impeachment of witnesses should request them.[5]

[1] Cullum v. Colwell, 83 A. 695, 85 Conn. 459; People v. Dumas, 125 N. W. 766, 161 Mich. 45; Dawson v. Flintom, 190 S. W. 972, 195 Mo. App. 75; White v. Lowenberg, 55 Mo. App. 69.

[2] State v. Parmenter, 213 S. W. 439, 278 Mo. 532; Deubler v. United Rys. Co. of St. Louis, 187 S. W. 813, 195 Mo. App. 658.

[3] Robert v. Rialto Bldg. Co., 199 S. W. 428, 198 Mo. App. 121; McDonald v. Redemeyer, 198 S. W. 483, 197 Mo. App. 630; Weller v. Plapao Laboratories Incorporation, 191 S. W. 1056, 197 Mo. App. 47.

[4] Grant v. State, 50 S. E. 946, 122 Ga. 740.

[5] Ga. Williams v. State (App.) 102 S. E. 875; Carson v. State, 97 S. E. 202, 22 Ga. App. 743; Brown v. State, 97 S. E. 69, 148 Ga. 509; Gibson v. State, 93 S. E. 48, 20 Ga. App. 73; Watkins v. State, 91 S. E. 284, 19 Ga. App. 234; Seaboard Air Line Ry. v. Barrow, 89 S. E. 383, 18 Ga. App. 261; Winder v. State, 88 S. E. 1003, 18 Ga. App. 67; Wyatt v. State, 88 S. E. 718, 18 Ga. App. 29; Giles v. Voiles, 88 S. E. 207, 144 Ga. 853; White v. State, 81 S. E. 440, 141 Ga. 526; Central of Georgia Ry. Co. v. McGuire, 73

§ 147. Impeachment of witnesses in general

It is proper for the court to charge as to the effect of evidence introduced to impeach a witness,[6] and that it is for the jury to say how far the impeachment of any witness is successful,[7] and although, as a general rule, it is not incumbent on a trial judge, in the absence of a request therefor, to give an instruction as to the impeachment of witnesses,[8] a general charge laying down the rules for determining the credibility of witnesses being sufficient,[9] the circumstances may be such as to make it error to fail to instruct upon the impeachment of witnesses, as well as upon the general subject of their credibility.[10]

Where there is no evidence tending to impeach any witness in any of the modes prescribed by law, a failure to charge on the

S. E. 702, 10 Ga. App. 483; Childs v. Ponder, 43 S. E. 986, 117 Ga. 553; Freeman v. Coleman, 88 Ga. 421, 14 S. E. 551; Cole v. Byrd, 83 Ga. 207, 9 S. E. 613.

Idaho. State v. Knudtson, 83 P. 226, 11 Idaho, 524.

Ill. Johnson v. People, 140 Ill. 350, 29 N. E. 895.

Ind. T. Parker v. United States, 43 S. W. 858, 1 Ind. T. 592.

Iowa. Halley v. Tichenor, 94 N. W. 472, 120 Iowa, 164.

Mich. Bartholomew v. Walsh, 157 N. W. 575, 191 Mich. 252.

Mo. State v. Thurman, 98 S. W. 819, 121 Mo. App. 374.

Neb. Edwards v. State, 95 N. W. 1038, 69 Neb. 386, 5 Ann. Cas. 312; Kerr v. State, 88 N. W. 240, 63 Neb. 115.

N. J. State v. Girone, 103 A. 803, 91 N. J. Law, 498.

Va. Shenandoah Valley Loan & Trust Co. v. Murray, 91 S. E. 740, 120 Va. 563.

Omission of word "willfully." A charge that, if the jury believe that plaintiff swore falsely in any one material fact, they might disregard his entire testimony, is not erroneous because it omits the word "willfully," where no request to supply the omission is made. Lindheim v. Duys (Super. N. Y.) 11 Misc. Rep. 16, 31 N. Y. S. 870.

[6] Florence v. State, 134 S. W. 689, 61 Tex. Cr. R. 238.

[7] Pike v. State, 49 S. E. 680, 121 Ga. 604.

[8] **Ga.** Western & A. R. Co. v. Holt, 95 S. E. 758, 22 Ga. App. 187; McDonald v. State, 94 S. E. 262, 21 Ga. App. 125; Garrett v. State, 93 S. E. 232, 20 Ga. App. 749; Seaboard Air Line Ry. v. Barrow, 89 S. E. 383, 18 Ga. App. 261; Kelly v. State, 88 S. E. 822, 145 Ga. 210; Giles v. Voiles, 88 S. E. 207, 144 Ga. 853; Fite v. State, 84 S. E. 485, 16 Ga. App. 22; Smith v. State, 78 S. E. 685, 13 Ga. App. 32; McCrary v. State, 74 S. E. 536, 137 Ga. 784; Craig v. State, 70 S. E. 974, 9 Ga. App. 233; Jackson v. State, 70 S. E. 245, 135 Ga. 684; Perdue v. State, 69 S. E. 184, 135 Ga. 277; Hunter v. State, 65 S. E. 154, 133 Ga. 78; Rouse v. State, 58 S. E. 416, 2 Ga. App. 184; Cæsar v. State, 57 S. E. 66, 127 Ga. 710; Hatcher v. State, 42 S. E. 1018, 116 Ga. 617; Louisville & N. R. Co. v. Thompson, 39 S. E. 483, 113 Ga. 983.

Iowa. Connors v. Chingren, 82 N. W. 934, 111 Iowa, 437.

Mont. State v. Willette, 127 P. 1013, 46 Mont. 326.

Tex. American Telegraph & Telephone Co. v. Kersh, 66 S. W. 74, 27 Tex. Civ. App. 127; Harrell v. State, 45 S. W. 581, 39 Tex. Cr. R. 204; Thurmond v. State, 27 Tex. App. 347, 11 S. W. 451.

[9] Givens v. State, 35 Tex. Cr. R. 563, 34 S. W. 626.

[10] Smith v. State, 171 P. 341, 14 Okl. Cr. 348; Wolfe v. State, 25 Tex. App. 698, 9 S. W. 44.

law relating to the impeachment of witnesses is not error,[11] and a mere direct contradiction of one witness by another will not ordinarily call for such an instruction.[12] Where the court undertakes to state the methods by which a witness may be impeached, it should state all of such methods, so far as authorized by the evidence,[13] but failure to do so will not require a new trial, in the absence of a request to charge as to the method of impeachment omitted.[14]

Whenever it is necessary to charge in regard to the effect of impeaching testimony, the jury should be told that such testimony is to be used for the purpose of affecting the credibility of the witnesses whose evidence is sought to be impeached.[15] An instruction that such testimony is to be considered for the sole purpose of enabling the jury to judge of the weight to be given to the testimony of the witness impeached is too restrictive.[16]

§ 148. Refusal of instructions because of other instructions given

Instructions with respect to the credibility of witnesses may properly be refused, where other instructions given sufficiently cover the ground.[17] Thus, where the court has instructed that

[11] Freeman v. State, 37 S. E. 172, 112 Ga. 48.

[12] Kipper v. State, 77 S. W. 611, 45 Tex. Cr. R. 377.

[13] Webb v. State, 79 S. E. 1126, 140 Ga. 779; Brand v. Bagwell, 66 S. E. 935, 133 Ga. 750.

Evidence impeaching witness in more than one way. An instruction on the subject of impeaching witnesses, which refers only to one method of impeachment, is erroneous, when the evidence tends to show impeachment both by contradictory statement and by general character. Southern Cotton Oil Co. v. Skipper, 54 S. E. 110, 125 Ga. 368.

Confining charge to methods of impeachment shown by the evidence. Where the only method by which a witness was sought to be impeached was by disproving the facts testified to by him and by proof of previous contradictory statements, it was proper to confine the instructions on the subject of impeachment of witnesses to those two methods. McGirt v. State, 54 S. E. 171, 125 Ga. 269.

[14] Millen & S. W. R. Co. v. Allen, 61 S. E. 541, 130 Ga. 656.

[15] Pratt v. State, 96 S. W. 8, 50 Tex. Cr. R. 227.

[16] Elkins v. State, 87 S. W. 149, 48 Tex. Cr. R. 205; Dean v. State (Tex. Civ. App.) 77 S. W. 803.

[17] Upton v. Paxton, 72 Iowa, 295, 33 N. W. 773; Carroll v. Boston Elevated Ry. Co., 86 N. E. 793, 200 Mass. 527.

Illustrations of instructions properly refused because of other instructions given. Where the jury have been instructed that their verdict should be determined by the evidence which would best satisfy them of the truth of the claims made by the respective parties, and in regard to the effect of the testimony of a witness who had made statements out of court contradictory to those made on the trial, it is not error to refuse to charge further in regard to the credibility of witnesses. Gutherless v. Ripley, 98 Iowa, 290, 67 N. W. 109.

Instructions on mental capacity. Where the court charged the jury to consider the mental capacity of plaintiff, and, if they should find him to be of a weak or unsound mind at time of testifying or shortly before,

the jury, in passing on the credibility of witnesses, may consider all the facts shown by the evidence, it is not error to refuse an instruction that they may consider particular facts bearing on the credibility of a party.[18] This rule applies with regard to instructions as to the effect of the interest of a witness,[19] and ordinarily, where the court has instructed in general terms that they may consider the interest which any witness has in the result of the suit, it need not instruct further as to the effect of the interest of a party.[20] But, where the testimony of a party is largely contradicted by other witnesses, the court cannot properly refuse to instruct that he is an interested witness, and the jury are not bound to accept his testimony as true, though he is uncontradicted or unimpeached, because it has instructed that in weighing his testimony the jury can consider his interest,[21] and a requested charge that in determining the credibility of a party his interest may be considered is not sufficiently contained in an instruction that, if any witness has knowingly testified falsely, his entire testimony may be disregarded;[22] nor is such request covered by a general instruction that the jury are the proper judges of the credibility of witnesses and the weight to be given to the testimony of each.[23]

The refusal of instructions as to the effect of the giving of false testimony by a witness is proper, where other instructions have

they could consider that fact, refusal to charge that the jury could reject his testimony if they believed he was then, or a short time before, of weak or unsound mind or of deficient understanding, and that if they believed he was laboring under a delusion that the money was deposited by him in defendant's vault, verdict should be for defendant, was not error. Mayer v. Brensinger, 54 N. E. 159, 180 Ill. 110, 72 Am. St. Rep. 196, affirming judgment 74 Ill. App. 475.

Means of information. Where the court charged, on defendant's behalf, that the jury, in determining the credibility of the witnesses, may consider their means of information, it was not error for the court to refuse to charge that where witnesses were otherwise equally credible, and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information are superior. Christy v. Elliott, 74 N. E. 1035, 216 Ill. 31, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

[18] Beasley v. Jefferson Bank, 89 S. W. 1040, 114 Mo. App. 406.

[19] **Iowa.** Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906.

Kan. Allison v. Ahlers, 26 Kan. 582; Fanson v. Harris, 21 Kan. 734; Central Branch Union Pac. R. Co. v. Holcomb, Id. 533; Same v. Young, Id., 532; Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 145.

[20] Chicago City Ry. Co. v. Mager, 56 N. E. 1058, 185 Ill. 336, affirming judgment 85 Ill. App. 524; Strasser v. Goldberg, 98 N. W. 554, 120 Wis. 621.

[21] Becker v. Woarms, 76 N. Y. S. 438, 72 App. Div. 196.

[22] Chicago & E. I. R. Co. v. Burridge, 71 N. E. 838, 211 Ill. 9, reversing judgment 107 Ill. App. 23.

[23] Denver City Tramway Co. v. Norton (C. C. A. Colo.) 141 F. 599, 73 C. C. A. 1.

sufficiently presented the subject to the jury,[24] and a general instruction, applicable to all the witnesses, as to the effect of false testimony, justifies the refusal of an instruction confined to the testimony of a party,[25] and it is held that, where the court has charged as to the effect of false testimony, it need not also charge as to the effect of making contradictory statements.[26]

§ 149. Sufficiency of evidence to sustain instructions on credibility of witnesses

An instruction on matters to be considered in passing upon the credibility of witnesses must be based upon the evidence in the case.[27] This rule applies with respect to instructions as to the effect of the general bad character of a witness,[28] or the effect of his good character,[29] or as to the effect of bias or prejudice resulting from the fact that a witness is employed by a

[24] West Chicago St. R. Co. v. Liserowitz, 64 N. E. 718, 197 Ill. 607, affirming judgment 99 Ill. App. 591; Burger v. Omaha & C. B. St. Ry. Co., 117 N. W. 35, 139 Iowa, 645, 130 Am. St. Rep. 343; Bernstein v. Smith, 10 Kan. 60.

[25] City of Spring Valley v. Gavin, 54 N. E. 1035, 182 Ill. 232, affirming judgment 81 Ill. App. 456; Whitaker v. Engle, 69 N. W. 493, 111 Mich. 205.

[26] Chicago City Ry. Co. v. Fennimore, 64 N. E. 985, 199 Ill. 9, affirming judgment 99 Ill. App. 174.

[27] **U. S.** (C. C. A. Cal.) Diggs v. United States, 220 F. 545, 136 C. C. A. 147, certiorari granted Caminetti v. United States, 35 S. Ct. 939, 238 U. S. 636, 59 L. Ed. 1500 and judgment affirmed 37 S. Ct. 192, 242 U. S. 470, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

Ala. Davis v. State, 66 So. 67, 188 Ala. 59; Conner v. State, 65 So. 309, 10 Ala. App. 206; Tennison v. State, 62 So. 780, 183 Ala. 1; Hicks v. State, 26 So. 337, 123 Ala. 15.

Cal. People v. Blunkall, 161 P. 997, 31 Cal. App. 778; People v. McPherson, 91 P. 1098, 6 Cal. App. 266; People v. Ward, 66 P. 372, 134 Cal. 301.

Ga. Gilstrap v. Leith, 102 S. E. 169, 24 Ga. App. 720; Devereaux v. State, 78 S. E. 849, 140 Ga. 225.

Ill. Johnson v. People, 64 N. E. 286, 197 Ill. 48.

Ind. Colondro v. State, 125 N. E. 27, 188 Ind. 533.

Kan. State v. Covington, 160 P. 1009, 99 Kan. 151.

Mich. Bulen v. Granger, 63 Mich. 311, 29 N. W. 718.

Miss. Layton v. State, 56 Miss. 791.

Mo. State v. O'Kelley, 137 S. W. 333, 156 Mo. App. 406.

N. Y. Lustig v. New York, L. E. & W. R. Co., 65 Hun, 547, 20 N. Y. S. 477.

Or. State v. Birchard, 59 P. 468, 35 Or. 484.

Wyo. Jenkins v. State, 134 P. 260, 22 Wyo. 34, rehearing denied 135 P. 749, 22 Wyo. 34.

[28] Southern Ry. Co. v. O'Bryan, 45 S. E. 1000, 119 Ga. 147; City Bank of Macon v. Kent, 57 Ga. 283.

Integrity or honesty of witness. A charge that the jury may consider the "integrity or honesty" of a witness in determining the weight to be given to his testimony is proper, even where there is no other proof thereof than that furnished by the appearance, deportment, and testimony of the witness himself. Fisher v. State, 77 Ind. 42.

[29] Helms v. State, 72 S. E. 246, 136 Ga. 799; Jenkins v. State, 58 S. E. 1063, 2 Ga. App. 626; Johnson v. State, 58 S. E. 684, 2 Ga. App. 405.

party,[30] or as to the effect of making contradictory statements,[31] or as to the effect of the corroboration of an impeached witness.[32] To sustain a charge that the jury may consider any feeling which a witness has towards a party, it is necessary that there should be direct evidence as to such feeling.[33] Where the credibility of a particular witness is not assailed, it is proper to refuse an instruction permitting the jury to consider certain matters in determining his credibility,[34] or telling them what weight should be accorded to the testimony of a discredited witness.[35] But an instruction that the jury will consider the character of the witnesses and their conduct on the stand, etc., is not objectionable as not based on evidence, where there is evidence contradicting the testimony of a witness,[36] and a charge that the jury are to consider the testimony in the light of the characters of the witnesses, and their opportunity of knowing the facts as to which they testified, is not reversible error, though there is no evidence in the case as to the character of witnesses; for such charge is no more likely to prejudice one party than another.[37]

§ 150. Right or duty of jury to believe witnesses

Where it is not sought to impeach any witness by evidence introduced for that purpose, it is not error to instruct that the law presumes all witnesses honest until the contrary is shown,[38] and in some jurisdictions, where the evidence given on behalf of one party tends to show that a witness for his adversary is guilty of perjury, it is error to refuse to instruct as to the presumption that such witness is innocent of such offense.[39] It is proper to charge that the jury may believe a witness, although he has been im-

[30] Chicago City Ry. Co. v. Rohe, 118 Ill. App. 322; West Chicago St. R. Co. v. Raftery, 85 Ill. App. 319; Illinois Cent. R. Co. v. Leggett, 69 Ill. App. 347; St. Louis, A. & T. H. R. Co. v. Walker, 39 Ill. App. 388; St. Louis, A. & T. H. R. Co. v. Huggins, 20 Ill. App. 639.

The mere fact that, in an action against a railroad, the witnesses for defendant are mostly its employés, does not warrant an instruction authorizing the jury, if they believe that any witness testified under fear of losing the employment, or with a desire of pleasing his employer, to consider such fact in determining the weight to be given his evidence. Wastl v. Montana Union Ry. Co., 17 Mont. 213, 42 P. 772.

[31] Nabors v. State, 25 So. 529, 120 Ala. 323; Cauley v. State, 92 Ala. 71, 9 So. 456.

[32] Kelly v. State, 45 S. E. 413, 118 Ga. 329; Plummer v. State, 36 S. E. 233, 111 Ga. 839.

[33] Mitchell v. State, 34 S. E. 576, 110 Ga. 272.

[34] Schmidt v. First Nat. Bank, 50 P. 733, 10 Colo. App. 261.

[35] Holly v. Flournoy, 54 Ala. 99.

[36] Wendling v. Bowden, 161 S. W. 774, 252 Mo. 647.

[37] Chattahoochee Brick Co. v. Sullivan, 86 Ga. 50, 12 S. E. 216.

[38] Georgia Talc Co. v. Cohutta Talc Co., 78 S. E. 905, 140 Ga. 245.

[39] Stevenson v. Gunning's Estate, 64 Vt. 601, 25 A. 697.

peached, if he is corroborated by other witnesses,[40] and an instruction is erroneous which might lead the jury to think that they cannot consider evidence in corroboration of such a witness.[41] An instruction telling the jury in effect that, while the law permits the impeachment of a witness by proving his general reputation for truth and veracity to be bad, yet if they believe the witness, while on the stand, gave a truthful, candid, and honest statement of the facts, they should give it such faith and credit as in their opinion it is entitled to, is proper, and should be given,[42] and it is proper to refuse an instruction that the jury may discard altogether the testimony of a witness so impeached.[43] It may not be improper in a criminal case, under some circumstances, to instruct that the jury cannot discard as false the testimony of a certain witness for the state, if the jury find beyond a reasonable doubt that such testimony is strengthened, confirmed, and corroborated as to all the facts and circumstances by other witnesses whose testimony is believed by the jury beyond a reasonable doubt; this instruction also being made applicable to every witness on either side.[44]

A charge with respect to the effect of the direct contradiction of a witness by the testimony of other witnesses upon the credibility of the witness so contradicted should not ignore the possibility of an honest mistake,[45] and it is not improper to charge that the jury should, if possible, reconcile the testimony of the

[40] Ector v. State, 48 S. E. 315, 120 Ga. 543; Grant v. State, 45 S. E. 603, 118 Ga. 804.

Right to believe impeached witness, although not corroborated. An instruction that the jury "might give full faith and credit to the testimony" of a witness whose veracity was impeached, and "might convict thereon without corroboration," was erroneous, as practically instructing the jury to give such faith and credit and convict thereon. Snyder v. State, 29 So. 78, 78 Miss. 366.

[41] Hamilton v. State, 41 So. 940, 147 Ala. 110.

[42] Roy v. Goings, 112 Ill. 656; Hedrick v. Bell, 84 Ill. App. 523.

[43] Osborn v. State, 27 So. 758, 125 Ala. 106.

[44] People v. Riker, 168 N. W. 434, 202 Mich. 377.

[45] Knight v. State, 49 So. 764, 160 Ala. 58; Hall v. State, 30 So. 422, 130 Ala. 45.

Instructions held improper within rule. Where, in a criminal prosecution, the principal testimony for the state consisted of that of a witness reciting a conversation with a third person, and the court instructed that in weighing the testimony of such witness the jury should consider whether it was true or not, or whether he fabricated the story for the purpose of convicting an innocent man, and told the jury that it was their plain duty, if they believed the story fabricated, to determine the motive; it being improbable that such a thing could be done without any motive, it was held that the instruction was erroneous, as excluding from the jury the question whether the conflict of evidence might be accounted for on the ground of innocent mistake. Schutz v. State, 104 N. W. 90, 125 Wis. 452.

witnesses, so as to impute perjury to no witness.[46] It has been held, however, that an instruction, in a case where the parties have given conflicting testimony, that it is plain that one or the other of them has committed perjury, and that the jury must meet the case fairly and decide which of the parties has sworn the truth, is not improper, since this is merely equivalent to saying that there is a direct conflict in the testimony, which is for the jury to determine.[47] An instruction tending to permit the jury to reject the testimony of a witness, if they conclude that there is a bare possibility of his being mistaken, is erroneous.[48]

§ 151. Right or duty of jury to disbelieve witnesses

It is proper to tell the jury to reject the evidence of witnesses if their testimony is not believed,[49] and an instruction telling the jury that they are not bound to take the testimony of any witness as absolutely true and that they should not do so, if they believed from the evidence that such witness was mistaken in the matters testified to by him or her, or for any reason appearing in the evidence his or her testimony is untrue or unreliable, is not erroneous.[50]

It is proper to charge, in effect, that if there is a conflict in the testimony of the witnesses, which the jury cannot reconcile, they may believe one witness and disbelieve the other,[51] taking into consideration the intelligence, interest, and apparent bias or prej-

[46] Skrine v. State, 51 S. E. 315, 123 Ga. 171; Price v. State, 40 S. E. 1015, 114 Ga. 855.

Presumption. An instruction that, if there is a conflict of testimony, the presumption is that either one or the other of the witnesses was honestly mistaken rather than either willfully testified falsely, was not misleading, though technically that is not a presumption of law. Hedger v. State, 128 N. W. 80, 144 Wis. 279.

[47] Critcher v. Hodges, 68 N. C. 22.

[48] Robinson v. State, 58 So. 121, 4 Ala. App. 1.

[49] State v. Minor, 77 N. W. 330, 106 Iowa, 642.

[50] Brant v. Chicago & A. R. Co., 128 N. E. 732, 294 Ill. 606; Rowden v. Travelers' Protective Ass'n of America, 201 Ill. App. 295; Black v. Rocky Mountain Bell Telephone Co., 73 P. 514, 26 Utah, 451.

[51] Shelton v. State, 42 So. 30, 144 Ala. 106; Marshall v. State, 44 So. 742, 54 Fla. 66.

Instructions held proper within rule. A charge that it was the jury's duty, in case of conflict in the testimony, to reconcile the conflict if they could do so without arbitrarily imputing perjury to any one, but if they could not reconcile such conflict they should accept what they considered to be the truth, and if in reaching such truth it should become necessary to impute perjury to a witness, it was their duty to take that responsibility, was not erroneous, as misleading, and wholly excluding from the jury the doctrine of reasonable doubt as to the imputation of perjury, or on the ground that it left to the jury the right to arbitrarily impute perjury in the testimony, where in conflict with what they considered to be the truth. Hunter v. State, 70 S. E. 643, 136 Ga. 103.

udice of the witnesses, as well as their manner of testifying;[52] and, subject to certain qualifications, already stated, as to the rule in some jurisdictions with respect to invading the province of the jury, the court may tell the jury that they may[53] or should[54] disregard the testimony of a witness who has been successfully impeached, except so far as he is corroborated by other credible evidence or facts proven in the case, and in some jurisdictions, where the evidence so authorizes, the court should give such an instruction on request.[55] Such an instruction, however, is properly refused in some jurisdictions, on the ground that it in effect charges the jury that they do not have the right to reject the testimony of any witness which has been corroborated by other evidence.[56]

It is error for the court to instruct a jury that a party introducing a witness thereby indorses the credibility of such witness; it being sufficient to say that a party cannot impeach his own witness.[57]

§ 152. Duty of jury not to act arbitrarily

While it is for the jury to determine the credibility of witnesses, the rule is that they cannot act arbitrarily in that regard, but must exercise their judgment and instructions giving them authority, or tending to lead them to suppose that they have the authority, to arbitrarily judge of the effect of evidence or to disregard it are erroneous.[58] Under this principle, an in-

[52] Lancaster v. State, 36 Tex. Cr. R. 16, 35 S. W. 165; Adam v. State (Tex. Cr. App.) 20 S. W. 548.

[53] Loehr v. People, 132 Ill. 504, 24 N. E. 68; Robertson v. Monroe, 7 Ind. App. 470, 33 N. E. 1002; Johnson v. Johnson, 115 N. W. 323, 81 Neb. 60.

[54] Landers v. State, 100 S. E. 569, 149 Ga. 482; Harris v. State, 57 S. E. 937, 1 Ga. App. 136; Long v. State, 56 S. E. 444, 127 Ga. 350; Holston v. Southern Ry. Co., 43 S. E. 29, 116 Ga. 656.

[55] **Ala.** Adams v. State, 57 So. 591, 175 Ala. 8; Davis v. State, 56 So. 844, 2 Ala. App. 200; Seawright v. State, 49 So. 325, 160 Ala. 33; Wynne v. State, 46 So. 459, 155 Ala. 99; Churchwell v. State, 23 So. 72, 117 Ala. 124.

Ga. Harper v. State, 87 S. E. 808, 17 Ga. App. 561; Fite v. State, 84 S. E. 485. 16 Ga. App. 22.

[56] Snyder v. State, 111 S. W. 465, 86 Ark. 456.

[57] Jarnigan v. Fleming, 43 Miss. 710, 5 Am. Rep. 514.

[58] **U. S.** (C. C. A. Ill.) Northern Pac. R. Co. v. Hayes, 87 F. 129, 30 C. C. A. 576.

Ala. Untreiner v. State, 41 So. 285, 146 Ala. 26; Shepherd v. State, 33 So. 266, 135 Ala. 9; Hall v. State, 32 So. 750, 134 Ala. 90.

Ill. Travers v. Snyder, 38 Ill. App. 379; Gibson v. Troutman, 9 Ill. App. 94.

Miss. Gables v. State, 54 So. 833, 99 Miss. 217.

Mont. Cameron v. Wentworth, 57 P. 648, 23 Mont. 70.

W. Va. State v. Lutz, 101 S. E. 434, 85 W. Va. 330; State v. Legg, 53 S. E. 545, 59 W. Va. 315, 3 L. R. A. (N. S.) 1152.

Instructions improper within rule. An instruction that "the jury

struction as to the right to disregard the testimony of a witness who has been successfully impeached will be insufficient, if it does not say what constitutes successful impeachment,[59] and instructions that the jury may disregard the uncontradicted testimony of a disinterested witness,[60] which is not inherently improbable,[61] or which permit them to reject the entire testimony of a witness because he may be found to have been impeached upon immaterial matters,[62] or to disregard the testimony of a witness merely because he has been guilty of an exaggeration are erroneous.[63] An instruction which broadly authorizes the jury to wholly disregard all the testimony given by a witness, if satisfied that his general reputation for truth and veracity is bad in the neighborhood in which he resides, no matter how truthful all or part

are not bound to take the testimony of any witness as absolutely true," should be qualified by adding, "if there is reason to believe it false or mistaken," or words of similar import. Chicago, R. I. & P. Ry. Co. v. Groves, 56 Kan. 601, 44 Pac. 628. After instructing a jury that, in deciding on the credibility of a witness, they may consider certain specific things, it is error to further instruct that they may consider whatever else they may have seen or heard during the trial that should go to the credibility of the witness. Paris v. Strong, 51 Ind. 339.

Instructions not improper within rule. An instruction which, after stating some of the recognized tests for determining the credibility of witnesses and the relative weight to be given to conflicting testimony, tells the jury that if they are unable to reconcile apparently conflicting testimony they must determine what portion of it was true and what false by the application of the tests given, and all other tests within their skill and power, is not erroneous, as giving the jury too much latitude in determining the credibility of testimony. Norris v. Cargill, 57 Wis. 251, 15 N. W. 148. An instruction that "the jury is not bound to believe the testimony of any witness" is not error, as allowing them to disregard uncontradicted testimony, if followed by an instruction which tells the jury that they are the sole judges of the weight of evidence, and correctly lays down to them the rules for determining its weight. United States v. Bassett, 5 Utah, 131, 13 P. 237. An instruction that the jury are the sole judges of the credibility of the witnesses, and may disbelieve any witness, provided they believe from the testimony that he has not sworn truthfully, and that in determining whether they will believe or disbelieve any witness, they may consider the interest, if any, he may have, together with all the facts and circumstances. Waldrop v. State, 54 So. 66, 98 Miss. 567.

[59] Chicago City Ry. Co. v. Ryan, 80 N. E. 116, 225 Ill. 287; People v. Spencer, 171 Ill. App. 237; Simmons v. Clement, 164 Ill. App. 477.

[60] Kapiloff v. Feist (Sup.) 91 N. Y. S. 27.

[61] Tyler v. Third Ave. R. Co. (Sup.) 41 N. Y. S. 523, 18 Misc. Rep. 165, 75 N. Y. St. Rep. 913.

[62] Remington v. Geiszler, 152 N. W. 661, 30 N. D. 346.

[63] Walker v. Chicago & J. E. Ry. Co., 142 Ill. App. 372; Hughes v. Hughes, 133 Ill. App. 654.

Failure to charge. A charge that the jury might disregard the testimony of witnesses who willfully swore falsely is not erroneous in omitting a similar instruction as to witnesses who should willfully exaggerate. Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667, 3 N. W. 173.

In New York, however, it has been held that an instruction that, if

of the testimony might in itself appear to be, is erroneous.[64] It has been held, however, that it is not error to refuse to charge that the jury has no right to disregard the testimony of any witness through caprice or without cause, merely because the witness is employed by one of the parties, there not being anything to indicate that the jury would disregard the testimony of any witness, and the court having instructed that the testimony of each witness should receive such credit as it seemed to be entitled to under all the circumstances.[65]

B. Particular Matters to be Considered in Passing on Credibility of Witnesses

Instructions criticized as invading province of jury, see ante, § 11.

§ 153. Necessity, propriety, and sufficiency in general

While there is no rule of law which requires a trial court to comment on all the circumstances tending to discredit or corroborate witnesses,[66] it is not improper for the court to direct the attention of the jury to any matter in the case affecting the credibility of a witness or which may influence his testimony,[67]

"plaintiff has under oath intentionally misrepresented or exaggerated the injuries received by him," the jury may disregard his entire testimony, is unobjectionable. Bonelle v. Pennsylvania R. Co., 51 Hun, 640, 4 N. Y. S. 127.

[64] Higgins v. Wren, 82 N. W. 859, 79 Minn. 462.

[65] Hintz v. Michigan Cent. R. Co., 104 N. W. 23, 140 Mich. 565.

[66] Faulkner v. Paterson Ry. Co., 46 A. 765, 65 N. J. Law, 181.

[67] **U. S.** (C. C. A. Tenn.) Louisville & N. R. Co. v. McClish, 115 F. 268, 53 C. C. A. 60.

Ga. Wheeler v. State, 37 S. E. 126, 112 Ga. 43; McDaniel v. Walker, 29 Ga. 266.

Mich. Hitchcock v. Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

Mo. State v. Hicks, 92 Mo. 431, 4 S. W. 742.

N. J. Bruch v. Carter, 32 N. J. Law, 554.

Pa. Brinton v. Walker, 15 Pa. Super. Ct. 449.

Vt. State v. Guyer, 100 A. 113, 91 Vt. 290.

Va. Horton v. Commonwealth, 38 S. E. 184, 99 Va. 848.

Sufficiency of instructions prescribing tests of credibility. The court properly instructed the jury that "in determining as to the credit you will give a witness and the weight and value you will attach to a witness' testimony you should take into consideration the conduct and appearance and manner of the witness while on the stand, the interest of the witness if any in the result of the trial, the motives which actuate the witness in testifying, or in giving contradictory or false testimony, the witness' relation or feeling toward the defendant, and the probability or improbability of the witness' statement being true when considered with all other evidence, etc. People v. Bernal, 180 P. 825, 40 Cal. App. 358. Where the testimony of witnesses is conflicting, it is not error for the court to instruct the jury that they should believe the witness whom they consider most worthy of belief, and that, in order to arrive at a conclusion as to who is most worthy of belief, they may look to the manner of the witnesses while testifying, their means

the jury being told that they are the sole judges of the credit to

of knowledge as disclosed by the evidence, and their bias or prejudice, if any has been shown by the testimony, and should see to what extent they have been impeached or corroborated, if at all. Central R. & Banking Co. v. Attaway, 90 Ga. 656, 16 S. E. 956. An instruction that the jury are the judges of the credibility of the witnesses, that they are not bound to regard the evidence as evenly balanced merely by a count of the witnesses, but that in determining such questions they have a right to consider the appearances of the witnesses while on the stand, their manner of testifying, their apparent candor and fairness, their intelligence or the lack of it, and all other surrounding circumstances appearing on the trial, is not erroneous. Hopp v. Chicago City Ry. Co., 170 Ill. App. 72. An instruction that "the jury, * * * in determining whether witnesses will be believed or not are not bound by the opinions of other witnesses but have a right to consider all the testimony of the case the motives and interests of the witness the nature of his testimony and all the facts in evidence throwing light upon the point," cannot be complained of by defendant in a criminal prosecution. Brown v. State, 23 So. 422, 75 Miss. 842. It is proper to instruct that in determining the facts the jury are to determine, from the appearance and demeanor of the witnesses, their manner of testifying, and their apparent candor and fairness, their bias or prejudice, their apparent intelligence, their interest in the result, and all their surrounding circumstances, the witnesses most worthy of credit, and to give credit accordingly. State v. Hoshor, 67 P. 386, 26 Wash. 643. An instruction that in determining credibility the jury should consider the witness' apparent intelligence, candor, knowledge of the matters testified about, interest in result of the trial, relations with the interested parties, corroboration by other credible evidence or proved facts or circumstances, the motives for falsifying or the absence of these things or any of them so far as their presence or absence appeared from the trial, the manner and appearance of the witness upon the stand, the inherent reasonableness or the absence of it of the statements made, and any other facts or circumstances appearing from the evidence or upon the trial tending to affect the question, correctly states the law so far as it goes, and is not objectionable, in the absence of any request for more explicit instructions, for failing to call the attention of the jury to the witness' opportunity to observe what took place, the attention paid to the occurrence, or the ability to recall and state it in its details correctly. Anderson v. Sparks, 125 N. W. 925, 142 Wis. 398. In a murder case, an instruction on the credibility of witnesses and weight to be attached to their testimony that the jury are the sole judges thereof, that in determining such credit, weight, and value to be attached to the testimony of any witness, they should consider the character of the witness, his or her manner on the stand and of testifying, his or her interest, if any in the result, his or her relation to or feeling for defendant or deceased, the probability of his or her statement, as well as all other facts and circumstances detailed in evidence, and finally that, if they believed any witness willfully or knowingly swore falsely to any material fact, they were at liberty to disregard any part of his testimony, is sufficient. State v. Shelton, 122 S. W. 732, 223 Mo. 118. Where an instruction directed that, in determining the weight of the testimony, the jury should consider any interest of the witnesses in the result of the case, their conduct and demeanor while testifying, their apparent fairness or bias, their opportunities for seeing or knowing the things about which they testify, the reasonableness of the "story told" by them, and all the evidence and circumstances proved tending to corroborate or contradict them, "if any such appears," it was held that such instruction was not erroneous in the use of the words "story told" and "appears"; the words "story told" being used in the

be given to the witnesses,[68] and in some jurisdictions it is reversible error to refuse to give such an instruction.[69] In a criminal case, where the testimony is sharply conflicting and the case is one peculiarly calculated to excite passion or prejudice, the accused has the right to have the jury accurately instructed as to all matters which might influence them.[70] An instruction which specifies certain matters as proper to be considered by the jury in passing upon the credibility of witnesses is not objectionable, as preventing the jury from considering other matters.[71]

sense of the testimony given on the trial, and the word "appears" to mean the fairness or bias of the witness as disclosed by his conduct on the stand, his manner of testifying, etc. Nicholson v. State, 106 P. 929, 18 Wyo. 298. An instruction that, in determining whether a witness had been impeached by the testimony of other witnesses, both his and their conduct on the stand, as well as his or their interest in the outcome of the case, may properly be considered, should have been qualified by adding that the contradictory statements must have been made as to matters relevant to the testimony and the case. Holston v. Southern Ry. Co., 43 S. E. 29, 116 Ga. 656.

Illiterate witness. It is not error to charge that "as to this witness, who cannot read or write, you should give his testimony the same weight, neither more or less, than you would give to the testimony of any other witness, after you have fully considered it and all the evidence. You should treat him as you would any other witness." Wilkinson v. Williamson, 76 Ala. 163.

Effect of statute specifying matters affecting credibility. A statute providing that the jury, in judging of the credibility of a witness, may consider the manner in which he testified, the character of his testimony, the evidence affecting his character for truth, his motives, or contradictory evidence, does not render it improper for the court to charge the jury to consider also the degree of intelligence of the witness. People v. Miles, 77 P. 666, 143 Cal. 636.

Matters not warranting instructions. Where plaintiff's attention was not directed to a discrepancy in his testimony, the court properly refused to instruct that his testimony was discredited by such discrepancy. Moyer v. Pennsylvania R. Co., 93 A. 282, 247 Pa. 210.

Argumentative instructions. An instruction that in determining the credibility of witnesses the jury should look, not only to the integrity of the witnesses and their purposes and intention to testify truthfully, but also to all the circumstances surrounding the witnesses at the time the events transpired, and that it is insisted that the suddenness with which the encounter between decedent and accused occurred, and the excitable and nervous disposition of an eyewitness were circumstances which should be looked to in determining whether the eyewitness could correctly understand what was said by accused, and that the testimony of any witness in undertaking to repeat the words of another, especially when heard under exciting conditions, is the most unsatisfactory evidence, etc., is properly refused as argumentative. Cooper v. State, 138 S. W. 826, 123 Tenn. 37.

[68] Jordan v. State, 39 So. 155, 50 Fla. 94.

[69] Stinson v. State, 64 So. 507, 10 Ala. App. 110; Storey v. State, 71 Ala. 329; Howard v. State, 73 Ga. 83; State v. Beeskove, 85 P. 376, 34 Mont. 41; Bernier v. Nute, 94 A. 509, 77 N. H. 568.

[70] People v. Turner, 107 N. E. 162, 265 Ill. 594, Ann. Cas. 1916A, 1062; Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835.

[71] Smith v. State, 52 S. E. 329, 124 Ga. 213; State v. Dugan, 89 A. 691, 84 N. J. Law, 603, judgment affirmed 89 A. 1135, 85 N. J. Law, 730.

While as a general rule it is not incumbent on the court to call the jury's attention to the fact that the testimony of a witness has been contradicted,[72] it is proper to caution the jury concerning the care to be used where the witnesses are at variance,[73] and it is proper to charge that the jury may or will consider the appearance and conduct of witnesses on the stand,[74] or their bias, impartiality, or prejudice, as disclosed by the evidence,[75] or the reasonableness or improbability of the statements of a witness,[76] and in some cases it may be error to refuse to instruct that the jury may take into consideration the business competency, care, and habits of witnesses as revealed by the evidence.[77] Ordinarily a party is entitled to an instruction that the jury may consider the friendship of a witness for a party,[78] or that a witness is a detective and therefore may be denominated as a "hired witness."[79] A delay in bringing an action may be of such a character as to make it proper to tell the jury that they may consider it in passing upon the credibility of a party testifying as a witness,[80] and it is proper to charge that the jury may call to their aid such knowledge of men and their actions as they have acquired by mingling with men.[81]

Where the question of the mental competency of a witness is raised by the evidence the court may,[82] and should on request, instruct the jury that, if they find that he is without sufficient capacity to understand what is going on, or his mind is so un-

[72] Joyce v. Joyce, 67 A. 374, 80 Conn. 88.

[73] Moore v. State, 76 S. E. 159, 11 Ga. App. 801; Johnson v. McKee, 27 Mich. 471.

[74] People v. Jailles, 79 P. 965, 146 Cal. 301; Georgia Home Ins. Co. v. Campbell, 29 S. E. 148, 102 Ga. 106; People v. Fox, 110 N. E. 26, 269 Ill. 300; Wendling v. Bowden, 161 S. W. 774, 252 Mo. 647; Chezem v. State, 76 N. W. 1056, 56 Neb. 496.

Duty of jury to consider demeanor of witness. An instruction that it is the jury's duty to consider the demeanor of a witness on the stand while testifying is not a correct statement of the law, as it may lead them to suppose that in the opinion of the court the conduct of the witness had been such as to shed light on the value of his evidence. Heenan v. Howard, 81 Ill. App. 629.

[75] Macon Ry. & Light Co. v. Barnes, 49 S. E. 282, 121 Ga. 443; Foley v. Detroit & M. Ry. Co., 159 N. W. 506, 193 Mich. 233.

[76] Tucker v. State, 59 So. 941, 64 Fla. 518; Rouse v. State, 71 S. E. 667, 136 Ga. 356; State v. Adair, 61 S. W. 187, 160 Mo. 391.

[77] First Nat. Bank v. Haight, 55 Ill. 191.

[78] Birmingham Ry., Light & Power Co. v. Glenn, 60 So. 111, 179 Ala. 263.

[79] People v. Rice, 103 Mich. 350, 61 N. W. 540. See State v. Bouchard, 149 P. 464, 27 Idaho, 500.

[80] Walker v. Harvey (C. C. A. Pa.) 108 F. 741, 47 C. C. A. 655.

[81] Cincinnati, H. & I. R. Co. v. Cregor, 50 N. E. 760, 150 Ind. 625; Renard v. Grande, 64 N. E. 644, 29 Ind. App. 579.

[82] Bowdle v. Detroit St. Ry. Co., 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366.

sound that his testimony is unworthy of belief, it should be disregarded.[83]

It is error in some jurisdictions to refuse an instruction requiring the jury, in case of conflict in the evidence, to consider the opportunities of the respective witnesses for knowing the facts to which they testify, in determining their credibility.[84] But an instruction that the jury may believe the witnesses having the best opportunity of knowing the facts and the least inducement to swear falsely, without qualifying the instruction by the addition of the words "if the witnesses are of equal credibility," is erroneous,[85] as tending to mislead the jury into supposing that the court intends that such a witness is to be believed in preference to other witnesses.[86]

While it is proper to charge that a party has a right to furnish transportation to witnesses, it is not error to refuse to so charge,[87] or to refuse to charge that no unfavorable inference as to the credibility of witnesses should be drawn because they have been brought from long distances at the expense of a party.[88] It is error to comment on the fact that a witness has testified against the character of a near relative,[89] and it is error to comment on the coincidence in all points of the stories of different witnesses.[90] Ordinarily it is proper to refuse an instruction that the fact that a witness has testified by deposition does not affect his credibility.[91]

Where the court has instructed on motives as affecting credibility, it is not required to also instruct on "hopes" and "fears" of a witness as bearing on his credibility,[92] and where, in a general instruction as to the credibility of any witness, the jury are told that they may consider the character of a witness, it is prop-

[83] Worthington v. Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407.

[84] Jones v. Alabama Mineral R. Co., 107 Ala. 400, 18 So. 30.

[85] Richter v. Cathy, 79 S. E. 179, 13 Ga. App. 369; Logan v. Hope, 77 S. E. 809, 139 Ga. 589; City of Dalton v. Humphries, 77 S. E. 790, 139 Ga. 556; Western & A. R. Co. v. Davis, 77 S. E. 576, 139 Ga. 493; Howell v. Clements, 77 S. E. 564, 139 Ga. 441; Nashville, C. & St. L. Ry. v. Pope, 77 S. E. 380, 139 Ga. 590; Wright v. Western & A. R. Co., 77 S. E. 161, 139 Ga. 343; Alabama Great Southern R. Co. v. Brock, 77 S. E. 20, 139 Ga. 248; Nashville, C. & St. L. Ry. v. Hubble, 76 S. E. 1009, 139 Ga. 300; Nashville, C. & St. L. Ry. v. Paris, 76 S. E. 357, 138 Ga. 864; Wilkes v. State, 75 S. E. 443, 11 Ga. App. 384; Lawrence v. State, 74 S. E. 300, 10 Ga. App. 786.

[86] Louisville & N. R. Co. v. Rogers, 71 S. E. 1102, 136 Ga. 674.

[87] Southern Ry. Co. v. State, 75 N. E. 272, 165 Ind. 613.

[88] Klepsch v. Donald, 8 Wash. 162, 35 P. 621.

[89] Spicer v. State, 105 Ala. 123, 16 So. 706.

[90] State v. Anderson, 89 P. 831, 35 Mont. 374; State v. Sloan, 89 P. 829, 35 Mont. 367.

[91] Williamson v. North Pacific Lumber Co., 73 P. 7, 43 Or. 337.

[92] People v. Glass, 112 P. 281, 158 Cal. 650.

er to refuse an instruction calling the attention of the jury to the fact that a witness is a habitual drunkard.[93]

The court should be careful not to permit the jury to gain the impression that they may go outside of the evidence in determining the credibility of witnesses,[94] and an instruction so framed as to tend to lead the jury to think that they can consider the conduct of a witness in the presence of the jury while off the stand in determining his credibility is erroneous.[95] An instruction that it is a wise rule for the jury, when considering conflicting testimony, to give credence to the testimony of that witness or those witnesses who have the least inducement, through interest or other motives, to testify falsely, is erroneous, as ignoring nearly all the factors entering into the credibility of a witness.[96]

§ 154. Character and conduct of witness

An instruction regarding the reputation of a witness should never be given, except when it has been directly attacked by the evidence introduced.[97] In a proper case, however, and within the limitations of the rule stated above, that the jury should be instructed that it is for them to say whether a witness is telling the truth,[98] the jury may be told that they may consider the character of a witness in determining his credibility,[99] or that a witness has been convicted of crime,[1] or that a witness may be impeached by proof of bad "moral" character,[2] the use of the word "moral" not being regarded as either restrictive or misleading, and under some circumstances it may be error to refuse to give such an in-

[93] State v. Wright, 133 S. W. 664, 152 Mo. App. 510.

[94] Autrey v. State, 74 So. 397, 15 Ala. App. 574.

Instructions not improper within rule. An instruction that the jury may consider the interest that a witness has shown in the result, his capacity and understanding, and the improbability of his statement. Wheeler v. State, 113 N. W. 253, 79 Neb. 491. An instruction, on the credibility of witnesses, that the jury may consider their interest, conduct, and demeanor in testifying, their opportunity for seeing or knowing the things of which they testify, and all the evidence and facts proven tending to corroborate or contradict the witnesses, is not objectionable as indefinite, and allowing the jury to consider other facts than those established by the evidence. State v. Burton, 67 P. 1097, 27 Wash. 528.

[95] People v. Terrell, 104 N. E. 264, 262 Ill. 138; Ryan v. People, 122 Ill. App. 461.

[96] Schutz v. State, 104 N. W. 90, 125 Wis. 452.

[97] Wendling v. Bowden, 252 Mo. 647, 161 S. W. 788.

[98] State v. Cloninger, 63 S. E. 154, 149 N. C. 567.

[99] Wheeler v. State, 37 S. E. 126, 112 Ga. 43; State v. Martin, 132 S. W. 595, 230 Mo. 680; Harrison v. Lakenan, 88 S. W. 53, 189 Mo. 581.

[1] Keating v. State, 93 N. W. 980, 67 Neb. 560.

[2] Sparks v. Bedford, 60 S. E. 809, 4 Ga. App. 13.

struction on request.[3] On the other hand, it is proper to charge that the jury are not to disregard the testimony of witnesses merely because of evidence as to their character,[4] or because they have been convicted of crime.[5] An instruction as to the general bad reputation for veracity of a witness should not be confined to what is said of him by the better elements in the community, but should include the opinion held of him by the whole neighborhood, whether good or bad.[6]

§ 155. Youth of witness

It may be proper,[7] or necessary on request, for the court to charge upon the quality and credibility of the testimony of children of tender years.[8]

§ 156. Corroboration of witness against whom impeaching testimony has been given

It is proper to instruct that, where a witness has been impeached by evidence of previous contradictory statements, he may be sustained by proof of good character, or by other facts and circumstances,[9] and it is error to refuse to charge that impeaching testimony adduced against witnesses should be weighed in the light of the proof of their good character, along with the other evidence in the case.[10]

C. Testimony Not Given in Open Court or not Given under Sanction of Oath

§ 157. Absent witnesses

Where evidence is presented in the form of the deposition or affidavit of an absent witness cautionary instructions as to the

[3] Prater v. State, 107 Ala. 26, 18 So. 238; Ohio & M. Ry. Co. v. Crauch-er, 132 Ind. 275, 31 N. E. 941; State v. Sandt (N. J. Sup.) 111 A. 651; State v. Rachman, 53 A. 1046, 68 N. J. Law, 120.

[4] State v. Olds, 76 N. W. 644, 106 Iowa, 110.

[5] People v. Puttman, 61 P. 961, 129 Cal. 258.

Instructing that conviction goes only to credibility. In homicide it was not necessary for the court to charge with reference to an accomplice who had pleaded guilty and been sentenced to state's prison for life for his participation in the crime that "in times past" a convict under life sentence was incompetent to testify, but it was sufficient to charge that his infamy as a convict went to his credibility. Jones v. State, 64 Ind. 473.

[6] Brown v. United States, 17 S. Ct. 33, 164 U. S. 221, 41 L. Ed. 410.

[7] State v. Labriola, 67 A. 386, 75 N. J. Law, 483.

[8] People v. Gralleranzo, 66 N. Y. S. 514, 54 App. Div. 360; State v. Morasco, 128 P. 571, 42 Utah, 5.

[9] Gordon v. State, 72 S. E. 544, 10 Ga. App. 35; Powell v. State, 29 S. E. 309, 101 Ga. 9, 65 Am. St. Rep. 277.

[10] Hammond v. State, 41 So. 761, 147 Ala. 79.

weight or degree of credibility to be given to depositions to overcome any disposition of the jury to accord them less weight than testimony in open court are generally warranted,[11] and the court should, on request,[12] charge that such evidence is to be weighed and considered the same as the testimony of other witnesses in the case, and although it is not ordinarily improper to refuse a charge that such evidence is to be given the same weight as if the witnesses had been present and examined in open court,[13] the circumstances may be such as to make it error to refuse to so charge.[14]

§ 158. Dying declarations

Instructions on weight of dying declarations as invading province of jury, see ante, § 50.

The court should instruct on request that the jury should give no more weight, or attach no greater degree of credit to dying declarations than to testimony of witnesses not subject to cross examination,[15] and instructions which are calculated to make the jury believe that such declarations are entitled to the same weight or the same degree of credit as the testimony of living witnesses given under oath on cross-examination are erroneous.[16]

Where the credibility of a witness whose dying declarations have been introduced in evidence is attacked by proof of general bad character or in any other way in which the law authorizes the impeachment of witnesses the court should, on request, instruct that such dying declarations, as evidence, should be considered under the same rules that govern in determining the credibility of witnesses who testify from the stand.[17] If the jury are instructed with respect to the conditions which render such declarations admissible they should be told that they should disregard a declaration not made under a sense of impending death and it is error to tell them merely that they are at liberty to disregard declarations made in the absence of such a belief.[18] Failure how-

[11] Hershiser v. Chicago, B. & Q. R. Co., 170 N. W. 177, 102 Neb. 820; McCormick v. State, 92 N. W. 606, 66 Neb. 337.

[12] Coburn v. Moline, E. M. & W. Ry. Co., 149 Ill. App. 132, judgment affirmed 90 N. E. 741, 243 Ill. 448, 134 Am. St. Rep. 377.

[13] Hogan v. State, 30 So. 358, 130 Ala. 104; State v. Heath, 141 S. W. 26, 237 Mo. 255; Hershiser v. Chicago, B. & Q. R. Co., 170 N. W. 177, 102 Neb. 820.

[14] Lee v. State, 23 So. 628, 75 Miss. 625.

[15] Zipperian v. People, 79 P. 1020, 33 Colo. 134.

[16] State v. Mathes, 90 Mo. 571, 2 S. W. 800; State v. Valencia, 140 P. 1119, 19 N. M. 113, 52 L. R. A. (N. S.) 152.

[17] Robinson v. State, 73 S. E. 622, 10 Ga. App. 462.

[18] People v. Profumo, 138 P. 109, 23 Cal. App. 376; Brown v. State, 112 S. W. 80, 54 Tex. Cr. R. 121.

ever explicitly to instruct the jury to decide whether a dying declaration was made when the declarant was in extremis and had abandoned all hope of recovery is not error in the absence of a request to so instruct.[19] In the absence of a request therefor it will not ordinarily be error to fail to give an instruction as to the weight to be attached to dying declarations or as to the matters to be considered in determining their credibility.[20]

D. Interest or Bias of Witness

§ 159. Right of jury to consider interest or bias of witness and effect of such matters

Instructions on interest of witness as invading province of jury, see ante, §§ 13, 14.

As a general rule it is proper to instruct that in determining the credibility of witnesses their interest in the result of the suit may be taken into consideration[21] and it is error to instruct that certain facts showing that a witness is interested are immaterial,[22] or to so frame instructions as to prevent the jury from passing on the bias of a witness as indicated by certain events.[23] It is proper to charge that it is for the jury to say whether they will

Compare People v. Rulia Singh, 188 P. 987, 182 Cal. 457.

[19] State v. Mueller, 141 N. W. 1113, 122 Minn. 91.

[20] Propes v. State, 95 S. E. 939, 22 Ga. App. 254; Howard v. State, 86 S. E. 540, 144 Ga. 169; Devereaux v. State, 78 S. E. 849, 140 Ga. 225; State v. Johns, 132 N. W. 832, 152 Iowa, 383; State v. Walker, 177 P. 315, 104 Wash. 472.

[21] People v. Amaya, 66 P. 794, 134 Cal. 531; State v. Elby, 83 So. 227, 145 La. 1019; Clarey v. State, 85 N. W. 897, 61 Neb. 688; City of Harvard v. Crouch, 47 Neb. 133, 66 N. W. 276; State v. Lovelace, 101 S. E. 380, 178 N. C. 762.

Instructions held not improper. A charge that the jury, in determining the credibility of a witness, may consider his interest in the result, and the probability of the truthfulness of his testimony, was not error as saying that the truthfulness of testimony depends upon whether the witness is interested. Mendenhall v. Stewart, 47 N. E. 943, 18 Ind. App. 262.

When counsel have referred, in their arguments, to the interest of witnesses, it is not error to charge that if the interest or employment of a witness has impaired or biased his judgment, such fact may be considered in weighing his testimony. McDonell v. Rifle Boom Co., 71 Mich. 61, 38 N. W. 681.

Duty of jury to consider interest of witness. A requested instruction that the jury was "at liberty" to consider the opportunity of the witnesses for seeing, their interest, their demeanor, etc., is not strictly correct, since, if the instruction is required, it should make such consideration the "duty" of the jury. Stanley v. Cedar Rapids & M. C. Ry. Co., 93 N. W. 489, 119 Iowa, 526.

[22] Needles v. Gregory, 73 Mo. App. 357.

[23] Wright v. City of Anniston, 44 So. 151, 151 Ala. 465.

believe the testimony of an interested witness,[24] and the court should charge on request, in a criminal prosecution in a proper case, that if any of the witnesses for the state have exhibited bias or anger against the defendant, so, that the jury are satisfied that such witnesses have not testified truly,[25] or if any of such witnesses have been induced to testify by a promise of immunity from further punishment,[26] such matters may be taken into consideration in passing on the credibility of the witnesses, and under some circumstances it may be error to refuse to charge that the jury may infer that the fact that a witness is in the employ of a party has some bearing on his testimony.[27]

On the other hand, it is improper to instruct that the jury may disregard the testimony of interested witnesses, although they are neither contradicted nor impeached,[28] or to give an instruction which suggests that the jury may disregard the testimony of a witness merely because he is in the employ of the party calling him to the witness stand,[29] and an instruction that if the jury believe that any witness for defendant testified under a fear of losing his employment, or a desire to avoid censure, or fear of offending, or a desire to please his employer, such fact may be considered in determining the weight to be given to his testimony, is erroneous, when not coupled with any caution that the jury will not be justified in drawing unfair inferences simply because the witnesses are employés, and there is nothing in the testimony itself or in the manner of the witnesses to justify the conclusion that the testimony is tainted in the manner suggested by the instruction.[30] Conversely, where the evidence is con-

[24] Le Boutillier v. Fiske, 47 Hun, 323.

Where there is a direct conflict in the testimony of the witnesses for plaintiff and that of the witnesses for defendant, its employés, it is not error to instruct that the jury may disregard the testimony of any witness. Reilly v. Third Ave. R. Co. (Sup.) 16 Misc. Rep. 11, 37 N. Y. S. 593.

[25] Burkett v. State, 45 So. 682, 154 Ala. 19; Hammond v. State, 41 So. 761, 147 Ala. 79.

[26] Howard v. State, 35 So. 653, 83 Miss. 378; People v. Butler, 71 N. Y. S. 129, 62 App. Div. 508; State v. Chandler, 112 P. 1087, 57 Or. 561.

[27] Bartholdi v. Hickson (Sup.) 136 N. Y. S. 92.

[28] Berzevizy v. Delaware, L. & W. R. Co., 46 N. Y. S. 27, 19 App. Div. 309.

Treating testimony of interested witness as without weight. A charge that the jury may reject the testimony of interested witnesses, if they feel, on all the evidence and circumstances of the case, that such evidence is untrue, is error, as creating the impression that such evidence is to receive no consideration. Soltau v. Loewenthal, 48 Hun, 620, 1 N. Y. S. 168.

[29] Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415.

[30] Gregory v. Detroit United Ry. Co., 101 N. W. 546, 138 Mich. 368.

flicting, a party may be entitled to an instruction that the jury have no right to disregard the testimony of a witness simply because he is an employee of either party.[31]

An instruction that, as a general rule, a witness who is interested in the result of a suit will not be as honest, candid, and fair in his testimony as one who is not interested, is erroneous,[32] and it is proper to refuse to charge that the testimony of a disinterested witness is entitled to more weight than that of a party.[33] In a criminal prosecution, however, it has been held that it is error to refuse an instruction that the jury have the right to disbelieve the testimony of any interested witness upon no other ground than the fact of interest.[34] A general instruction that it is proper to consider the interest and bias or prejudice of witnesses in judging of their credibility is sufficient, unless some good reason appears for specially cautioning the jury.[35]

§ 160. Complaining witness in criminal prosecution

Instructions criticized as invading province of jury, see ante, § 18.

Cautionary instructions with respect to the testimony of a complaining witness in a criminal prosecution should be given on request.[36] In a rape case it is proper to caution the jury to weigh

[31] Olsen v. Chicago City Ry. Co., 153 Ill. App. 75.

[32] Muncie, H. & Ft. W. Ry. Co. v. Ladd, 76 N. E. 790, 37 Ind. App. 90; Boyce v. Palmer, 75 N. W. 849, 55 Neb. 389.

Instructions not improper within rule. A charge that, "in determining the weight to be given the testimony of the different witnesses, you should take into account the interest or want of interest they have in the case, their manner on the stand, the probability or improbability of their testimony, with all other circumstances before you which can aid you in weighing their testimony," is not erroneous, as charging that an interested witness is, as a matter of law, entitled to less credence than another. Deal v. State, 140 Ind. 354, 39 N. E. 930.

[33] Platz v. McKean Tp., 36 A. 136, 178 Pa. 601, 39 Wkly. Notes Cas. 480.

[34] Hunter v. State, 29 Fla. 486, 10 So. 730.

[35] Porter v. People, 74 P. 879, 31 Colo. 508; State v. Gray, 135 P. 566, 90 Kan. 486.

Instructions on bias held sufficient. An instruction that, in determining the credibility and weight of a witness' testimony, "his relation to or feeling towards the defendant" may be taken into consideration, is sufficient on the question of the witness' bias, since it necessarily contemplates whether he was friendly or unfriendly to the defendant. State v. Miller, 89 S. W. 377, 190 Mo. 449.

[36] Abaly v. State, 158 N. W. 308, 163 Wis. 609. Compare State v. Stemmons, 205 S. W. 8, 275 Mo. 544.

Instructions held sufficient. The jury, in prosecution for rape was sufficiently cautioned by instructions that a charge of rape is easy to make and difficult to disprove; that testimony of a child of tender years such as prosecutrix ought to be viewed with care and caution; and that evidence in such case must be weighed with utmost care and without bias or prejudice. People v. Fraysier, 172 P. 1126, 36 Cal. App. 579.

Propriety of instruction in bastardy proceedings. An instruc-

the testimony of the prosecutrix with the utmost care, that no wrong be done to the defendant;[37] and it is error to instruct in effect that no difference is to be made between the testimony of such a witness and that of any disinterested witness.[38]

§ 161. Police officers, detectives, and informers

Invading province of jury, see ante, § 20.

In some jurisdictions, where, in a criminal case, the state relies upon the testimony of informers or paid detectives in whole or in part, cautionary instructions with respect to such testimony are proper,[39] and the jury should be told that such testimony should be scrutinized and weighed with greater care than in the case of witnesses wholly disinterested.[40] Such rule does not ordinarily apply to the testimony of a county attorney, a sheriff or his deputy,[41] or a post office inspector.[42] It is held that the giving of such an instruction rests largely in the discretion of the trial court,[43] and in some jurisdictions such an instruction is erroneous and properly refused.[44]

tion, in bastardy proceedings, that the jury, in determining the credibility of the prosecuting witness, might take into consideration the fact that she was interested, but that such fact would not permit them to give any greater or less weight to her evidence than if they were considering any other case in which she might be interested, is not error as being an attempt to measure the interest of the witness. State v. Carey, 55 N. E. 261, 23 Ind. App. 278.

[37] People v. Scott, 141 P. 945, 24 Cal. App. 440.

[38] State v. Scott (Utah) 188 P. 860.

[39] Gassenheimer v. United States, 26 App. D. C. 432.

[40] Commonwealth v. Downing, 4 Gray (Mass.) 29; State v. Fullerton, 90 Mo. App. 411; Sandage v. State, 85 N. W. 35, 61 Neb. 240, 87 Am. St. Rep. 457; State v. Boynton, 71 S. E. 341, 155 N. C. 456.

Necessity of instruction as to effect of interest. Where, in a prosecution for the unlawful sale of whisky, the only witnesses called by the state were detectives employed by the state at a fixed salary to ascertain where whisky was illegally sold, and institute prosecutions against parties selling it, it was held that, though it was not shown that they had any direct interest in convicting accused, or that their pay depended upon conviction, the accused was entitled to have the jury instructed that the consideration of the evidence and determination of its weight and the credibility of the witnesses are for the jury, and in weighing the evidence and determining whether a witness should be believed the jury could consider any terest such witness may have in the case, and if they believe that any witness has willfully sworn falsely as to any material matter the jury have a right to disbelieve the whole evidence of such witness. Turner v. State, 50 So. 629, 95 Miss. 879.

[41] Hudson v. State, 149 N. W. 104, 97 Neb. 47; McMartin v. State, 145 N. W. 695, 95 Neb. 292; Keezer v. State, 133 N. W. 204, 90 Neb. 238.

[42] Lorenz v. United States, 24 App. D. C. 337.

[43] Jaynes v. People, 99 P. 325, 44 Colo. 535, 16 Ann. Cas. 787; Holliday v. State, 67 So. 181, 108 Miss. 726;

[44] People v. Gardt, 101 N. E. 687, 258 Ill. 468, affirming judgment 175 Ill. App. 80; Copeland v. State, 38 S. W. 210, 36 Tex. Cr. R. 575.

In Illinois the rule is that, while the fact that witnesses in a criminal case are informers and detectives should be taken into consideration and given such effect, in determining their credibility, as the jury, after fair and candid deliberation, think it should have, it is not a rule of law that their testimony must be weighed with greater care than that of other witnesses.[45] In Kansas it is held by the later cases,[46] overruling the earlier ones,[47] that no sound reason can be suggested why the testimony of such witnesses should be singled out as deserving of less credence than the evidence of witnesses in general.

Where such an instruction is proper, it should only be given when the witness testifies for the state,[48] and ordinarily a charge on this head is sufficient which tells the jury that they may consider the fact that witnesses are paid detectives, without directing them to view such testimony with disfavor.[49] While the court should not give judicial indorsement to such testimony,[50] nor place it on an equal basis of credence with the testimony of wholly disinterested witnesses,[51] it is not error to charge that the mere fact that a witness is a police officer does not require that his testimony be discarded.[52]

Salt Lake City v. Robinson, 125 P. 657, 40 Utah, 448.

Cases in which such instruction properly refused. Where, at the trial of a complaint for keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the complainant testified that he was employed by a law and order league to obtain evidence against liquor sellers, and to prosecute such for illegal sales of intoxicating liquors; that the league furnished him with money to pay expenses; that he asked some sailors to visit the tenement in question with him, and ordered liquors for them, which he paid for out of money furnished by the league, it was held that the defendant was not entitled to have the jury instructed that the witness was not entitled to be believed, or that the jury should not convict upon such evidence. Commonwealth v. Moore, 145 Mass. 244, 13 N. E. 893.

[45] People v. Newbold, 103 N. E. 69, 260 Ill. 196, reversing judgment 178 Ill. App. 63; People v. Carter, 188 Ill. App. 22.

[46] State v. Roberts, 147 P. 828, 95 Kan. 280.

[47] State v. Shew, 57 P. 137, 8 Kan. App. 679; State v. Snyder, 57 P. 135, 8 Kan. App. 686.

[48] Shellenberger v. State, 150 N. W. 643, 97 Neb. 498, L. R. A. 1915C, 1163.

[49] Baumgartner v. State, 178 P. 30, 20 Ariz. 157; People v. Plummer, 155 N. W. 533, 189 Mich. 415.

[50] McWhorter v. State, 95 S. E. 1013, 22 Ga. App. 251.

[51] Frudie v. State, 92 N. W. 320, 66 Neb. 244.

Instructions not improper within rule. A charge, on trial for violation of the prohibition law, where the principal witness for the prosecution was a detective, that, while the jury may consider the witness' manner of testifying and his interest in the case, it was legitimate for the state to employ detectives to ascertain those who violated the law. Watts v. State, 71 S. E. 766, 9 Ga. App. 500.

[52] People v. Shoemaker, 90 N. W. 1035, 131 Mich. 107.

Instructions held proper. An

§ 162. Wife or relatives of accused

Invading province of jury, see ante, § 19.

In a criminal case it is proper for the court to instruct that in determining the credibility of the different witnesses the jury may,[53] or should,[54] consider the fact that a witness is a relative or is the wife of the defendant, although it is not error to refuse such a charge.[55] It is proper to charge that, if the jury believe that the relatives of the accused, giving testimony on his behalf, are credible witnesses, they should give such testimony the same weight as that of other witnesses,[56] and instructions having a tendency to lead the jury to think that the testimony of a wife or relative of the accused is to be discredited to some extent, although they may believe that the witness is speaking the truth are erroneous.[57]

§ 163. Coindictee of defendant in criminal case

Cautionary instructions, on the ground of interest, as to the testimony of a coindictee of a defendant in a criminal case, such coindictee not being on trial, but testifying for the defendant, are held improper,[58] and where a codefendant turns state's evidence, the accused is not entitled to an instruction that such codefendant testifies under the strong bias of self-protection and hope of im-

instruction, on a prosecution for selling liquor on Sunday, that, if the jury believed witness was a spy, they should scrutinize his testimony, and, after doing so, if they were satisfied his testimony was true, it made no difference what his motive was in going to defendant's house, or what his character was. State v. Black, 28 S. E. 518, 121 N. C. 578.

[53] **Ind.** Keesler v. State, 56 N. E. 232, 154 Ind. 242.

Mo. State v. Kyle, 168 S. W. 681, 259 Mo. 401; State v. Hyder, 167 S. W. 524, 258 Mo. 225; State v. McDonough, 134 S. W. 545, 232 Mo. 219; State v. Napper, 42 S. W. 957, 141 Mo. 401.

Utah. State v. Morgan, 74 P. 526, 27 Utah, 103.

Use of permissive or imperative form of verb. The court should charge that the jury "may take" into consideration the fact that accused or his wife, testifying in his own or in her husband's behalf, instead of using the formula "will take" such fact into consideration. State v. Newcomb, 119 S. W. 405, 220 Mo. 54.

[54] Van Buren v. State, 88 N. W. 671, 63 Neb. 453; State v. Fogleman, 79 S. E. 879, 164 N. C. 458.

[55] Mitchell v. State, 32 So. 132, 133 Ala. 65.

[56] State v. Lance, 81 S. E. 1092, 166 N. C. 411; State v. Apple, 28 S. E. 469, 121 N. C. 584.

Duty to give such instruction. An instruction, in passing on the evidence of the defendant's near relations, who testified for him, to scrutinize the same with great caution, considering their interest in the result of the verdict, and then to give it such weight as is deemed proper, is erroneous, in the absence of a further charge that, if such witnesses were found to be credible, their testimony should be given full credit. State v. McDowell, 39 S. E. 840, 129 N. C. 523.

[57] State v. Lee, 28 S. E. 552, 121 N. C. 544.

[58] State v. Mintz, 150 S. W. 1042, 245 Mo. 540, 43 L. R. A. (N. S.) 146.

munity, and that such bias should be considered by the jury, whether or not the evidence discloses a promise of immunity,[59] although the defendant is entitled to have the jury told that they may consider whether witnesses are under a strong bias of self-protection and hope of immunity.[60]

E. Credibility of Party Testifying as Witness

§ 164. Singling out party for comment

There is some conflict of authority as to the right of the court to single out a party testifying as a witness and comment on the effect of his interest on the quality of his testimony. In some jurisdictions it is held that the court may,[61] and should[62] on request,

[59] Commonwealth v. Harris, 122 N. E. 749, 232 Mass. 588.

[60] Commonwealth v. Harris, 122 N. E. 749, 232 Mass. 588.

[61] **U. S.** (C. C. A. Colo.) Denver City Tramway Co. v. Norton, 141 F. 599, 73 C. C. A. 1.

Ill. Lauth v. Chicago Union Traction Co., 91 N. E. 431, 244 Ill. 244, reversing judgment 146 Ill. App. 584; Hancheft v. Haas, 76 N. E. 845, 219 Ill. 546; Ed. C. Smith Furniture Co. v. Peter & Volz, 205 Ill. App. 379; Dickerson v. Henrietta Coal Co., 158 Ill. App. 454; Scanlan v. Chicago Union Traction Co., 127 Ill. App. 406; Eckhardt v. People, 116 Ill. App. 408; Chicago City Ry. Co. v. Olis, 94 Ill. App. 323, judgment affirmed 61 N. E. 459, 192 Ill. 514; North Chicago St. R. Co. v. Dudgeon, 83 Ill. App. 528, judgment affirmed 56 N. E. 796, 184 Ill. 477.

Neb. Barmby v. Wolfe, 44 Neb. 77, 62 N. W. 318.

N. Y. Cullinan v. Furthman, 79 N. E. 989, 187 N. Y. 160, reversing judgment 94 N. Y. S. 1142, 105 App. Div. 642.

Instruction not abstract. An instruction that the jury may consider the interest of a plaintiff in weighing his testimony as a witness is proper, and not objectionable as being abstract. West Chicago St. R. Co. v. Estep, 162 Ill. 130, 44 N. E. 404, affirming 62 Ill. App. 617.

[62] **Ill.** Chicago & E. I. R. Co. v. Burridge, 71 N. E. 838, 211 Ill. 9, reversing judgment 107 Ill. App. 23; West Chicago St. Ry. Co. v. Dougherty, 48 N. E. 1000, 170 Ill. 379, reversing judgment 64 Ill. App. 599; Langan v. Chicago City Ry. Co., 145 Ill. App. 249; Chicago Union Traction Co. v. Hansen, 125 Ill. App. 153; Wabash R. Co. v. Jensen, 99 Ill. App. 312; Schlesinger v. Rogers, 80 Ill. App. 420; Chicago & G. T. Ry. Co. v. Spurney, 69 Ill. App. 549.

N. C. Ferebee v. Norfolk-Southern R. Co., 83 S. E. 360, 167 N. C. 290.

Wis. Vogel v. Herzfeld-Phillipson Co., 134 N. W. 141, 148 Wis. 573; Blankavag v. Badger Box & Lumber Co., 117 N. W. 852, 136 Wis. 380.

Right of jury to discredit testimony of party. When the trial judge states that, in considering plaintiff's testimony, the jury are to take into account the fact that he is interested, and that they may discredit his testimony, it is not necessary to explain further. Ney v. City of Troy, 50 Hun, 604, 3 N. Y. S. 679.

Instruction on effect of false testimony. In an action on a life policy an instruction that if the jury believed from the evidence that plaintiff had willfully sworn falsely as to any material matter on the trial then they might disregard his entire testimony, was held improperly refused, since, one of the parties being a natural person, it was proper to direct the attention of the jury to his testimony and not draft the instruction so as to apply to both parties, as should be done where both parties were nat-

charge that, while a plaintiff or defendant, as the case may be, is permitted to testify the jury have a right to, or should, consider the interest of such party in the result of the suit in passing upon his credibility, or give some instruction of equivalent import,[63] and it is not sufficient in such case to tell the jury to use their common experience and common sense in regard to the credibility of witnesses.[64] In Wisconsin an instruction with reference to matters to be considered in determining the credibility of a party testifying as a witness is not objectionable, as violating the rule that the evidence of one witness should not be singled out for special comment, where the court directs that the testimony of the other witnesses be subjected to like tests,[65] and it is improper to refuse such an instruction.[66] While, as a general rule, mere neglect or omission to charge in a particular way is not error, in the absence of a particular request for such instructions, in one jurisdiction an exception to this rule exists where the testimony of a plaintiff is contradicted by disinterested witnesses. In such case it is error in this jurisdiction for the court not to call attention to the conflict and the nature of the testimony, and to explain and set forth the weight to be given to that kind of testimony, or to fail to explain adequately the relative value of the testimony of the different parties.[67]

In some cases it may be error to refuse an instruction that the testimony of a plaintiff can be disregarded because of his interest.[68] In Missouri, however, in opposition to the doctrine above

ural persons. Neeley v. Metropolitan Life Ins. Co., 199 Ill. App. 90.

In Montana, a requested instruction on the credibility of the testimony of a party to the case, if correct in law, should be given, where no other instruction on the credibility of witnesses generally is given. Murray v. City of Butte, 151 P. 1051, 51 Mont. 258.

[63] Hill v. Sprinkle, 76 N. C. 353.

[64] Lancashire Ins. Co. v. Stanley, 62 S. W. 66, 70 Ark. 1.

[65] Kavanaugh v. City of Wausau, 98 N. W. 550, 120 Wis. 611.

[66] Kavanaugh v. City of Wausau, 98 N. W. 550, 120 Wis. 611.

[67] Weiss v. Pittsburgh Rys. Co., 89 A. 586, 242 Pa. 506; Davies v. Philadelphia Rapid Transit Co., 77 A. 450, 228 Pa. 176; Clark v. Union Traction Co., 60 A. 302, 210 Pa. 636; Floyd v. Lehigh Valley R. Co., 60 Pa. Super. Ct. 1.

Action against carrier for injuries to passenger. The existence of violence or neglect in coupling cars, and the relation thereof to a passenger's condition, depending almost entirely on the testimony of the passenger and his wife, and his credibility having been attacked by many witnesses, and by his own conduct in failing for many months to complain of the coupling, or any injury from it, the attention of the jury should have been particularly called to the question involved of the witness' credibility. Herstine v. Lehigh Valley R. Co., 151 Pa. 244, 25 A. 104. 31 Wkly. Notes Cas. 49.

[68] Silvey v. Lehigh Valley R. Co. (Sup.) 151 N. Y. S. 122.

It is proper to refuse such an instruction, where no charge is given or asked as to the function of the jury in weighing evidence and passing on the credibility of witness-

stated, it is held in the later cases,[69] practically overruling the earlier ones,[70] that in civil cases it is error to instruct that, while plaintiff is a competent witness, yet in determining the weight of his testimony the jury should consider his interest, and, while the law presumes that what he says against his interest is true, the jury need not believe his testimony in his own favor, but can treat it as true or false, as they believe it when considered with all the other testimony. In California it is held that it is proper to refuse an instruction that the jury can consider, in determining the credibility of a party, his interest in the result of the suit.[71]

Where both of the parties to a cause are natural persons and are witnesses, it is error to single out one of such parties and to direct the attention of the jury to the situation and interest of such party in the result of the suit, without making reference to the situation and interest of the other party to the cause,[72] and

es. Irwin v. Metropolitan St. Ry. Co. (Sup.) 54 N. Y. S. 195, 25 Misc. Rep. 187, affirmed 57 N. Y. S. 21, 38 App. Div. 253, 6 N. Y. Ann. Cas. 374.

When refusal to charge harmless error. A refusal to charge "that the jury are at liberty wholly to reject the plaintiff's testimony, so far as it is not corroborated by other evidence," is not prejudicial error, where plaintiff produces corroboration of some kind upon the material points of the case, and the jury are instructed that if they believe plaintiff's testimony they can find for him, but that if they believe defendant's witnesses the result must be different. Shea v. Manhattan Ry. Co. (Com. Pl.) 8 N. Y. S. 332, affirming judgment (City Ct. N. Y.) 7 N. Y. S. 497.

Benjamin v. Metropolitan St. Ry. Co., 151 S. W. 91, 245 Mo. 598; Quinn v. Metropolitan St. Ry. Co., 118 S. W. 46, 218 Mo. 545; Huff v. St. Joseph Ry., Light, Heat & Power Co., 111 S. W. 1145, 213 Mo. 495; Stetzler v. Metropolitan St. Ry. Co., 109 S. W. 666, 210 Mo. 704; Zander v. St. Louis Transit Co., 103 S. W. 1006, 206 Mo. 445; Conner v. Missouri Pac. Ry. Co., 81 S. W. 145, 181 Mo. 397.

[70] McCaffery v. St. Louis & M. R. R. Co., 90 S. W. 816, 192 Mo. 144; Septowsky v. St. Louis Transit Co., 76 S. W. 693, 102 Mo. App. 110.

[71] Douglas v. Berlin Dye Works & Laundry Co., 145 P. 535, 169 Cal. 28.

[72] **Ill.** Thiele v. Hetzel, 184 Ill. App. 633; Hartshorn v. Hartshorn, 179 Ill. App. 421; Wicks v. Wheeler, 157 Ill. App. 578; Klick v. Boost, 145 Ill. App. 411; Sangster v. Hatch, 134 Ill. App. 340; Taylor v. Crowe, 122 Ill. App. 518.

Minn. Harriott v. Holmes, 79 N. W. 1003, 77 Minn. 245.

Refusal to charge as misleading. After a charge that defendant is an interested witness, a refusal to charge on defendant's request that a conflicting witness is interested is erroneous, as liable to mislead. Stevens v. Rosenwasser (Sup.) 162 N. Y. S. 989.

Instructions not improper within rule. A charge in an action to recover for professional services of an attorney, that the jury were not bound to credit the testimony of the plaintiff as a matter of law, as he was an interested witness in his own behalf, even if his testimony were uncontradicted, especially as such testimony rested on opinion only as to the value of the services. Such charge, being given in connection with others as to the conclusiveness of opinion evidence on the question of the value of plaintiff's services, is not objectionable on the ground that

such an instruction is properly refused.[73] Under this principle it is error to call the attention of the jury to the effect upon the testimony of a party of his interest in the result when a witness against him is deeply interested in a moral sense and no instruction as to his interest is given.[74]

§ 165. Ignoring interest of party

Where witnesses are parties to the suit whatever may be their numbers their opportunities or means of information the jury are to judge of the degree in which their interest affects their credibility and, where two parties on one side of a suit testify against a disinterested witness on the other an instruction that, if the witnesses are alike in everything but numbers, the evidence of the two will overcome the evidence of the one is erroneous, as ignoring the element of interest.[75] So an instruction that the jury are to treat a plaintiff in the same way as any other witness and subject him to the same tests is erroneous.[76]

F. Credibility of Testimony of Accused

Invading province of jury, see ante, §§ 15–17.

§ 166. Necessity of instructions

As a general rule the court should give, on request, appropriate instructions as to the proper tests for weighing the testimony of the defendant in a criminal case.[77] Such a defendant is entitled to an instruction based on the theory that the jury may believe his version of the facts bearing on the question of whether he is guilty of the crime alleged against him,[78] however incredible his testimony may appear to be;[79] and in one jurisdiction, where

it unfairly singles out plaintiff and charges as to his credibility alone. Schmitt v. Murray, 91 N. W. 1116, 87 Minn. 250.

[73] Pennsylvania Co. v. Versten, 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798.

[74] Tompkins v. Pacific Mut. Life Ins. Co., 44 S. E. 439, 53 W. Va. 479, 63 L. R. A. 489, 97 Am. St. Rep. 1006.

[75] Amis v. Cameron, 55 Ga. 449.

[76] Pienta v. Chicago City Ry. Co., 120 N. E. 1, 284 Ill. 246, reversing judgment 208 Ill. App. 309; Hedger v. Chicago City Ry. Co., 207 Ill. App. 26.

[77] People v. Archibald, 101 N. W. 582, 258 Ill. 383; State v. Poree, 68 So. 83, 136 La. 939; People v. McArron, 79 N. W. 944, 121 Mich. 1; McVay v. State, 26 So. 947.

[78] **Colo.** Almond v. People, 135 P. 783, 55 Colo. 425.

Mo. State v. Fredericks, 37 S. W. 832, 136 Mo. 51; State v. Talmage, 107 Mo. 543, 17 S. W. 990; State v. Brown, 104 Mo. 365, 16 S. W. 406; State v. Partlow, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; State v. Anderson, 86 Mo. 309.

N. D. State v. Tough, 96 N. W. 1025, 12 N. D. 425.

Okl. Douglas v. Territory, 98 P. 1023, 1 Okl. Cr. 583.

[79] People v. Keefer, 65 Cal. 232, 3 P. 818.

the statement of the defendant is not given under oath, while it is not error for the judge to shape his general charge on the evidence alone and the law applicable thereto,[80] the court should instruct, even without request, that such statement may be believed in preference to the sworn testimony.[81] Where, however, the court has charged that the defendant has the right to testify, and that the jury are the sole judges of his credibility and the weight to be given his testimony,[82] or the court has given a general instruction as to the credibility of all the witnesses, it is not error to refuse to charge that the jury has no right to disregard the testimony of the accused merely because he is the defendant,[83] and in some jurisdictions, where the testimony of the defendant is contrary to the physical facts and the general experience of mankind, he is not entitled to an instruction based on the truth of his testimony.[84]

Where the testimony of the defendant is immaterial, it is not necessary to instruct as to his credibility,[85] and, in the absence of a request therefor, the court need not give an instruction as to the credibility of the defendant as a witness, unless there is something peculiar in the testimony itself, or in the manner of giving it, or in the circumstances surrounding the case.[86]

§ 167. Propriety and sufficiency of instructions

While it is error, in some jurisdictions, to single out the accused personally and charge upon the credibility of his testimony,[87] a general instruction on the credibility of witnesses be-

[80] Fry v. State, 82 S. E. 135, 141 Ga. 789; Tolbirt v. State, 53 S. E. 327, 124 Ga. 767; Roberts v. Same, 51 S. E. 374, 123 Ga. 146; Tucker v. State, 39 S. E. 926, 114 Ga. 61; Hoxie v. State, 39 S. E. 944, 114 Ga. 19.

[81] Rivers v. State, 70 S. E. 47, 8 Ga. App. 694; Fields v. State, 58 S. E. 327, 2 Ga. App. 41; Burns v. State, 89 Ga. 527, 15 S. E. 748; Hayden v. State, 69 Ga. 731.

[82] State v. McClellan, 59 P. 924, 23 Mont. 532, 75 Am. St. Rep. 558.

[83] State v. Davidson, 157 S. W. 890, 172 Mo. App. 356.

[84] State v. Pollard, 40 S. W. 949, 139 Mo. 220; State v. Nelson, 118 Mo. 124, 23 S. W. 1088.

[85] State v. Brandenburg, 118 Mo. 181, 23 S. W. 1080, 40 Am. St. Rep. 362.

[86] People v. Rodundo, 44 Cal. 538.

In Missouri, it is held that a statutory provision making it the duty of the court to instruct, in criminal cases, on all questions of law on its own motion, does not apply to questions relating to the credibility of witnesses. State v. Westlake, 61 S. W. 243, 159 Mo. 669.

[87] **Idaho.** State v. Rogers, 163 P. 912, 30 Idaho, 259.

Okl. Doud v. State, 154 P. 1008, 12 Okl. Cr. 273; Brown v. State, 132 P. 359, 9 Okl. Cr. 382; Madison v. State, 118 P. 617, 6 Okl. Cr. 356, Ann. Cas. 1913C, 484; Manning v. State, 115 P. 612, 5 Okl. Cr. 532; Eidson v. State, 115 P. 606, 4 Okl. Cr. xiii; Black v. State, 115 P. 604, 5 Okl. Cr. 512, 662; Guiaccimo v. State, 115 P. 120, 5 Okl. Cr. 371; Peck v. State, 113 P. 200, 5 Okl. Cr. 104; Culpepper v. State, 111 P. 679, 4 Okl. Cr. 103, 31 L. R. A. (N. S.) 1166, 140 Am. St. Rep. 668; Clark v. State, 111 P. 659, 4 Okl. Cr. 368; Crow v. State, 106 P. 556, 3 Okl. Cr. 428; Bridges v. United

ing deemed a sufficient rule for the guidance of the jury,[88] in a considerable number of jurisdictions the trial court may, with respect to the testimony of a defendant in a criminal case, lay down general rules, applicable to all other witnesses, for weighing his evidence and determining his credibility.[89] Even in these

States, 104 P. 370, 3 Okl. Cr. 64; Reed v. United States, 103 P. 371, 2 Okl. Cr. 652; Mitchell v. State, 101 P. 1100, 2 Okl. Cr. 442; Price v. United States, 101 P. 1036, 2 Okl. Cr. 449, 139 Am. St. Rep. 930; Banks v. State, 101 P. 610, 2 Okl. Cr. 339; Fletcher v. State, 101 P. 599, 2 Okl. Cr. 300, 23 L. R. A. (N. S.) 581.

[88] Munson v. State, 165 P. 1162, 13 Okl. Cr. 569.

[89] **Ala.** Carpenter v. State, 69 So. 531, 193 Ala. 51; Bell v. State, 54 So. 116, 170 Ala. 16.

Ark. Ridgel v. State, 162 S. W. 773, 110 Ark. 606.

Colo. Bruno v. People, 186 P. 718, 67 Colo. 146.

Ill. People v. Snyder, 117 N. E. 119, 279 Ill. 435; People v. Dougherty, 107 N. E. 695, 266 Ill. 420; Dunn v. People, 109 Ill. 635; Uzzell v. People, 173 Ill. App. 257.

Ind. Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

Ind. T. Helms v. United States, 52 S. W. 60, 2 Ind. T. 595.

Iowa. State v. Case, 96 Iowa, 264, 65 N. W. 149.

Mo. State v. Martin, 132 S. W. 595, 230 Mo. 680.

Neb. Keating v. State, 93 N. W. 980, 67 Neb. 560.

N. M. Territory v. Gonzales, 68 P. 925, 11 N. M. 301.

Pa. Commonwealth v. Breyessee, 160 Pa. 451, 28 A. 824, 34 Wkly. Notes Cas. 228, 40 Am. St. Rep. 729.

Utah. People v. Callaghan, 6 P. 49, 4 Utah, 49.

Wash. State v. Melvern, 72 P. 489, 32 Wash. 7.

Instructions held proper within rule. An instruction to consider the situation of defendant, his relations to the trial, its consequences to him, and the inducements that he labored under, and adding, "You should carefully determine the amount of credibility to which his evidence is entitled; if convincing, and carrying with it a belief in its truth, to act upon it; if not, to reject it." People v. Morrow, 60 Cal. 142. An instruction that the jury should gather the intent with which the homicide was committed from all the circumstances surrounding it is not erroneous as precluding the consideration of defendant's testimony on the question of intent, where the jury are also instructed to weigh the testimony of all the witnesses and to judge the testimony of defendant fairly, and apply the same tests to his testimony, so far as applicable, that they would apply to that of other witnesses. People v. O'Brien, 78 Cal. 41, 20 P. 359. An instruction that accused may testify in his own behalf or not as he pleases, and if he does testify the jury cannot disregard his testimony merely because he is accused, but that his credibility must be tested by the same rules applied to any other witness, considering the fact that he is interested in the result, as well as his demeanor and conduct on the stand, and whether he is corroborated or contradicted. People v. Scarbak, 92 N. E. 286, 245 Ill. 435. A charge that accused was a competent witness, and that his testimony should not be discredited from caprice or because he was the defendant, that he should be treated the same as any other witness and subjected to the same tests, and that, while the jury might consider his interests, yet they should also consider the fact that he was corroborated by other circumstantial evidence, or by facts and circumstances proved. People v. Strauch, 93 N. E. 126, 247 Ill. 220. On a trial for manslaughter where accused testified, an instruction that the jury, in determining the degree of credibility to be accorded to his testimony, might take into consideration the fact, if it was a fact, that he was contradicted by other witnesses, is not objectionable, because

jurisdictions, however, an instruction which singles out the testimony of the accused alone, and calls the attention of the jury to his interest, or to some other circumstance which may affect his credibility, ought not to be given without also telling the jury that the same tests apply to all the witnesses in the case, as well as to the defendant.[90]

The court has no more right to disparage or discredit the testimony of the defendant than in the case of any other witness.[91]

the jury might understand that the court believed the accused had been contradicted, as it does not bear such construction. Moeck v. People, 100 Ill. 242, 39 Am. Rep. 38. A charge that, "if you find from the evidence that the defendant has made any false, improbable, and contradictory statements explaining suspicious circumstances against him, then this may be considered by you." Jones v. State, 61 Ark. 88, 32 S. W. 81.

[90] People v. Harvey, 122 N. E. 138, 286 Ill. 593; People v. Harrison, 104 N. E. 259, 261 Ill. 517; Schutz v. State, 104 N. W. 90, 125 Wis. 452.

Instructions held proper within rule. A charge that defendant was a competent witness in his own behalf, but that, notwithstanding that fact, the jury had a right to consider his situation, his interest, the temptation to testify falsely, and everything appearing in the case bearing on his credibility, and that it was their duty to give his testimony just such weight as they believed it entitled to receive; that it should be considered in connection with all the other evidence, and the same tests applied to defendant's testimony should be applied to the testimony of every other witness. Grabowski v. State, 105 N. W. 805, 126 Wis. 447.

[91] **U. S.** Hickory v. United States, 160 U. S. 408, 16 S. Ct. 327, 40 L. Ed. 474; (C. C. A. Ark.) McCallum v. United States, 247 F. 27, 159 C. C. A. 245.

Ga. Alexander v. State, 40 S. E. 231, 114 Ga. 266.

Ill. People v. Barkas, 99 N. E. 698, 255 Ill. 516; People v. Arnold, 93 N. E. 786, 248 Ill. 169.

Mich. People v. White, 160 N. W. 452, 194 Mich. 172.

Instructions improper within rule. An instruction that the jury will not allow themselves to be imposed on, nor led into the belief of unreasonable stories on the part of either the prosecution or of the defense, and must bear in mind the tendency on the part of the guilty, when accused of crime to fabricate some story or stories which they think may effect their acquittal. State v. Hoy, 86 N. W. 98, 83 Minn. 286. A charge that the acts of defendant are a safer foundation from which to draw a conclusion than any subsequent declarations in his own favor. State v. Maynard, 19 Nev. 284, 9 P. 514.

Instructions not objectionable within rule. An instruction that in weighing the testimony of defendant the jury can consider "the manner of his testifying, the reasonableness or unreasonableness of his account of the transaction, and his interest in the result of the case, as affecting his credibility. You are not required to receive blindly the testimony of such accused person as true, neither are you at liberty to disregard his testimony, but you are to give due consideration," etc.—when considered with other instructions that the jury could not, on account of defendant's interest in the result, or because he was charged with a crime, disregard his testimony, but that it should be given the same weight as that of other witnesses, if in their opinion it merited it, and that defendant must be acquitted if there was a reasonable doubt of his guilt. McIntosh v. State, 51 N. E. 354, 151 Ind. 251. An instruction that in considering the weight and effect to be given defendant's evidence, while the jury may consider his manner and the prob-

Thus, while sustained in some jurisdictions,[92] it is error in other jurisdictions to give an instruction to the effect that the jury are not required to receive blindly the testimony of the accused, but that they may consider whether it is true and given in good faith, or only for the purpose of avoiding a conviction,[93] and an instruction on the right of the defendant to testify which tends to lead the jury to think that his testimony is to be treated differently from that of other witnesses is improper.[94] An instruction that it is the duty of the jury to contrast the manner and demeanor of the defendant, while testifying, with that of the wit-

ability of his statements, taken in connection with all the evidence in the case, and, "if convincing and carrying with it a belief in its truth, act on it"; if not, they may reject it. People v. Hill, 82 P. 398, 1 Cal. App. 414. An instruction to take the evidence in connection with defendant's statement measuring the statement under the rule of law the court has given, and to determine what the truth of the matter is, and let the verdict be in accordance with what the jury believes to be the truth, and that there is nothing in the case but the law and the evidence. Roberts v. State, 72 S. E. 287, 9 Ga. App. 807. An instruction that, in passing on the evidence of the accused, the jury should take into consideration the interest he has in the indictment, and should scrutinize his evidence closely, but that the jury would not be warranted in refusing to believe what accused said, because of the fact that he was under indictment, etc. State v. Dixon, 62 S. E. 615, 149 N. C. 460. A charge that, in weighing defendant's testimony, the jury should fully and fairly consider whether it is true and made in good faith; the terms "true" and "made in good faith" being in such case synonymous, and not implying that the testimony should be rejected, though true, if not made in good faith. Carleton v. State, 43 Neb. 373, 61 N. W. 699. An instruction that the interest of the prisoner is never to be excluded from the minds of the jury; that wherever he "has made a statement not true, to establish a falsity instead of a truth, his testimony is not entitled to the credit of a witness who stands fairly before you uncontradicted"; and that then "his testimony is entitled to no weight or credit of itself, except so far as it is consistent with the known and established facts of the case, as corroborated by other witnesses"—is not open to an objection that it charges that the "testimony of the prisoner was entitled to no weight, except as corroborated by others," especially where, upon exception being taken on such ground, the judge replied, "I have not said that, gentlemen." People v. Petmecky, 99 N. Y. 415, 2 N. E. 145. Where, after the court instructed the jury that they could believe a part of the statement and reject a part, it was not misleading to charge to "find out what the truth of the case is, what the real facts are, and look to the evidence for that purpose, and to the prisoner's statement, if you think it worthy of credit." Westbrook v. State, 97 Ga. 189, 22 S. E. 398. Where the court charged that the jury must consider all the evidence, an instruction that the evidence of accused, if convincing, could be acted on, otherwise rejected, was not erroneous, as leading the jury to fail to give due consideration to the testimony of accused. State v. Johnny, 87 P. 3, 29 Nev. 203.

[92] Jones v. State, 61 Ark. 88, 32 S. W. 81; State v. Walker, 110 N. W. 925, 133 Iowa, 489; State v. Mecum, 95 Iowa, 433, 64 N. W. 286.

[93] Donner v. State, 100 N. W. 305, 72 Neb. 263, 117 Am. St. Rep. 789; State v. Fuller, 96 P. 456, 52 Or. 42.

[94] People v. Gerold, 107 N. E. 165, 265 Ill. 448, Ann. Cas. 1916A, 636.

nesses for the state, gives undue prominence to the manner of the defendant,[95] and an instruction which permits the jury to consider the demeanor and conduct of the accused while off the witness stand is erroneous.[96]

It is not improper, however, to charge that the jury are not required to believe the testimony of the defendant,[97] or that they shall give it such weight only as they think it is entitled to receive under all the circumstances of the case,[98] where such rule is made applicable to all the witnesses alike.[99] Instructions which tend to lead the jury to think that they should give the same credence to the testimony of the defendant as to that of any disinterested witness,[1] or which set up an arbitrary standard for weighing his testimony,[2] are properly refused.

[95] Pope v. State, 53 So. 292, 168 Ala. 33.

[96] People v. McGinnis, 84 N. E. 687, 234 Ill. 68, 123 Am. St. Rep. 73; Vale v. People, 161 Ill. 309, 43 N. E. 1091.

Instructions not erroneous within rule. An instruction that the jury could determine, from the witnesses' appearance, their interest in the event, their bias, etc., and, from all the surrounding circumstances which witnesses were worthy of credit was not erroneous as authorizing the consideration of accused's demeanor during the trial. People v. Curtright, 101 N. E. 551, 258 Ill. 430.

[97] People v. Lalor, 124 N. E. 866, 290 Ill. 234; People v. Foster, 123 N. E. 534, 278 Ill. 371; People v. Duzan, 112 N. E. 315, 272 Ill. 478.

Instructions proper within rule. A charge that while the law says defendant is a competent witness and may testify in his own behalf, and the jury should not capriciously disregard it, this does not mean that they should believe it, but only that they should consider it, and ascertain to the best of their judgment whether it is true, and, if true, they should act on it as on truth from any other source, and, if they should not believe it, they should reject it, they being the sole judges of the truth of the evidence. Harrison v. State, 40 So. 568, 144 Ala. 20. A charge that, while the law requires the jury to consider the testimony of the defendant in connection with all other evidence in the case, they are the judges of what is true, and if they are not satisfied that defendant's testimony is true, then they may disregard it. Lewis v. State, 88 Ala. 11, 6 So. 755. An instruction that the jury were not bound to believe all or any part of the testimony given by the defendant in his own behalf, but might disbelieve the same if the facts warranted it, is not erroneous, where the court has already charged the jury that the defendant was a competent witness, and that his testimony was to be weighed by the same rules that govern the testimony of other witnesses, and the evidence tends to discredit a part of his testimony. State v. Elliot, 90 Mo. 350, 2 S. W. 411.

[98] Olive v. State, 34 Fla. 203, 15 So. 925; Brown v. State, 60 Ga. 210; McIntosh v. State, 51 N. E. 354, 151 Ind. 251; State v. Buffington, 81 P. 465, 71 Kan. 804, 4 L. R. A. (N. S.) 154; Palmer v. State, 97 N. W. 235, 70 Neb. 136.

[99] Territory v. Livingston, 84 P. 1021, 13 N. M. 318.

[1] People v. Hiltel, 63 P. 919, 131 Cal. 577; Blanton v. State, 41 So. 789, 52 Fla. 12; State v. Ringer, 100 S. E. 413, 84 W. Va. 546.

[2] Lang v. State, 28 So. 856, 42 Fla. 595.

§ 168. Reference to interest of the defendant in the event of the trial

In some jurisdictions the statute makes the defendant in a criminal case an exception to the general rule against singling out a particular witness and directing the attention of the jury to his testimony,[3] and in a number of jurisdictions an instruction that the jury may, in estimating the credibility of the testimony of the accused, consider the interest which he has in the result of the prosecution, is proper,[4] so long as the jury are not authorized to disregard the testimony of the defendant,[5] and are

[3] State v. De Lea, 93 P. 814, 36 Mont. 531.

[4] **U. S.** (C. C. A. Cal.) Schulze v. United States, 259 F. 189, 170 C. C. A. 257, affirming judgment (D. C.) United States v. Schulze, 253 F. 377; (C. C. A. La.) Foster v. United States, 256 F. 207, 167 C. C. A. 423; (C. C. A. Va.) Belvin v. U. S., 260 F. 455, 171 C. C. A. 281.

Ala. Weaver v. State, 55 So. 956, 1 Ala. App. 48, rehearing denied 56 So. 749, 2 Ala. App. 98; Wright v. State, 42 So. 745, 148 Ala. 596; Hammond v. State, 41 So. 761, 147 Ala. 79; Smith v. State, 24 So. 55, 118 Ala. 117. Compare Roberson v. State, 57 So. 829, 175 Ala. 15.

Ark. Whitener v. State, 178 S. W. 394, 120 Ark. 30; Weatherford v. State, 93 S. W. 61, 78 Ark. 36; Hamilton v. State, 36 S. W. 1054, 62 Ark. 543.

Colo. Gankyo Mitsunaga v. People. 129 P. 241, 54 Colo. 102.

Fla. Robertson v. State. 60 So. 118, 64 Fla. 437; Fuentes v. State, 59 So. 395, 64 Fla. 64.

Idaho. State v. Webb, 55 P. 892, 6 Idaho, 428.

Ill. People v. Maciejewski, 128 N. E. 489, 294 Ill. 390.

Kan. State v. Killion, 148 P. 643, 95 Kan. 371.

Mich. People v. Hahn, 183 N. W. 43, 214 Mich. 419; People v. Williams, 175 N. W. 187, 208 Mich. 586.

Mont. State v. Metcalf, 17 Mont. 417. 43 P. 182.

N. J. State v. Randall, 113 A. 231.

Neb. Philamalee v. State, 78 N. W. 625. 58 Neb. 320.

N. M. State v. Moss, 172 P. 199, 24 N. M. 59.

N. C. State v. Burton, 90 S. E. 561, 172 N. C. 939.

Pa. Commonwealth v. McKwayne, 70 A. 809, 221 Pa. 449.

Tenn. Cooper v. State, 138 S. W. 826. 123 Tenn. 37.

Wis. Emery v. State, 78 N. W. 145, 101 Wis. 627.

[5] **U. S.** (C. C. A. La.) Alexis v. United States, 129 F. 60, 63 C. C. A. 502.

Ala. Brown v. State, 38 So. 268, 142 Ala. 287.

Ark. Blair v. State, 64 S. W. 948, 69 Ark. 558.

Ill. People v. Cotton, 95 N. E. 283, 250 Ill. 338.

Iowa. State v. Brooks, 165 N. W. 194, 181 Iowa, 874; State v. Ryan, 85 N. W. 812, 113 Iowa, 536.

N. C. State v. Lovelace, 101 S. E. 380. 178 N. C. 762.

Instructions held not improper within rule. In a murder case, a charge that the jury had no right to disregard the testimony of accused simply because he was charged with the commission of a crime, and that they were not required to receive his testimony as true, but that they should fairly consider whether it was true, taking into consideration his interest in the prosecution, that the law presumed accused to be innocent until proved guilty by the evidence beyond a reasonable doubt, that it allowed him to testify in his own behalf, which testimony should be fairly and impartially considered together with the other evidence. Johnson v. State, 130 N. W. 282, 88 Neb. 565, Ann. Cas. 1912B, 965. In a prosecution for rape, an instruction that the rules governing evidence generally

told to apply the same tests to the defendant as to other witnesses,[6] and the court need not refer, in connection with such an instruction, to the interest of other witnesses where the defendant is the only witness interested,[7] and, of course, in jurisdictions where a cautionary instruction referring directly to the interest of the defendant in the result of the trial as affecting his credibility is proper, an instruction of general application regarding the credibility of witnesses, otherwise proper and correct, is not open to objection because the defendant is the only witness having a direct legal interest in such result.[8]

In some jurisdictions, however, it is error specially to call the attention of the jury to the interest of the accused,[9] and there is

applied to the defendant as a witness in his own behalf, and that the jury were at liberty to give his evidence such weight as it was entitled to in view of all the facts in the case, and referring to defendant's interest as bearing on his credibility. People v. Rich, 94 N. W. 375, 133 Mich. 14. An instruction that the jury should give the testimony of accused the same impartial consideration as accorded that of other witnesses and not arbitrarily disregard his testimony, but that on the other hand they were not required blindly to receive a fact as true because he stated it, but that they should consider his testimony with all the facts in evidence in order to determine whether they were made in good faith or only in order to avoid conviction, and that in considering the degree of credit to be given accused they might take into consideration his appearance and manner, the reasonableness of his statements, and his interest. Hudson v. State, 91 S. W. 299, 77 Ark. 334. An instruction that it was the jury's duty to scrutinize the testimony of the accused carefully, because of his interest, but that, notwithstanding such interest, the jury might believe all or a part of his evidence, if it saw fit. State v. Vann, 77 S. E. 295, 162 N. C. 534.

[6] Foster v. People, 139 P. 10, 56 Colo. 452; People v. Harrison, 104 N. E. 259, 261 Ill. 517.

Instructions held proper within rule. An instruction that it was defendant's right to be sworn as a witness, and that the jury should consider his testimony with the other testimony in the case, and give it such weight as in their judgment it should receive, bearing in mind the fact of his interest and applying to his testimony the same rules of credibility that the jury apply to other witnesses. State v. Ames, 96 N. W. 330, 90 Minn. 183. Where the court had previously charged that accused was a competent witness in his own behalf, and that the credibility of his testimony was a matter exclusively for the jury, and that they might consider his interest in the result of the case, another instruction that the jury should not believe testimony given blindly, but should determine for themselves whether it was true and made in good faith, or only for the purpose of avoiding a conviction, was not erroneous on the ground that defendant's testimony was thereby singled out and made the subject of a distinct method of measuring the credibility thereof. Porter v. People, 74 P. 879, 31 Colo. 508.

[7] State v. Young, 74 N. W. 693, 104 Iowa, 730.

[8] Savary v. State, 87 N. W. 34, 62 Neb. 166.

[9] Erickson v. State, 127 Pac. 754, 14 Ariz. 253; State v. King, 64 So. 1007, 135 La. 117; Tardy v. State, 78 S. W. 1076, 46 Tex. Cr. R. 214.

In Arizona, the rule of the text case is based on the constitutional provision forbidding judges to charge juries with respect to matters of fact or to comment thereon, and former

a growing tendency on the part of the courts to disapprove of instructions with respect to the testimony of the accused, which depart from the general rule against singling out a particular witness for the purpose of charging as to his credibility. In California, the earlier position of the courts on this subject has been abandoned, and it is now held, in this jurisdiction, that an instruction that it is proper for the jury to consider whether the interest of the defendant in a criminal case may not affect his credibility is vicious in calling particular attention to his testimony,[10] and that it is reversible error to instruct that in determining the credibility of the accused it is proper for the jury to consider the consequences and temptations which would ordinarily influence a person in his situation.[11] In Missouri the later cases hold,[12] overruling a long line of earlier decisions,[13] that it is reversible error to tell the jury that they may consider the interest of the defendant in the result of the trial. In Mississippi, where the de-

decisions (Prior v. Territory, 89 P. 412, 11 Ariz. 169, Halderman v. Territory, 60 P. 876, 7 Ariz. 120) to the effect that the jury might properly be told that they could consider the very great interest of the accused in their verdict have been overruled.

Instructions not objectionable within rule. Where the court in a homicide case instructed the jury to consider the interest or lack of interest that any witness might have in the outcome of the trial, a subsequent instruction to judge the testimony of defendant by the same general rules that govern the testimony of other witnesses did not direct the jurors' attention too pointedly to defendant's interest in the trial, a matter which was apparent to the jury. State v. Elby, 83 So. 227, 145 La. 1019.

[10] People v. Blunkall, 161 P. 997, 31 Cal. App. 778; People v. Bartol, 142 P. 510, 24 Cal. App. 659.

Instruction of general application. An instruction that, in considering the weight and effect to be given to the testimony of witnesses, the jurors have the right to consider the consequences resulting to a witness from the result of the trial is not open to the criticism that it singles out defendant. People v. Botkin, 98 P. 861, 9 Cal. App. 244. The court properly instructed the jury that, "in judging the credibility of a witness, whether such witness be the defendant, the prosecutor, or any other witness produced on either side, you may consider the interest and relation of such witness in and to the case." People v. Bernal, 180 P. 825, 40 Cal. App. 358.

[11] People v. Maughs, 86 P. 187, 149 Cal. 253.

Former decisions in this jurisdiction while holding such an instruction as subject to criticism, did not deem it a cause for reversal. People v. Ryan, 92 P. 853, 152 Cal. 364; People v. Tibbs, 76 P. 904, 143 Cal. 100.

[12] State v. Clark, 202 S. W. 259; State v. Willner, 199 S. W. 126; State v. Sparks, 195 S. W. 1031; State v. Reeves, 195 S. W. 1027; State v. Goode, 195 S. W. 1006, 271 Mo. 43; State v. Fish, 195 S. W. 997; State v. Rose, 193 S. W. 811; State v. Asbell, 192 S. W. 469; State v. Pace, 192 S. W. 428, 269 Mo. 681; State v. Finkelstein, 191 S. W. 1002, 269 Mo. 612. See State v. Kocian, 208 S. W. 44.

[13] State v. Hyder, 167 S. W. 524, 258 Mo. 225; State v. Brown, 115 S. W. 967, 216 Mo. 351; State v. Dower, 114 S. W. 1104, 134 Mo. App. 352; State v. Stanley, 100 S. W. 678, 123 Mo. App. 294; State v. Dilts, 90 S. W. 782, 191 Mo. 665; State v. Summar, 45 S. W. 254, 143 Mo. 220.

fendant is the only witness in his behalf, it is error to give such an instruction,[14] and in this jurisdiction an instruction of general application to all the witnesses, permitting the jury to consider their interest, is erroneous, where the defendant is the only witness in his own behalf, and testifies to facts which, if believed, entitle him to an acquittal.[15] In Nevada the statute expressly provides that no special instruction relating exclusively to the testimony of the defendant or particularly directing the attention of the jury to such testimony shall be given.[16]

In jurisdictions where it is proper to give an instruction on the interest of the accused, the court should avoid unduly emphasizing the idea that such interest may induce him to testify falsely,[17] and it is error, as has been indicated by the foregoing discussion, to give instructions which discredit the testimony of the accused,[18] or which put him in a separate and inferior class of wit-

[14] Smith v. State, 43 So. 465, 90 Miss. 111, 122 Am. St. Rep. 313.

[15] Pigott v. State, 65 So. 583, 107 Miss. 552; Chatman v. State, 59 So. 8, 102 Miss. 179; Gaines v. State (Miss.) 48 So. 182.

Rule where relative testifies for accused. An instruction that, in determining weight of testimony of each witness, the jury could consider his interest or lack thereof and reasonableness or the unreasonableness of testimony, etc., was not objectionable as pointing out accused, where his brother-in-law testified for him. Vails v. State, 48 So. 725, 94 Miss. 365. Defendant's father, as well as defendant, having testified for the defense, defendant is not singled out by an instruction that in determining credibility of witnesses the motive and interest any may have may be considered. Murphy v. State, 80 So. 636, 119 Miss. 220.

[16] State v. Blaha, 154 P. 78, 39 Nev. 115.

[17] Peterson v. State, 120 N. W. 1110, 84 Neb. 76; Burk v. State, 112 N. W. 573, 79 Neb. 241.

[18] People v. Munday, 117 N. E. 286, 280 Ill. 32, reversing judgment 204 Ill. App. 24; State v. Bartlett, 93 P. 243, 50 Or. 440, 19 L. R. A. (N. S.) 802, 126 Am. St. Rep. 751.

Instructions not improper within rule. A charge, in a prosecution for robbery, that the credibility of witnesses was for the jury, that they should consider the interest of each one in the case, his manner of giving testimony, the opportunity he had for observing, etc. People v. Blanchard, 98 N. W. 983, 136 Mich. 146. A charge, on a prosecution for murder, that the jury are not bound to believe the defendant, but are bound to give his testimony such weight as they believe it entitled to; that defendant's credibility, and the weight to be attached to his testimony, are matters exclusively for the jury; and that the defendant's interest in the result of the trial is proper to be considered—when taken in connection with instructions that such testimony should be fully and impartially considered, and subjected to the same tests as that of other witnesses. Henry v. People, 65 N. E. 120, 198 Ill. 162. An instruction that the credibility and weight of defendant's testimony were for the jury, and that they might consider his manner of testifying, the reasonableness of his account of the transaction, and his interest in the case, and should consider his testimony and determine whether it was true or not, was not open to the objection of telling the jury that they were not bound to treat defendant's testimony the same as that of other witnesses. Waller v. People, 70 N. E. 681, 209 Ill. 284. Where instructions given at the request of defendant, who did not testify on a trial for murder, gave him the full benefit before

nesses,[19] and it is improper to charge that the defendant, being an interested witness, is not entitled to as much credence as an uninterested witness.[20] So the court should avoid giving the jury the impression that the defendant should be corroborated in order to be believed.[21] Thus it is error to instruct that the jury may believe or disbelieve the testimony of the defendant, accordingly as they shall find it to be corroborated or contradicted by the other facts and circumstances in evidence.[22]

§ 169. Effect of impeaching testimony

Where the defendant in a criminal case, testifying as a witness, has been contradicted, or there is evidence impeaching him in other ways, it is proper, in some jurisdictions, to charge that such impeaching matters may be considered by the jury for the purpose of determining his credibility;[23] the jury being told that the same tests apply to the defendant as to other witnesses.[24] An instruction, however, that in determining the credibility of the testimony of defendant the jury are to take into consideration the fact, if such is the fact, that he has been contradicted by other witnesses, is objectionable as in effect telling the jury that they must consider such contradiction, regardless of whether it is in respect to a matter which is material or relevant to the issues, or not, and regardless of whether the witnesses contradicting the defendant are deemed by the jury to be worthy of credit.[25]

the jury of his statements before the examining magistrate that his wife was killed by an unknown burglar, which were introduced by the state as a part of its evidence in chief, an instruction, given for the prosecution, that in weighing defendant's testimony the jury had a right to consider his interest in the result, was not objectionable on the ground that it tended to discredit him. Gott v. People, 58 N. E. 293, 187 Ill. 249.

[19] Keigans v. State, 41 So. 886, 52 Fla. 57; People v. Fitzgerald, 130 N. E. 720, 297 Ill. 264; Hellyer v. People, 58 N. E. 245, 186 Ill. 550; Bird v. State, 8 N. E. 14, 107 Ind. 154; State v. Graham, 45 S. E. 514, 133 N. C. 645.

[20] People v. Gerdvine, 104 N. E. 129, 210 N. Y. 184.

[21] State v. Hunter, 92 N. W. 872, 118 Iowa, 686; State v. Patterson, 98 Mo. 283, 11 S. W. 728.

[22] State v. Sanders, 106 Mo. 188, 17 S. W. 223.

[23] Miller v. People, 82 N. E. 391, 229 Ill. 376; Maguire v. People, 76 N. E. 67, 219 Ill. 16; Faulkner v. Territory, 6 N. M. 464, 30 P. 905; State v. Reyner, 91 P. 301, 50 Or. 224; Commonwealth v. Wendt, 102 A. 27, 258 Pa. 325.

Contradiction by "credible" witnesses. Where accused testified in his own behalf, an instruction that the jury in determining his credibility should consider the fact, if such is the fact, that he has been contradicted by other witnesses, is not erroneous, because of the omission of the qualifying word "credible" before the word "witnesses." Higgins v. People, 98 Ill. 519.

[24] People v. Harrison, 104 N. E. 259, 261 Ill. 517.

[25] Purdy v. People, 140 Ill. 46, 29 N. E. 700.

§ 170. Effect of false testimony

Where the accused has given testimony in his own behalf, the court may, in some jurisdictions, in a proper case, charge generally that, if the jury believe that any witness has willfully testified to any material fact, they may disregard his entire testimony,[26] such an instruction not being open to objection as being directed especially against the defendant,[27] and in some jurisdictions, as has already been indicated, it is proper to specifically point out the defendant and apply such an instruction to his testimony,[28] so long as the qualification with respect to lack of corroboration is included,[29] and so long as the jury are told that the same tests apply to other witnesses.[30] Such an instruction, as in the case of other witnesses, must require that the false testimony be willfully so,[31] and must relate to a material fact.[32]

§ 171. Unsworn statement of defendant

Where the defendant makes an unsworn statement at the trial, it is held to be reversible error to fail to charge the rule of law applicable thereto, although no request is made to so instruct.[33]

Usually, in charging on the weight to be accorded to the statement of the accused, not given under oath, it will be well to follow the language of the statute,[34] although the failure to use the exact language of the statute touching such statement will not constitute error.[35]

[26] State v. Raice, 123 N. W. 708, 24 S. D. 111.

[27] Shumway v. State, 117 N. W. 407, 82 Neb. 152, judgment affirmed on rehearing 119 N. W. 517, 82 Neb. 166.

[28] Parham v. State, 42 So. 1, 147 Ala. 57.

[29] McCracken v. People, 70 N. E. 749, 209 Ill. 215; Hirschman v. People, 101 Ill. 568.

Materiality of facts concerning which false testimony given. On a prosecution for perjury, an instruction that, unless corroborated, the jury may disregard all of defendant's testimony, if they believe he willfully swore falsely as to any of the facts in issue, is substantially the same as telling the jury they must believe he so swore to some material fact before they can disregard his uncorroborated testimony. Johnson v. People, 94 Ill. 505.

[30] People v. Harrison, 104 N. E. 259, 261 Ill. 517; State v. Melvern, 72 P. 489, 32 Wash. 7.

[31] Keef v. State, 60 So. 963, 7 Ala. App. 15; Lambert v. People, 34 Ill. App. 637.

[32] Funderburk v. State, 145 Ala. 661, 39 So. 672.

[33] Bryant v. State, 97 S. E. 271, 23 Ga. App. 3.

[34] McLane v. State, 93 S. E. 558, 20 Ga. App. 825; Lucas v. State, 91 S. E. 72, 146 Ga. 315; Glover v. State, 72 S. E. 926, 137 Ga. 82; Washington v. State, 70 S. E. 797, 136 Ga. 66; Rouse v. State, 58 S. E. 416, 2 Ga. App. 184; Caesar v. State, 57 S. E. 66, 127 Ga. 710; Howell v. State, 52 S. E. 649, 124 Ga. 698; Morgan v. State, 46 S. E. 836, 119 Ga. 566.

[35] Hill v. State, 86 S. E. 657, 17 Ga. App. 294; Mixon v. State, 68 S. E. 315, 7 Ga. App. 805; Brundage v. State, 67 S. E. 1051, 7 Ga. App. 726.

Under the Georgia decisions the court may instruct that such unsworn statement should be considered in connection with all the evidence,[36] that the jury may take the evidence from the testimony of the witnesses and the statement of the defendant,[37] that such statement is to be given such weight as the jury may think proper,[38] that they may believe it in preference to the sworn testimony, provided they believe it to be true,[39] and that, in determining the weight to be given such statement, the jury should take into consideration the manner of the defendant on the stand, his manner in making the statement, the fact that he is not under oath, that he is not subject to cross-examination without his consent, that he has an interest, and if the jury should determine to give such statement any faith or credit they should consider it along with all the testimony in the case.[40]

[36] Murphy v. State, 50 S. E. 48, 122 Ga. 149; Sutherland v. State, 48 S. E. 915, 121 Ga. 190; Smalls v. State, 31 S. E. 571, 105 Ga. 669.

Instructions held proper. An instruction that the prisoner has a right to make a statement not under oath, and it is the province of the jury to consider such statement in connection with the sworn testimony in the case, and give it such weight as they think proper, and, if they find the statement true, they have a right to believe it in preference to the sworn testimony in the case, but under their oaths as jurors they must consider the statement in connection with the sworn testimony in the case, and test it in the light of that testimony, giving it such weight as they think proper. Barnes v. State, 39 S. E. 488, 113 Ga. 716.

[37] Hendrix v. State, 63 S. E. 939, 5 Ga. App. 819.

[38] Douglas v. State, 79 S. E. 1134, 14 Ga. App. 14; Woods v. State, 73 S. E. 608, 10 Ga. App. 476.

Permitting jury to act arbitrarily. An instruction that the jury can give the statement of accused such credence as they think it ought to have, they may believe it in preference to the sworn testimony in the case, or believe it in part, or reject it in part, or reject it altogether, giving it just such weight as they think it ought to have, was not erroneous as giving the jury to understand that they could act arbitrarily in the matter. Adams v. State, 53 S. E. 804, 125 Ga. 11.

[39] Smith v. State, 79 S. E. 764, 13 Ga. App. 663; Mason v. State, 97 Ga. 388, 23 S. E. 831.

Such a charge is not objectionable as excluding the privilege of believing the statement only in part, and as requiring the jury either to entirely accept or reject it. Wilder v. State, 96 S. E. 325, 148 Ga. 270.

[40] Ryals v. State, 54 S. E. 168, 125 Ga. 266; Hackett v. State, 33 S. E. 842, 108 Ga. 40; Teasley v. State, 32 S. E. 335, 105 Ga. 842; Poppell v. State, 71 Ga. 276.

Reference to fact that statement is not under oath. An instruction, on a trial for assault with intent to murder, in reference to defendant's statement, that defendant, as in all other criminal cases, was allowed to make a statement not under oath, but to state such matters as he liked or deemed best, that the jury were authorized to accept the statement and believe the whole of it and disregard his sworn testimony, or to discard the statement, or to take such portion of it as they desired and discard the rest, and that it was for the jury to determine the weight and credit they would give to the statement, was substantially correct, and not unfavorable to defendant. Parker v. State, 57 S. E. 1028, 1 Ga. App. 781. A charge, in a murder case, that no penalty attaches for the making of a

G. TESTIMONY OF ACCOMPLICES

Province of court or jury, see ante, § 21.

§ 172. Instructions as to who are accomplices

It is held that an accused, who desires that the question of whether a witness is an accomplice be presented to the jury, should request an instruction submitting such issue.[41] Where the court submits to the jury the question whether a witness is an accomplice, it should state to them the elements essential to constitute one an accomplice,[42] and the evidence may be such as to require the court to charge, on request, that if certain facts are established a witness is an accomplice, although it has previously given a correct abstract definition of an accomplice;[43] but no such definition is necessary where the court in a proper case tells the jury that a witness is an accomplice.[44] Ordinarily the question of whether a witness is an accomplice is one of fact, and the

false statement by accused, but that the jury can give to it such weight and credit as they deem it entitled to, and act upon it, and acquit accused, even in preference to the sworn testimony, if they desire, or can set the statement aside, and look to the sworn testimony for the truth, is not erroneous, because not in the exact language of the statute. Webb v. State, 69 S. E. 601, 8 Ga. App. 430. An instruction that statement of accused is not made under oath, and has only such force as the jury may think right to give it, and that they may believe it in preference to the sworn testimony is not erroneous, as being subject to the construction that the statement could have been made under oath. Oppenheim v. State, 77 S. E. 652, 12 Ga. App. 480. Instruction that defendant had made statement in his own behalf, not under oath, and that jury was not bound to give it any weight, but might believe it in preference to sworn testimony in case, was in accord with statute, and not erroneous, or objectionable as minimizing statement. Mitchell v. State, 94 S. E. 570, 147 Ga. 468. It is not ground for new trial that the court charged, as to accused's statement, that "it is your province to give such weight to the evidence and statement as you see proper, bearing in mind that defendant's statement is not under oath, and sworn evidence is under oath," where the court immediately added: "This distinction, however, will not control you in the consideration of the evidence or statement, they being entirely within your province." Keaton v. State, 25 S. E. 615, 99 Ga. 197.

[41] People v. Richardson, 118 N. E. 514, 222 N. Y. 103, affirming judgment 165 N. Y. S. 1104, 178 App. Div. 925.

[42] Spencer v. State, 194 S. W. 863, 128 Ark. 452; Suddeth v. State, 37 S. E. 747, 112 Ga. 407; Chappell v. State, 119 P. 139, 6 Okl. Cr. 398; Pace v. State, 124 S. W. 949, 58 Tex. Cr. R. 90; Thomas v. State, 73 S. W. 1045, 45 Tex. Cr. R. 81.

Instructions held to sufficiently define an accomplice. An instruction that an accomplice is one who willfully and knowingly aids, encourages, or assists another in the commission of the crime is not objectionable because the disjunctive conjunction was used, in view of the use of the qualifying words "willfully and knowingly." People v. Kosta, 112 P. 907, 14 Cal. App. 696.

[43] Crawford v. State (Tex. Cr. App.) 34 S. W. 927.

[44] Winfield v. State, 72 S. W. 182, 44 Tex. Cr. R. 475.

general rule is therefore that the court cannot be required to affirmatively charge that a certain witness is an accomplice.[45] The fact that a witness has been indicted for the same offense with which the defendant is charged does not entitle the latter to such an instruction.[46] Where, however, the undisputed evidence shows that a witness is an accomplice the court should so instruct on request.[47]

When under the facts it is for the jury to say whether a witness is an accomplice, and there is not sufficient evidence to corroborate him if he is an accomplice, the court should charge, on request, that the defendant must be acquitted if the jury should find that the witness was an accomplice.[48]

§ 173. Necessity and propriety of instructions on reliability of accomplice testimony

While, in the absence of any statute requiring the testimony of an accomplice to be corroborated in order to support a conviction, the court should not charge as to the policy of using accomplice testimony,[49] it is proper in some jurisdictions, for the court to advise the jury that it is unsafe to find a verdict of guilty on the uncorroborated testimony of an accomplice, notwithstanding the lack of such a statutory provision,[50] and in some

[45] **Driggers** v. United States, 104 S. W. 1166, 7 Ind. T. 752, judgment reversed 95 P. 612, 21 Okl. 60, 1 Okl. Cr. 167, 129 Am. St. Rep. 823, 17 Ann. Cas. 66; Carroll v. State, 62 S. W. 1061; Martin v. State, 43 S. W. 352, 38 Tex. Cr. R. 462; Dill v. State, (Tex. Cr. App.) 28 S. W. 950; Beach v. State, 32 Tex. Cr. R. 240, 22 S. W. 976.

[46] **Hunter** v. State, 65 S. E. 154, 133 Ga. 78; Davis v. State, 50 S. E. 376, 122 Ga. 564; Grau v. Commonwealth, 214 S. W. 916, 185 Ky. 111; State v. Price, 160 N. W. 677, 135 Minn. 159.

[47] **Malone** v. State, 214 S. W. 36, 139 Ark. 385: People v. Southwell, 152 P. 939, 28 Cal. App. 430; Dedeaux v. State, 87 So. 664, 125 Miss. 326; Wadkins v. State, 124 S. W. 959, 58 Tex. Cr. R. 110, 137 Am. St. Rep. 922, 21 Ann. Cas. 556; Clifton v. State, 79 S. W. 824, 46 Tex. Cr. R. 18, 108 Am. St. Rep. 983.

Instructions held sufficient within rule. An instruction that the jury could not convict accused on the testimony of H. alone, unless they first believed his testimony to be true and that it connected accused with the offense charged, and not then unless they believe that there was other testimony corroborative of H.'s testimony connecting defendant with the offense, and that the corroboration was insufficient if it merely showed the commission of the offense, was equivalent to charging that H. was an accomplice, and was sufficient on such subject. King v. State, 123 S. W. 135, 57 Tex. Cr. R. 363.

[48] **Morris** v. State, 82 So. 574, 17 Ala. App. 126.

[49] **Long** v. State, 23 Neb. 33, 36 N. W. 310.

[50] **Freed** v. U. S. (D. C.) 266 F. 1012; United States v. Murphy (D. C. N. Y.) 253 F. 404; State v. Robinson, 103 A. 657, 7 Boyce (Del.) 106; Luery v. State, 81 A. 685; Id., 81 A. 681, 116 Md. 284, Ann. Cas. 1913D, 161; Commonwealth v. Simon, 44 Pa. Super. Ct. 538, 545.

Advising against conviction. In Louisiana, it is held that to advise the jury not to convict upon the uncorroborated testimony of an accomplice

jurisdictions, where no such statutory provision exists, the defendant is entitled, at least upon request, to an instruction cautioning the jury with respect to the reliability of such testimony,[51] or advising them not to convict upon such testimony, unless it is corroborated by other evidence as to some material fact,[52] or unless they are satisfied beyond a reasonable doubt, after a careful examination of such testimony, of its truth and that they can safely rely upon it.[53] In other jurisdictions there is no absolute rule of law which requires that, whenever an accomplice testifies, the court must instruct that it is unsafe to convict upon his testimony alone,[54] or that they should not rely on

especially in a case lacking such corroboration, would be to express an opinion on the facts. State v. Henderson, 87 So. 721, 148 La. 713.

[51] **U. S.** (C. C. A. Mo.) Sykes v. United States, 204 F. 909, 123 C. C. A. 205; (C. C. A. N. Y.) McGinniss v. United States, 256 F. 621, 167 C. C. A. 651.

Colo. O'Brien v. People, 94 P. 284, 42 Colo. 40.

Fla. Anthony v. State, 32 So. 818, 44 Fla. 1.

Ill. Hoyt v. People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239.

La. State v. Hopper, 38 So. 452, 114 La. 557.

Miss. Dedeaux v. State, 87 So. 664, 125 Miss. 326.

Mo. State v. Meysenburg, 71 S. W. 229, 171 Mo. 1; State v. Woolard, 111 Mo. 248, 20 S. W. 27.

N. M. Territory v. Chavez, 45 P. 1107, 8 N. M. 528.

Ohio. Allen v. State, 10 Ohio St. 287.

Pa. Commonwealth v. Haines, 101 A. 641, 257 Pa. 289; Commonwealth v. Klein, 42 Pa. Super. Ct. 66.

Wash. State v. Engstrom, 150 P. 1173, 86 Wash. 499.

W. Va. State v. Perry, 41 W. Va. 641, 24 S. E. 634.

[52] State v. Patterson, 52 Kan. 335, 34 P. 784.

Instruction held improperly refused within rule. Where, in a prosecution for cattle theft, the state introduced an accomplice previously convicted, it was error to refuse to charge that such witness was an accomplice, and that, while defendant might be convicted on the uncorroborated testimony of an accomplice, where the honest judgment is satisfied beyond a reasonable doubt, still the jury should act on such testimony with great care, and, if such accomplice had testified differently at another time from his testimony in the case, they could not find defendant guilty on his uncorroborated testimony, but that the corroboration must be as to some fact connecting defendant with the commission of the offense, other than the fact that the offense was committed, and the circumstances thereof. State v. Pearson, 79 P. 985, 37 Wash. 405.

[53] People v. Sapp, 118 N. E. 416, 282 Ill. 51; People v. Rosenberg, 108 N. E. 54, 267 Ill. 202.

[54] **U. S.** (C. C. A. Okl.) Reeder v. U. S., 262 F. 36, certiorari denied 252 U. S. 581, 40 S. Ct. 346, 64 L. Ed. 726.

Conn. State v. Carey, 56 A. 632, 76 Conn. 342.

La. State v. Hauser, 36 So. 396, 112 La. 313; State v. De Hart, 33 So. 605, 109 La. 570; State v. Banks, 40 La. Ann. 736, 5 So. 18.

Mass. Commonwealth v. Leventhal, 128 N. E. 864, 236 Mass. 516; Commonwealth v. Phelps, 78 N. E. 741, 192 Mass. 591; Commonwealth v. Clune, 162 Mass. 206, 38 N. E. 435; Commonwealth v. Wilson, 152 Mass. 12, 25 N. E. 16.

Mich. People v. Dumas, 125 N. W. 766, 161 Mich. 45.

Miss. Cheatham v. State, 67 Miss. 335, 7 South. 204, 19 Am. St. Rep. 310.

Vt. State v. Hier, 63 A. 877, 78 Vt. 488; State v. Potter, 42 Vt. 495.

such testimony unless it produces in their minds the most positive conviction of its truth,[55] and the discretion of the trial judge with respect to giving such an instruction is determined by the character and interest of the accomplice, and not solely by his participation in the alleged crime.[56] In some jurisdictions it is held that, while it is the duty of the court to give such a cautionary instruction, the failure to give it will not, in the absence of a statute regulating the subject, constitute reversible error.[57]

In jurisdictions where the statute provides that a conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by other evidence tending to connect the defendant with the commission of the alleged offense, an instruction to this effect must be given in a proper case at the request of the defendant,[58] and, in some jurisdictions, although no request is

The particular language in which the cautionary instruction is stated must, in a large measure, be left to the discretion of the trial court. Dedeaux v. State, 87 So. 664, 125 Miss. 326.

[55] Nee v. U. S. (C. C. A. Pa.) 267 F. 84.

[56] State v. Kritchman, 79 A. 75, 84 Conn. 152.

Necessity of moral turpitude. It is only when moral turpitude attaches to the fact that accused and a witness for the state are accessories that the court is required to caution the jury that corroboration of the accomplice's testimony is essential. State v. Weiner, 80 A. 198, 84 Conn. 411.

[57] Diggs v. United States (C. C. A. Cal.) 220 F. 545, 136 C. C. A. 147, certiorari granted Caminetti v. United States, 35 S. Ct. 939, 238 U. S. 636, 59 L. Ed. 1500, and judgment affirmed 37 S. Ct. 192, 242 U. S. 470, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168.

[58] **Ark.** Beck v. State, 216 S. W. 497. 141 Ark. 102; Murphy v. State, 197 S. W. 585, 130 Ark. 353; Kennedy v. State, 171 S. W. 878, 115 Ark. 480.

Cal. People v. Southwell, 152 P. 939, 28 Cal. App. 430; People v. Lawlor, 131 P. 63, 21 Cal. App. 63.

Idaho. State v. Grant, 140 P. 959, 26 Idaho, 189.

Iowa. Ray v. State, 1 G. Greene, 316, 48 Am. Dec. 379.

Ky. Taylor v. Commonwealth, 8 S. W. 461; Adams v. Commonwealth, 7 Ky. Law Rep. (abstract) 529; Craft v. Commonwealth, 80 Ky. 349, 4 Ky. Law Rep. 182.

Nev. State v. Carey, 122 P. 868, 34 Nev. 309.

N. Y. People v. Ferola, 109 N. E. 500, 215 N. Y. 285; People v. Stehr, 153 N. Y. S. 296, 168 App. Div. 119, rehearing granted 153 N. Y. S. 1134, 169 App. Div. 967, and judgment affirmed on rehearing 156 N. Y. S. 1139, 172 App. Div. 970, order affirmed 114 N. E. 1077; People v. Thomsen, 3 N. Y. Cr. R. 562.

Okl. Blankenship v. State, 174 P. 298, 14 Okl. Cr. 575; Souther v. State, 153 P. 293, 12 Okl. Cr. 195; Fairgrieve v. State, 134 P. 837, 10 Okl. Cr. 109; Id., 134 P. 838, 10 Okl. Cr. 646.

Or. State v. Bunyard, 144 P. 449, 73 Or. 222.

Tex. Franklin v. State, 227 S. W. 488; Clark v. State, 218 S. W. 366, 86 Tex. Cr. R. 585; Hornbuckle v. State, 216 S. W. 880, 86 Tex. Cr. R. 352; Flores v. State, 216 S. W. 185, 86 Tex. Cr. R. 267; Childress v. State, 210 S. W. 193, 85 Tex. Cr. R. 22; Davidson v. State, 208 S. W. 664, 84 Tex. Cr. R. 433; Winn v. State, 208 S. W. 506, 84 Tex. Cr. R. 475; Williams v. State, 199 S. W. 296, 82 Tex. Cr. R. 215; Bagley v. State, 179 S. W. 1167, 77 Tex. Cr. R. 539; Cooper v. State, 177 S. W. 975, 77 Tex. Cr. R. 209; Davis v. State, 158 S. W. 288, 70 Tex. Cr. R. 524; Thomas v. State, 147 S. W. 262, 66 Tex. Cr. R. 374; Carlisle v. State,

made.[59] In other jurisdictions the failure to give such an instruction will not be error, in the absence of a request therefor.[60]

As indicated in the preceding section where there is no sufficient evidence of corroboration of an accomplice upon whose testimony the state relies, the court should charge the jury that if they find the witness to be an accomplice they should acquit.[61] An instruction as to the corroboration of the testimony of an accomplice is not necessary, where the accomplice testifies in favor of the accused,[62] or where he gives no testimony to assist the state to make out its case,[63] or where he refuses or fails to testify.[64]

142 S. W. 1178, 64 Tex. Cr. R. 535; Polk v. State, 131 S. W. 580, 60 Tex. Cr. R. 150; Johnson v. State, 125 S. W. 16, 58 Tex. Cr. R. 244; Green v. State, 120 S. W. 1002, 56 Tex. Cr. R. 599; Russell v. State, 116 S. W. 573, 55 Tex. Cr. R. 330; Gonzales v. State (Cr. App.) 105 S. W. 196; Garland v. State, 104 S. W. 898, 51 Tex. Cr. R. 643; Saye v. State, 99 S. W. 551, 50 Tex. Cr. R. 569; Simmons v. State, 97 S. W. 1052, 50 Tex. Cr. R. 527; Leak v. State (Cr. App.) 97 S. W. 476; Sapp v. State (Cr. App.) 77 S. W. 456; Brooks v. State (Cr. App.) 56 S. W. 924; Wilson v. State, 51 S. W. 916, 41 Tex. Cr. R. 115; Collins v. State (Cr. App.) 51 S. W. 216; Humphries v. State, 48 S. W. 184, 40 Tex. Cr. R. 59; Smith v. State (Cr. App.) 45 S. W. 707; Clark v. State, 45 S. W. 576, 39 Tex. Cr. R. 179, 73 Am. St. Rep. 918; Robinson v. State, 43 S. W. 526, 35 Tex. Cr. R. 54, 60 Am. St. Rep. 20; Brann v. State (Cr. App.) 39 S. W. 940; Martin v. State, 38 S. W. 194, 36 Tex. Cr. R. 632; Parr v. State (Cr. App.) 38 S. W. 180, 36 Tex. Cr. R. 493; Ballew v. State (Cr. App.) 34 S. W. 616; Boren v. State, 23 Tex. App. 28, 4 S. W. 463; Sitterlee v. State, 13 Tex. App. 587; Watson v. State, 9 Tex. App. 237.

Utah. State v. McCurtain, 172 P. 481, 52 Utah, 63.

See Ryal v. State, 182 P. 253, 16 Okl. Cr. 266.

Duty to explain scope of statute. In Texas interdict of conviction upon uncorroborated evidence of an accomplice applies to all participes criminis, and an omission so to explain the word "accomplice" to the jury is a ground for reversal of a conviction of murder although not objected to at the trial. Roach v. State, 4 Tex. App. 46; Miller v. Same, 4 Tex. App. 251.

In California, however, it has been held, overruling earlier cases (People v. Sternberg, 43 P. 201, 111 Cal. 11; People v. Bonney, 98 Cal. 278, 33 P. 98, distinguishing Same v. O'Brien, 96 Cal. 171, 31 P. 45; People v. Strybe, 36 P. 3, 4 Cal. Unrep. 505), that, notwithstanding the provisions of a statute that the jury is to be instructed on all proper occasions that the testimony of an accomplice is to be viewed with distrust, error cannot be predicated upon the refusal of the court to so instruct. People v. Ruiz, 77 P. 907, 144 Cal. 251.

Effect of incriminating evidence independent of testimony of accomplice. Henry v. State (Tex. Cr. App.) 43 S. W. 340.

[59] Weems v. State, 182 P. 264, 16 Okl. Cr. 198; Hollingsworth v. State, 189 S. W. 488, 80 Tex. Cr. R. 299; Kelly v. State, 1 Tex. App. 628.

Rule in misdemeanor cases. Where the defendant, in a prosecution for misdemeanor, does not request a written charge as to the weight of accomplice testimony, the failure to instruct thereon will not be considered on appeal. Tracy v. State, 61 S. W. 127, 42 Tex. Cr. R. 494.

[60] People v. Rose, 183 P. 874; Butts v. State, 82 S. E. 375, 14 Ga. App. 821.

[61] Jones v. State, 129 S. W. 1118, 59 Tex. Cr. R. 559.

[62] Bosselman v. United States (C. C. A. N. Y.) 239 F. 82, 152 C. C. A.

[63, 64] See notes 63 and 64 on following page.

§ 174. Necessity and sufficiency of evidence of complicity in crime to authorize or require instructions on accomplice testimony

There must be some evidence of the complicity of a witness in the crime for which a defendant is being prosecuted, to require or warrant an instruction on accomplice testimony,[65] although the

132; State v. Smith, 77 N. W. 499, 106 Iowa, 701.

Necessity of instruction that evidence for defendant need not be corroborated. Where an accomplice is witness for defendant, but not for the state, an instruction requiring corroboration of evidence of the accomplice if relied upon for conviction, without stating that evidence of the accomplice for the defendant need not be corroborated is error. Josef v. State, 34 Tex. Cr. R. 446, 30 S. W. 1067.

[63] Moseley v. State, 37 S. W. 736, 36 Tex. Cr. R. 578.

[64] State v. Burns, 74 P. 983, 27 Nev. 289; Wyres v. State, 166 S. W. 1150, 74 Tex. Cr. R. 28; Gracy v. State, 121 S. W. 705, 57 Tex. Cr. R. 68; Waggoner v. State, 35 Tex. Cr. R. 199, 32 S. W. 896.

[65] **Cal.** People v. Balkwell, 76 P. 1017, 143 Cal. 259; People v. Ward, 66 P. 372, 134 Cal. 301.

Fla. Tuberson v. State, 26 Fla. 472, 7 So. 858.

Ga. Rouse v. State, 71 S. E. 667, 136 Ga. 356; Bridges v. State, 70 S. E. 968, 9 Ga. App. 235; Baker v. State, 48 S. E. 967, 121 Ga. 189.

Ky. Commonwealth v. Stites, 227 S. W. 574, 190 Ky. 402; Elmendorf v. Commonwealth, 188 S. W. 483, 171 Ky. 410; Wellington v. Commonwealth, 164 S. W. 333, 158 Ky. 161; Nelms v. Commonwealth, 82 S. W. 260, 26 Ky. Law Rep. 604.

Mo. State v. Richardson, 154 S. W. 735, 248 Mo. 563, 44 L. R. A. (N. S.) 307; State v. Shapiro, 115 S. W. 1022, 216 Mo. 359; State v. Bailey, 88 S. W. 733, 190 Mo. 257.

Okl. Hisaw v. State, 165 P. 636, 13 Okl. Cr. 484; Maggard v. State, 131 P. 549, 9 Okl. Cr. 236.

S. C. State v. Lee, 29 S. C. 113, 7 S. E. 44.

Tex. Clark v. State, 218 S. W. 366, 86 Tex. Cr. R. 585; Fisher v. State, 197 S. W. 189, 81 Tex. Cr. R. 568; Hyroop v. State, 179 S. W. 878, 79 Tex. Cr. R. 150; Womack v. State, 170 S. W. 139, 74 Tex. Cr. R. 640; Coker v. State, 160 S. W. 366, 71 Tex. Cr. R. 504; Holmes v. State, 156 S. W. 1172, 70 Tex. Cr. R. 214; Williams v. State, 144 S. W. 622, 65 Tex. Cr. R. 193; Miller v. State, 138 S. W. 113, 62 Tex. Cr. R. 507; Tucker v. State, 124 S. W. 904, 58 Tex. Cr. R. 271; Fields v. State, 124 S. W. 652, 57 Tex. Cr. R. 613; Reno v. State, 120 S. W. 430, 56 Tex. Cr. R. 242; Scott v. State, 111 S. W. 657, 53 Tex. Cr. R. 332; Powell v. State (Cr. App.) 106 S. W. 362; Jenkins v. State, 93 S. W. 726, 49 Tex. Cr. R. 457; Prendergast v. State, 57 S. W. 850, 41 Tex. Cr. R. 358; Smith v. State, 37 S. W. 743, 36 Tex. Cr. R. 442; Lawrence v. State, 35 Tex. Cr. R. 114, 32 S. W. 530; Wilson v. State (Cr. App.) 24 S. W. 649; Trent v. State, 31 Tex. Cr. R. 251, 20 S. W. 547; Pitner v. State, 23 Tex. App. 366, 5 S. W. 210; May v. State, 22 Tex. App. 595, 3 S. W. 781; Kerrigan v. State, 21 Tex. App. 487, 2 S. W. 756; Smith v. State, 8 Tex. App. 39.

Evidence tending to cast suspicion on witness as against direct evidence that he was not an accomplice. Where there was direct evidence from both sides that a certain witness was not an accomplice in the crime, though the evidence as a whole tended to cast suspicion on him, it was held that it was proper to refuse to instruct that the witness was an accomplice, and that his uncorroborated testimony could not convict, though it would have been proper, if requested, to have submitted to the jury the fact whether he was an accomplice, together with the effect of complicity, on his testimony. State v. Haynes, 75 N. W. 267, 7 N. D. 352.

defendant contends that a certain witness is an accomplice.[66] Mere knowledge on the part of a witness that the defendant committed the crime of which he is accused does not call for such an instruction.[67] On the other hand inculpatory testimony against a witness may render it necessary for the court to charge, on re-

Evidence held sufficient to necessitate an instruction on accomplice testimony. Where the principal state's witness, who has twice been arrested for other murders, testifies that he accompanied defendants to the body, by traveling several miles through dense brush; that they informed him that they were going to bury deceased; that witness dug the grave at their instruction, and helped to bury the body; and that the father threatened to injure him if anything became known—the inference is deducible that witness was intimately connected with the crime, and it is error to refuse to charge in regard to the necessary corroboration of an accomplice. Conde v. State, 33 Tex. Cr. R. 10, 24 S. W. 415. Where, in a murder case, a witness for the state testified, in regard to a piece of quilt and a sack found together the morning after the murder, on the road between the house of the murdered persons and that of defendant, that he thought the quilt belonged to defendant, but was positive that the sack belonged to the principal witness for the state, who had testified that defendant confessed to him that he committed the murder and the principal witness had said nothing about this confession until after he knew that he himself was suspected of the crime, and had then lied about his knowledge of the murder before telling of the confession, it was held that the evidence called for a charge on the testimony of an accomplice. Shulze v. State, 28 Tex. App. 316, 12 S. W. 1084. A refusal to give an instruction as to the weight of accomplice testimony is error where one of the witnesses for the state was shown to have had knowledge of the whereabouts of the deceased at the time of the killing, where his tracks were found going to and from the body, and he had been seen going with a gun in the direction of the scene of the killing shortly before; and where he had told some one before the body was found that the deceased had been killed, and related the manner of the killing. Hines v. State, 27 Tex. App. 104, 10 S. W. 448. Testimony that defendant proposed to witness and others that they break into a car; that they all walked to the car; that defendant broke into the car, and all went in, except witness and another; that witness, with the others, was fined, and placed in jail on the same charge of burglary for which defendant was tried—is sufficient evidence of the witness' complicity to necessitate an instruction as to accomplice testimony. Hamilton v. State, 26 Tex. App. 206, 9 S. W. 687. On a trial for theft, where it was shown that P. received a sack of money from defendant, knowing that he was arrested for stealing it, and carried it away to conceal it, a charge, in connection with his evidence, requested by defendant, upon the law of accomplice testimony, should have been given. Kelley v. State, 34 Tex. Cr. R. 412, 31 S. W. 174.

[66] Walker v. State, 44 S. E. 850, 118 Ga. 34; Powell v. State, 81 S. E. 396, 14 Ga. App. 484.

[67] Smith v. State, 28 Tex. App. 309, 12 S. W. 1104.

Effect of remaining silent. Where, on a trial for murder, certain Mexicans were witnesses for the state, and at the time of the murder, which they witnessed, they were among strangers, hundreds of miles from their homes and were assisting in driving cattle to a distant market, did not know the English language, and defendant and deceased were Americans, in whom they had no particular interest, it was held that the mere fact of their having remained silent as to the murder did not call for instructions on accomplice testimony. O'Connor v. State, 28 Tex. App. 288, 13 S. W. 14.

quest, on accomplice testimony, although he denies any connection with the crime.[68]

§ 175. Sufficiency of instructions on right to convict upon accomplice testimony

In jurisdictions where the jury may convict upon the uncorroborated testimony of an accomplice, it is proper for the court to instruct that, while such testimony is to be received with caution, the jury will be justified in acting upon it if they believe it to be true,[69] and in such a jurisdiction an instruction that an ac-

[68] Scales v. State, 217 S. W. 149, 86 Tex. Cr. R. 433.

[69] **U. S.** (C. C. A. Tex.) Eisenberg v. U. S., 261 F. 598.

Colo. Wisdom v. People, 11 Colo. 170, 17 P. 519.

Conn. State v. Maney, 54 Conn. 178, 6 A. 401.

Ill. People v. Rees, 109 N. E. 473, 268 Ill. 585; People v. Harris, 105 N. E. 303, 263 Ill. 406; People v. Darr, 179 Ill. App. 130, judgment affirmed 104 N. E. 389, 262 Ill. 202.

La. State v. Swindall, 56 So. 702, 129 La. 760; State v. Prudhomme, 25 La. Ann. 522; State v. Bayonne, 23 La. Ann. 78.

Mo. State v. Cummins, 213 S. W. 969, 279 Mo. 192; State v. Shelton, 122 S. W. 732, 223 Mo. 118; State v. Donnelly, 130 Mo. 642, 32 S. W. 1124; State v. Minor, 117 Mo. 302, 22 S. W. 1085.

Neb. Olive v. State, 11 Neb. 1, 7 N. W. 444.

N. C. State v. Register, 46 S. E. 21, 133 N. C. 746.

Vt. State v. Hier, 63 A. 877, 78 Vt. 488.

See State v. Greenburg, 53 P. 61, 59 Kan. 404.

Instructions held proper within rule. An instruction to the effect that the testimony of an accomplice is competent evidence, the credibility of such accomplice is for the jury to pass upon as they do upon any other witness, that, while the testimony of an accomplice will sustain a verdict when uncorroborated, such testimony must be received with great caution, but, if it carries conviction, and the jury are convinced of its truth, they should give to it the same effect as would be allowed to a witness who is in no way implicated in the offense, is not erroneous. Shiver v. State, 27 So. 36, 41 Fla. 630. An instruction that the testimony of an accomplice is admissible, yet, when uncorroborated by some person, not implicated in the crime, as to matters connecting defendant with its commission, ought to be received by the jury with great caution, and they ought to be fully satisfied of its truth before convicting defendant on such testimony, but they are at liberty to convict on the uncorroborated testimony of an accomplice, if they believe his statements, and that the facts sworn to by him establish defendant's guilt, fairly presents the law. State v. Crab, 121 Mo. 554, 26 S. W. 548. Where the court charged "that they [the jury] might convict on the unsuppported testimony of an accomplice, but that it was dangerous and unsafe to do so; but if the story of the accomplice, taken with the other facts and circumstances in the case, carry conviction to the minds of the jury, then it is their duty to convict. The jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant, before they can convict," it was held that such instruction was not objectionable as tending to mislead the jury as to the weight to be given to an accomplice's testimony. State v. Barber, 113 N. C. 711, 18 S. E. 515.

Instructions held not erroneous as authorizing a conviction on the uncorroborated testimony of an accomplice. An instruction that the testimony of an accomplice is admissible, yet, when uncorroborated, ought to be received with great caution, and

complice must be corroborated requires too high a degree of proof from the state.[70]

An instruction as to the right to convict upon the uncorroborated testimony of an accomplice should inform the jury as to what is meant by corroboration.[71] In such an instruction, telling the jury to weigh the testimony of an accomplice with great caution and that they may disregard it altogether, it is not error to add, "if they believe it to be untrue," or "if they have a reason-

that the jury can convict on the uncorroborated testimony of an accomplice if they believe it to be true, and if the facts sworn to by such witness will establish the guilt of defendant. State v. Dawson, 124 Mo. 418, 27 S. W. 1104. An instruction, in a prosecution for theft, that, in case the jury believed a certain person to be an accomplice, "you should consider with greater care whether the story he has told on the witness stand is corroborated by any fact or facts testified to by other witnesses," and that "you should not decide the case on the testimony" of the alleged accomplice alone, but upon all the evidence. State v. Harras, 65 P. 774, 25 Wash. 416. In a prosecution for burglary, an instruction that, "while it is a rule of law that a person may be convicted on the uncorroborated testimony of an accomplice, still a jury should always act on such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case, and the jury ought not to convict on such testimony alone, unless satisfied beyond all reasonable doubt of its truth," was not erroneous, in that it implied that the jury might convict on the evidence of the accomplice alone. State v. Coates, 61 P. 726, 22 Wash. 601.

Instructions held susceptible of a construction prejudicial to accused. Where, in a prosecution for breaking and entering a storehouse, the court charged that it was unsafe to convict on uncorroborated testimony of an accomplice, but, if the jury is convinced of the truthfulness of the accomplice's testimony and sees fit to convict on such testimony, if the trial judge refused to set aside the verdict, the Supreme Court will let it stand according to its decision, that sometimes the state cannot make out a case without using an accomplice's testimony, as an outrageous crime may be committed, and, if it were not permitted the use of such testimony, criminals would sometimes be permitted to go free, it was held that the charge might have been construed to the prejudice of accused. State v. Clark, 67 S. E. 300, 85 S. C. 273.

[70] State v. Black, 143 Mo. 166, 44 S. W. 340.

[71] State v. Sprague, 50 S. W. 901, 149 Mo. 409, followed and approved 149 Mo. 425, 50 S. W. 1117; Smith v. State, 67 P. 977, 10 Wyo. 157.

Instructions held to sufficiently define "corroborate." An instruction that the testimony of an accomplice, while admissible, must be corroborated by some other witness or witnesses not implicated in the crime as to facts connecting defendant with its commission, and should be received with great caution, but if the jury were satisfied that the accomplice's testimony was true, and that such testimony was sufficient to establish defendant's guilt, then they could convict on it alone, was proper, and not objectionable for the court's failure to define "corroborate." State v. Bobbitt, 114 S. W. 511, 215 Mo. 10. A charge that accused in a murder case could be convicted on the uncorroborated testimony of an accomplice alone if the jury believed the accomplice's statements to be true and sufficient in proof to establish accused's guilt, but the testimony of an accomplice when not corroborated by some person not implicated in the crime as to matters material to the issue ought to be received with great caution, etc., sufficiently explains the meaning of the word "corroborate." State v. Sassaman, 114 S. W. 590, 214 Mo. 695.

able doubt of its truth." [72] An instruction that, in order to determine the truth or falsity of the testimony of an accomplice, it should be weighed by the same rule as the testimony of any other witness is proper,[73] and is not objectionable as leading the jury to think that they need not consider the turpitude of the accomplice in determining the weight to be given to his testimony.[74] In jurisdictions where corroboration of an accomplice is required, a charge on accomplice testimony, to be sufficient, should define an accomplice, state the statutory inhibition against a conviction on accomplice testimony without corroboration, tell the jury, in substance, that the corroborating evidence, to be sufficient, must be as to some material matter and must tend to connect the accused with the commission of the offense, and apply the law to the facts.[75] A charge, which authorizes a conviction on accomplice testimony, if it is believed and the requirements as to the corroboration of such testimony are met, should also state that it is necessary that the accomplice testimony, in connection with the other evidence, should show defendant's guilt beyond a reasonable doubt.[76] An instruction as to the value of accomplice testimony in the language of a statute regulating the subject will ordinarily be sufficient.[77]

§ 176. Sufficiency of instructions on corroboration of accomplice

In jurisdictions where corroboration of an accomplice is not required by statute it has been held that, in a proper case, it may not be error to instruct that the testimony of an accomplice may be corroborated by the circumstances given in evidence.[78]

In jurisdictions where the statute requires such corroboration, instructions which follow the language of the statute will ordinarily be sufficient, if no others are asked.[79] Under such a stat-

[72] Brown v. State, 72 Miss. 990, 18 So. 431; Wilson v. State, 71 Miss. 880, 16 So. 304.

[73] Butt v. State, 98 S. W. 723, 81 Ark. 173, 118 Am. St. Rep. 42.

[74] State v. Weldon, 71 S. E. 828, 89 S. C. 308.

[75] Standfield v. State, 208 S. W. 532, 84 Tex. Cr. R. 437.

[76] Lockhead v. State, 213 S. W. 653, 85 Tex. Cr. R. 459.

[77] Henderson v. Commonwealth, 91 S. W. 1141, 28 Ky. Law Rep. 1212, 122 Ky. 296.

[78] State v. Shaffer, 161 S. W. 805, 253 Mo. 320.

[79] Vaughan v. State, 58 Ark. 353, 24 S. W. 885; Elizando v. State, 31 Tex. Cr. R. 237, 20 S. W. 560; Lockhart v. State, 29 Tex. App. 35, 13 S. W. 1012.

Instructions held sufficient. Under a statute providing that a conviction cannot be had on the testimony of an accomplice unless corroborated, a charge that a conviction cannot be had on an accomplice's testimony "only," unless corroborated, and that proof of the death of deceased is not sufficient to justify a conviction on the accomplice's testimony "alone," is not erroneous, the words "only" and "alone" being implied in the statute. State v. Smith, 77 N. W. 499, 106 Iowa, 701.

ute an instruction which fails to define the character of corroboration and the nature of the corroborative testimony required will be erroneous.[80] In a proper case the court may instruct that the required corroboration of an accomplice may be drawn "from the circumstances of the case shown in evidence."[81] The defendant is entitled to an instruction that, if the jury do not believe the evidence tending to corroborate the testimony of the accomplice, they must acquit the accused.[82] Under the usual wording of such statutes it is error, in some jurisdictions, to charge merely that the jury cannot convict alone on accomplice testimony,[83] but they should be expressly informed that the testimony of an accomplice, to sustain a conviction, must be corroborated by other evidence tending to connect the accused with the commission of the crime charged,[84] and the accused is en-

[80] State v. Holter, 138 N. W. 953, 30 S. D. 353; Id., 142 N. W. 657, 32 S. D. 43, 46 L. R. A. (N. S.) 376, Ann. Cas. 1916A, 193; Mitchell v. State, 42 S. W. 989, 38 Tex. Cr. R. 325.

Instructions held insufficient within rule. An instruction, in a trial for robbery, that if the jury believe, beyond a reasonable doubt, from the testimony of an accomplice who testified for the people, that defendant is guilty of the offense charged, and if they believe from the evidence, "outside of that which tends to connect the defendant with the commission of the offense, other than shown in the commission of the offense itself and the circumstances thereof," they should find defendant guilty, failed to state with sufficient clearness the rule that testimony of an accomplice is insufficient of itself to justify conviction, and the degree of proof sufficient to corroborate such testimony. People v. Lynch, 55 P. 248, 122 Cal. 501. An instruction that slight evidence that the crime was committed by defendant, and identifying him with it, will corroborate the accomplice, and warrant a finding of guilty. Chapman v. State, 34 S. E. 369, 109 Ga. 157.

[81] State v. Shaffer, 161 S. W. 810, 253 Mo. 320.

[82] McDaniels v. State, 50 So. 324, 162 Ala. 25.

[83] Hollingsworth v. State, 189 S. W. 488, 80 Tex. Cr. R. 299; Loessin v. State, 81 S. W. 715, 46 Tex. Cr. R. 553.

[84] State v. Wong Si Sam, 127 P. 683, 63 Or. 266; Crowell v. State, 24 Tex. App. 404, 6 S. W. 318; Watson v. State, 9 Tex. App. 287.

Instructions held sufficient within rule. An instruction that a conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence which in itself tends to connect him with the offense, etc. Rain v. State, 137 P. 550, 15 Ariz. 125. Under a statute providing that an accused cannot be convicted by the evidence of an accomplice, unless corroborated by other evidence "tending to prove" defendant's complicity, an instruction that a conviction for receiving stolen goods cannot be had on the testimony of the thief, unless corroborated by such evidence as tends to impute to defendant knowledge that the goods were stolen, is not erroneous in using the expression "tends to impute," instead of "imputes." People v. Ribolsi, 89 Cal. 492, 26 P. 1082. A charge, "If you believe that an accomplice has testified in this case, and you believe beyond all reasonable doubt from his testimony, to a moral certainty, that the defendant is guilty of the alleged offense in the information mentioned, and then in connection therewith you believe there is evidence outside of that which tends to connect the defendant with the commission of the offense, outside of showing the com-

titled to an instruction that the corroboration is not sufficient, if

mission of the offense itself and the circumstances thereof, then it would be your bounden duty to convict him." People v. Clough, 73 Cal. 348, 15 P. 5. An instruction that testimony to corroborate an accomplice is sufficient "if it tends to connect defendants with commission of the offense, though of itself, standing alone, it would be entitled to but little weight." People v. Blunkall, 161 P. 997, 31 Cal. App. 778. In homicide, a charge in the language of the statute, providing that a conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence which in itself tends to connect defendant with the commission of the offense, etc., and, in concluding, declared that the corroborative evidence was sufficient "if it tended to connect defendant with the commission of the offense." People v. Balkwell, 76 P. 1017, 143 Cal. 259. An instruction, requiring testimony of accomplice to be corroborated by additional evidence relating to facts and circumstances tending to show that defendant committed the crime either alone or with the witness. State v. Price, 160 N. W. 677, 135 Minn. 159. Where an accomplice testifies for the state, a charge that his evidence, to warrant a conviction, must be corroborated, both as to its truth and the identity of the defendant, by other evidence which "satisfactorily amounts to the swearing of one credible witness, either in direct evidence or from facts and circumstances," is not prejudicial to defendant. Clapp v. State, 94 Tenn. 186, 30 S. W. 214. A charge that, though the accomplice has testified to the essential facts of the crime, there cannot be a conviction on her evidence alone, but there must be other evidence tending to show such fact, and that the corroborative evidence need not be direct and positive, but such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the essential facts, are sufficient corroboration, and that it is for the jury to say, from all the facts and circumstances in evidence, whether she has been sufficiently corroborated, is not erroneous, as it could not be understood by the jury to refer to anything else than the concrete case and the facts before them. Beeson v. State, 130 S. W. 1006, 60 Tex. Cr. R. 39. In a prosecution for seduction, a charge upon the testimony of an accomplice, "that the corroborating evidence need not be direct and positive, independent of the testimony of [the accomplice], but proof of such facts and circumstances as tend to support her testimony, and which satisfy the jury that she is worthy of credit as to the facts essential to constitute the offense," etc., was not erroneous. Capshaw v. State 166 S. W. 737, 73 Tex. Cr. R. 609. Where the jury returned into court and asked whether accused's testimony could be used as corroborative of that of an accomplice, an instruction that any testimony in the case, other than the testimony of an accomplice, believed by the jury to be true, might be considered in corroboration of the testimony of an accomplice, provided it tended materially to connect defendant with the commission of the crime, was proper. Morawitz v. State, 91 S. W. 227, 49 Tex. Cr. R. 366. Though it is better practice to follow the statute, providing that a conviction cannot be had on accomplice testimony, "unless corroborated by other evidence tending to connect defendant with the offense committed," a charge is not erroneous because merely requiring corroboration by evidence tending in "some degree" to connect defendant with the offense. McKinney v. State, 88 S. W. 1012, 48 Tex. Cr. R. 402. An instruction relating to the conviction of one charged with crime on the testimony of an accomplice that there should be evidence tending to show that accused took part in the actual commission of the crime sufficiently stated what constitutes a material fact on which a corroboration of the accomplice is necessary. Clay v. State, 86 P. 17, 15 Wyo. 42.

Corroboration on question of identity of accused. An instruction

it merely shows the commission of the offense or the circumstances thereof,[85] and in some cases it may be error to refuse to charge, not only that there must be evidence tending to connect the defendant with the commission of the alleged offense, but that this requires more than such evidence as merely raises a suspicion of guilt.[86]

Under the Texas statute requiring that, in order to convict a defendant upon the testimony of an accomplice, it must be corroborated by other evidence tending to connect the accused with the crime charged, there is a long line of cases holding that the jury should be told that in order to convict they must believe the testimony of the accomplice to be true and that it connects the defendant with the offense alleged against him, not merely that it tends to show such connection.[87] A charge, calculated to

that the testimony of accomplices should be carefully scrutinized, and that, unless corroborated by other witnesses, especially as to the identity of the accused as the person against whom the accomplices have testified, such testimony is insufficient to convict, is correct; as it sufficiently presents the necessity for corroboration on the question of identity. State v. Walker, 98 Mo. 95, 9 S. W. 646.

[85] State v. Smith, 72 N. W. 279, 102 Iowa, 656; Moore v. State, 170 P. 519, 14 Okl. Cr. 292; Fisher v. Territory, 87 P. 301, 17 Okl. 455.

Instructions held sufficient. An instruction that the corroboration of an accomplice which will justify a conviction cannot come from facts that merely showed the commission of the offense or the circumstances thereof, leaving it to the jury to say whether or not there is corroboration in the other evidence, is correct. State v. Jackson, 73 N. W. 467, 103 Iowa, 702.

[86] People v. Williams, 1 N. Y. Cr. R. 336, 29 Hun, 520.

[87] Savage v. State, 170 S. W. 730, 75 Tex. Cr. R. 213; Baggett v. State, 144 S. W. 1136, 65 Tex. Cr. R. 425; Long v. State, 138 S. W. 401, 62 Tex. Cr. R. 540; Franklin v. State, 138 S. W. 112, 62 Tex. Cr. R. 433; Shrewder v. State, 133 S. W. 281, 60 Tex. Cr. R. 659; Grant v. State, 132 S. W. 350, 60 Tex. Cr. R. 358; Ware v. State, 129 S. W. 836, 60 Tex. Cr. R. 38; Maibaum v. State, 128 S. W. 378, 59 Tex. Cr. R. 386; Jordan v. State, 128 S. W. 139, 59 Tex. Cr. R. 208; Dorham v. State, 125 S. W. 397, 58 Tex. Cr. R. 283; Wadkins v. State, 124 S. W. 959, 58 Tex. Cr. R. 110, 137 Am. St. Rep. 922, 21 Ann. Cas. 556; Pace v. State, 124 S. W. 949, 58 Tex. Cr. R. 90; Snelling v. State, 123 S. W. 610, 57 Tex. Cr. R. 416; Campbell v. State, 123 S. W. 583, 57 Tex. Cr. R. 301; Fruger v. State, 120 S. W. 197, 56 Tex. Cr. R. 393; Maples v. State, 119 S. W. 105, 56 Tex. Cr. R. 99; Gardner v. State, 117 S. W. 148, 55 Tex. Cr. R. 400; Newman v. State, 116 S. W. 577, 55 Tex. Cr. R. 273; Oates v. State, 103 S. W. 859, 51 Tex. Cr. R. 49. See Middleton v. State, 217 S. W. 1046, 86 Tex. Cr. R. 307.

Instructions held erroneous as not requiring the jury to believe testimony of accomplice to be true. An instruction that a certain witness was an accomplice, and the jury could not evict accused, unless it found from the evidence that the testimony of such witness had been corroborated by other evidence connecting accused with the offense charged in either the first or second counts, and that the corroboration was not sufficient if it merely showed the commission of the offense charged, was erroneous. Tims v. State, 130 S. W. 1003, 60 Tex. Cr. R. 58. An instruction that a conviction cannot be had on testimony of an accomplice,

lead the jury to think that the corroboration of the accomplice on main facts other than the connection of the defendant with the alleged crime is sufficient, is erroneous.[88]

§ 177. Corroboration of one accomplice by another

Where the state relies mainly upon the testimony of two or more accomplices, the failure or refusal of the judge to charge

unless corroborated by other evidence to connect defendant with the offense, and corroboration is not sufficient if it merely shows commission of the offense, followed by a definition of "accomplice," but nowhere applying the law to the facts, nor charging that his testimony must be considered true by the jury, was defective. Floyd v. State (Tex. Cr. App.) 117 S. W. 138; Close v. State, 117 S. W. 137, 55 Tex. Cr. R. 380. A charge that the jury cannot find defendant guilty upon the testimony of an accomplice unless the same is corroborated by other evidence is erroneous in that it authorizes a conviction if the accomplice's testimony is corroborated, regardless as to whether it is true or not. Crenshaw v. State, 85 S. W. 1147, 48 Tex. Cr. R. 77. A charge, in a prosecution for seduction, that the prosecutrix is an accomplice of defendant, and no conviction can be had on her testimony, unless corroborated by evidence sufficient to satisfy the jury of the truth of the evidence of prosecutrix. Lemmons v. State, 125 S. W. 400, 58 Tex. Cr. R. 269. A charge that prosecutrix, on a trial for seduction, was an accomplice with accused in the commission of the offense, and that accused could not be convicted on her testimony alone, unless it was corroborated by other evidence connecting accused with the offense, but that such corroborating evidence need not be direct and positive, or sufficient to convict independent of the accomplice, but simply such as would support her testimony and satisfy the jury that she was worthy of credit was erroneous. Vantreese v. State, 128 S. W. 383, 59 Tex. Cr. R. 281.

Instructions held not objectionable as authorizing a conviction on a less amount of proof than required by statute. Where, after charging that the jury could not convict on the testimony of an accomplice or any number of accomplices, unless corroborated by other evidence connecting defendant with the offense and that the corroboration was not sufficient if it merely showed the commission of the offense, the court defined the word "accomplice," and then charged that two of the state's witnesses were accomplices, and that the jury could not find defendant guilty on their testimony unless satisfied that the same was true, and that it had been corroborated by other evidence that defendant did in fact commit the offense, that the evidence of one accomplice could not be corroborated by another, but that the jury must be satisfied that the testimony of each accomplice was true and corroborated by other evidence that defendant, in fact, committed the offense, it was held that such instructions were not objectionable as authorizing a conviction if the jury found that the accomplices testified truthfully. McCue v. State (Tex. Cr. App.) 103 S. W. 883. A charge, in a prosecution for larceny, that another was an accomplice if any offense was committed, and the jury could not find accused guilty upon the accomplice's testimony unless they believed it to be true and that it showed accused guilty as charged, and could not convict even then unless they believed that there was evidence outside of the accomplice's, tending to connect accused with the offense charged, and believed beyond a reasonable doubt from all the evidence that accused was guilty. Brown v. State, 124 S. W. 101, 57 Tex. Cr. R. 570.

[88] State v. Hughes, 75 So. 416, 141 La. 578.

that one accomplice cannot be corroborated by another will constitute error,[89] and in such case it is prejudicial error to instruct that the defendant cannot be convicted upon the uncorroborated testimony of "an accomplice," instead of using the words "an accomplice or accomplices."[90]

H. Instructions on Effect of False Testimony

Effect of false testimony of accused, see ante, § 170.
Invading province of jury, see ante, § 22.

§ 178. Necessity and propriety of instructions

In some jurisdictions the rule is that, as the jury are the sole judge of the credibility of the witnesses, it is their right, untrammeled by any direction, check, or restraint on the part of the court, to adopt their own rules or modes of testing the credit to which a witness is entitled, and that therefore the court cannot be required to give as a charge the legal maxim, "falsus in uno, falsus in omnibus."[91] In other jurisdictions the propriety or necessity of giving an instruction as to the effect of a false statement by a witness on his entire testimony rests largely in the discretion of the trial court,[92] and failure to so instruct will not be error, where no request is made for such a charge.[93] In some jurisdictions a charge stating the statutory rule that a witness false in one part of his testimony is to be distrusted in others is proper.[94] In most jurisdictions it is proper to give an instruc-

[89] Lockhead v. State, 213 S. W. 653, 85 Tex. Cr. R. 459; Franklin v. State, 110 S. W. 909, 53 Tex. Cr. R. 547; Whitlow v. State (App.) 18 S. W. 865; McConnell v. State (App.) 18 S. W. 645; Hannahan v. State, 7 Tex. App. 664; Heath v. State, 7 Tex. App. 464.

Sufficiency of charge. A charge which fails to distinctly tell the jury that one accomplice cannot corroborate another, but the effect of which is to so instruct them, is sufficient. Stevens v. State (Tex. Cr. App.) 49 S. W. 105.

[90] Powers v. Commonwealth, 61 S. W. 735, 110 Ky. 386, 53 L. R. A. 245, 22 Ky. Law Rep. 1807.

[91] State v. Banks, 40 La. Ann. 736, 5 So. 18.

[92] **Ga.** Harrell v. State, 71 S. E. 1030, 9 Ga. App. 624.

Mo. Milton v. Holtzman (App.) 216 S. W. 828; State v. Barnes, 204 S. W. 267, 274 Mo. 625; Lloyd v. Meservey, 108 S. W. 595, 129 Mo. App. 636; Paddock v. Somes, 51 Mo. App. 320.

Vt. Doyle v. Melendy, 75 A. 881, 83 Vt. 339.

[93] Rumph v. State, 100 S. E. 768, 24 Ga. App. 338; Harrell v. State, 71 S. E. 1030, 9 Ga. App. 624; State v. Blaha, 154 P. 78, 39 Nev. 115.

[94] Shea v. United States (C. C. A. Alaska) 260 F. 807, 171 C. C. A. 533; People v. MacDonald, 140 P. 256, 167 Cal. 545; People v. Grill, 91 P. 515, 151 Cal. 592.

"Deliberately" false. A charge that a witness who deliberately testifies falsely in one part of his testimony is to be distrusted in other parts is not erroneous by reason of the use of the word "deliberately." People v. Brown, 152 P. 58, 28 Cal. App. 261.

tion, where the evidence is in conflict on a material point, permitting the jury, with proper qualifications, to disregard entirely the testimony of a witness whom the jury believe to have willfully testified falsely on a material matter,[95] this rule applying to criminal cases,[96] and in the majority of jurisdictions the circumstances may be such as to make it error for the court to refuse such an instruction.[97]

[95] **Ill.** City of Sandwich v. Dolan, 141 Ill. 430, 31 N. E. 416, following Reynolds v. Greenbaum, 80 Ill. 416; Marshall v. Illinois Cent. R. Co., 207 Ill. App. 619.

Mo. State v. Weiss (Sup.) 219 S. W. 368; Sampson v. St. Louis & S. F. R. Co., 138 S. W. 98, 156 Mo. App. 419; Seligman v. Rogers, 113 Mo. 642, 21 S. W. 94; Henry v. Wabash Western Ry. Co., 109 Mo. 488, 19 S. W. 239; State v. Johnson, 91 Mo. 439, 3 S. W. 868.

Wis. Rounds v. State, 57 Wis. 45, 14 N. W. 865.

Duty of jury. A charge that, where any witness has willfully sworn falsely as to any material matter, it is the duty of the jury to distrust his entire testimony may be properly given. Spear v. United Railroads of San Francisco, 117 P. 956, 16 Cal. App. 637.

Instructions criticised as too broad or too restrictive. An instruction that the jury are the judges of the credibility of the witnesses, and of the weight to be given their statements, and if the jury believe, from all they have "seen and heard at the trial," that a witness has sworn falsely, they may disregard entirely his testimony, while too broad, will not be held to have misled the jury to suppose they could go outside the evidence and the demeanor of the witnesses. Elkenberry v. St. Louis Transit Co., 80 N. W. 360, 103 Mo. App. 442. An instruction that if the jury believed, from all they had seen and heard at the trial, that any witness had willfully sworn falsely as to any of the facts mentioned in the instructions, they could disregard his entire testimony, was erroneous, as too restrictive, since, if any witness willfully swore falsely to any material fact, whether mentioned in the instructions or not, the jury should disregard his testimony. Hansberger v. Sedalia Electric Ry., Light & Power Co., 82 Mo. App. 566.

Argumentative instructions. A charge that it is a sound rule of law that, if a witness is found to willfully swear falsely in one material thing, the jury may disregard the whole of his testimony, is argumentative, and properly refused. McClendon v. McKissack, 38 So. 1020, 143 Ala. 188.

[96] **Cal.** People v. Fitzgerald, 70 P. 1014, 138 Cal. 39; Same v. Wilder, 66 P. 228, 134 Cal. 182; People v. Arlington, 63 P. 347, 131 Cal. 231.

Idaho. State v. Bogris, 144 P. 789, 26 Idaho, 587.

Ill. People v. Scarbak, 92 N. E. 286, 245 Ill. 435.

Mo. State v. Lamont (Sup.) 180 S. W. 861; State v. Swisher, 84 S. W. 911, 186 Mo. 1; State v. Hale, 56 S. W. 881, 156 Mo. 102; State v. Martin, 124 Mo. 514, 28 S. W. 12.

Neb. Mauder v. State, 149 N. W. 800, 97 Neb. 380; Titterington v. State, 106 N. W. 421, 75 Neb. 153.

W. Va. State v. Ringer, 100 S. E. 413, 84 W. Va. 546.

Effect of false testimony of accused. See ante, § 170.

[97] **Ala.** Taylor v. State, 81 So. 364, 17 Ala. App. 28; Kelly v. State, 72 So. 573, 15 Ala. App. 63; Reynolds v. State, 72 So. 20, 196 Ala. 586; Harrison v. State, 68 So. 532, 12 Ala. App. 284; Aycock v. Schwartzchild & Sulzsberger Co. of America, 58 So. 811, 4 Ala. App. 610; Penney v. McCauley, 57 So. 510, 3 Ala. App. 497; Merriweather v. Sayre Mining & Mfg. Co., 49 So. 916, 161 Ala. 441; Burton v. State, 22 So. 585, 115 Ala. 1.

Ga. Pelham & H. R. Co. v. Elliott, 75 S. E. 1062, 11 Ga. App. 621; Plum-

Where the court has given such an instruction in general terms, it need not instruct as to the effect of false testimony upon a particular point.[98] To warrant such an instruction there must be a sufficient basis in the evidentiary facts and circumstances tending to show that a witness has been willfully guilty of false swearing,[99] and a mere conflict in the testimony does not consti-

mer v. State, 36 S. E. 233, 111 Ga. 839.

Idaho. State v. Waln, 80 P. 221, 14 Idaho, 1.

Ill. Conlon v. Chicago Great Western Ry. Co., 139 Ill. App. 555.

Miss. Owens v. State, 32 So. 152, 80 Miss. 499.

Mo. State v. Dwire, 25 Mo. 553; Gillett v. Wimer, 23 Mo. 77; Peckham v. Lindell Glass Co., 7 Mo. App. 563.

Neb. Barber v. State, 106 N. W. 423, 75 Neb. 543.

S. D. State v. Goodnow, 170 N. W. 661, 41 S. D. 391.

W. Va. State v. Perry, 41 W. Va. 641, 24 S. E. 634.

Circumstances making it duty of court to give such instruction. Where a witness swore to a certain state of facts before a grand jury material to the issue, and afterwards, on the trial of the issue on the indictment found, swore to a different state of facts concerning the same issue, and that his testimony before the grand jury was false, assigning as the reason for his false testimony before the grand jury that he was at that time a friend of the accused, but was at the time of the trial at enmity with him, it was error to fail to charge the jury that, if a witness willfully and knowingly swears falsely to a material matter, his testimony ought to be disregarded entirely, unless corroborated. Plummer v. State, 36 S. E. 233, 111 Ga. 839. In a prosecution for assault, it is error to refuse an instruction that, if the jury believe from the evidence that any witness or witnesses have knowingly or willfully testified falsely as to any material fact, they are at liberty, unless corroborated by other credible evidence, to disregard the testimony of such witness or witnesses in toto, where the court, at the state's request, has called especial attention to the testimony of accused and his interest in the result of the prosecution, as bearing on his credibility. Gorgo v. People, 100 Ill. App. 130.

Effect of corroboration. When there are facts in a case tending to corroborate a witness who has willfully and corruptly sworn falsely to a material fact therein, it is not error to refuse a charge that the rule, "Falsus in uno, falsus in omnibus," applies, and to charge that the witness' false swearing went "greatly to discredit his testimony, and to impeach him in considering the rest of his evidence." Brett v. Catlin, 47 Barb. (N. Y.) 404.

Instructions with respect to particular witness. Where no effort was made to impeach a witness, and it cannot be said that defendant's guilt was dependent upon his testimony, a charge that if defendant's guilt depended upon his testimony, and the jury believed that it was willfully false as to any material particular, then they might disregard all of his testimony, was properly refused. Phillips v. State, 50 So. 194, 162 Ala. 14.

[98] People v. Demousset, 71 Cal. 611, 12 P. 788.

[99] **Ga.** Bell v. G. Ober & Sons Co., 96 Ga. 214, 23 S. E. 7.

La. State v. Allen, 35 So. 495, 111 La. 154.

Mo. Guldewell v. Patterson (Mo. App.) 229 S. W. 225; Logan v. Metropolitan St. Ry. Co., 82 S. W. 126, 183 Mo. 582.

Neb. Wunrath v. People's Furniture & Carpet Co., 160 N. W. 971, 100 Neb. 539.

Wis. Pumorlo v. City of Merrill, 103 N. W. 464, 125 Wis. 102; Ingalls v. State, 48 Wis. 647, 4 N. W. 785.

Where there is no conflict in the testimony, and no witness makes

tute such a basis.[1] The fact, however, that a witness is not directly impeached does not preclude the court from charging on the effect of false testimony,[2] and, as has already been indicated, such an instruction will be proper where there is a material and direct conflict in the testimony,[3] or where the testimony of a witness is wholly discredited,[4] or where the testimony of a witness is palpably contradictory,[5] or he has made previous contradictory statements.[6]

§ 179. Sufficiency of instructions

An instruction permitting the jury to disregard the entire testimony of a witness whom they find to have testified falsely on a material point, which fails to require that such false testimony

any inconsistent or contradictory statement, and no effort is made to impeach any of them, it is proper to refuse an instruction that the jury are the sole judges of the credibility of witnesses and the probability or improbability of the testimony of any witness; and that, if they believe any witness has sworn falsely, they may disregard his whole testimony. Brazis v. St. Louis Transit Co., 76 S. W. 708, 102 Mo. App. 224.

Cases in which such instruction held improper. Where several witnesses give testimony in support of plaintiff's case, substantially without contradiction, an instruction "that the testimony of one creditable witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe, and do believe, from the evidence and all the facts before you, that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proved in the case," is not applicable to the testimony, and is cause for reversal where the verdict is for defendant. La Bonty v. Lundgren, 31 Neb. 419, 48 N. W. 65. Where in an action for injuries to a pedestrian who stepped into a hole in a sidewalk, she testified that she passed over the walk in daylight at different times during several weeks before the accident, and that she did not see the hole, that she went from her home, and called on another woman for about 20 minutes, before passing over the walk at the time of such injury, the fact that it appears that on a former trial of the cause she had not testified as to the call, and that it is contended that the fact of the call was adduced for the purpose of showing that she passed over the walk at so late an hour that it was impossible for her to see the hole does not indicate a willfully false statement or suppression of facts as to warrant the giving of an instruction on the rule of "Falsus in uno, falsus in omnibus." Pumorlo v. City of Merrill, 103 N. W. 464, 125 Wis. 102.

[1] Carter v. Chambers, 79 Ala. 223; Reed v. City of Mexico, 76 S. W. 53, 101 Mo. App. 155.

[2] Gorman v. Fitts, 69 A. 357, 80 Conn. 531; Sanders v. Illinois Cent. R. Co., 90 Ill. App. 582; Schuler v. Metropolitan Life Ins. Co., 176 S. W. 274, 191 Mo. App. 52.

[3] **Mo.** Volk v. Zepp (App.) 190 S. W. 609; Walker v. St. Louis & S. Ry. Co., 80 S. W. 282, 106 Mo. App. 321; Hartpence v. Rodgers, 45 S. W. 650, 143 Mo. 623; Gerdes v. Christopher & Simpson Architectural Iron & Foundry Co., 124 Mo. 347, 27 S. W. 615; Britton v. City of St. Louis, 120 Mo. 437, 25 S. W. 366.

Neb. Walker v. Hagerty, 30 Neb. 120, 46 N. W. 221.

[4] Fields v. Missouri Pac. Ry. Co., 88 S. W. 134, 113 Mo. App. 642.

[5] Millar v. Madison Car Co., 130 Mo. 517, 31 S. W. 574.

[6] McCullough Bros. v. Sawtell, 68 S. E. 89, 134 Ga. 512.

shall have been willfully given, while not regarded as improper in some jurisdictions, on the theory that the word "willfully" does not add anything to the meaning of the word "false" or "falsely" [7] is considered erroneous in the majority of jurisdictions,[8] and such error is presumed to be prejudicial,[9] although not necessa-

[7] People v. Righetti, 66 Cal. 184, 4 P. 1185; State v. Connors, 94 P. 199, 37 Mont. 15; State v. Merlo, 173 P. 317, 92 Or. 678; State v. Meyers, 117 P. 818, 59 Or. 537; State v. Kyle, 14 Wash. 550, 45 P. 147.

Compare Poor v. W. P. Fuller & Co., 159 P. 233, 30 Cal. App. 650.

[8] **Ala.** Barnett v. State, 79 So. 675, 16 Ala. App. 539, certiorari denied State v. Barnett, 202 Ala. 191, 79 So. 677; Ellis v. State, 72 So. 578, 15 Ala. App. 99; Robinson v. State, 58 So. 121, 4 Ala. App. 1; Hamilton v. State, 41 So. 940, 147 Ala. 110; Prater v. State, 107 Ala. 26, 18 So. 238; Childs v. State, 76 Ala. 93.

Ariz. Babb v. State, 163 P. 259, 18 Ariz. 505, Ann. Cas. 1918B, 925.

Colo. Ward v. Ward, 52 P. 1105, 25 Colo. 33.

Ga. Central R. & Banking Co. of Georgia v. Phinazee, 93 Ga. 488, 21 S. E. 66.

Ill. Panton v. People, 114 Ill. 505, 2 N. E. 411; Noonan v. Maus, 197 Ill. App. 103; Stephens v. Elkins, 169 Ill. App. 269; People v. Welch, 143 Ill. App. 191; Geringer v. Novak, 117 Ill. App. 160.

Ind. Pittsburgh, C., C. & St. L. Ry. Co. v. Haislup, 79 N. E. 1035, 39 Ind. App. 394.

Mich. Gerardo v. Brush, 79 N. W. 646, 120 Mich. 405.

Miss. State v. Wofford, 56 So. 162, 99 Miss. 759; Howell v. State, 53 So. 954, 98 Miss. 439; Sardis & D. R. Co. v. McCoy, 37 So. 706, 85 Miss. 391.

Mo. State v. Jordan (Sup.) 225 S. W. 905; Jackson v. Powell, 84 S. W. 1132, 110 Mo. App. 249; Iron Mountain Bank of St. Louis v. Murdock, 62 Mo. 70; Smith v. Wabash, St. L. & P. Ry. Co., 19 Mo. App. 120; Evans v. St. Louis, I. M. & S. Ry. Co., 16 Mo. App 522; Fath v. Hake, Id. 537.

Nev. State v. Burns, 74 P. 983, 27 Nev. 289.

N. J. State v. Samuels, 104 A. 322, 92 N. J. Law, 131.

N. Y. People v. Parsons, 133 N. Y. S. 100, 192 App. Div. 841; Lack v. Weber (Sup.) 113 N. Y. S. 102, 61 Misc. Rep. 91; Jennings v. Kosmak (Sup.) 45 N. Y. S. 802, 20 Misc. Rep. 300, reversing judgment (City Ct.) 43 N. Y. S. 1134, 19 Misc. Rep. 433.

N. D. State v. Johnson, 103 N. W. 565, 14 N. D. 288.

Wis. Gehl v. Milwaukee Produce Co., 93 N. W. 26, 116 Wis. 263; Cahn v. Ladd, 68 N. W. 652, 94 Wis. 134; Little v. Superior Rapid Transit Ry. Co., 88 Wis. 402, 60 N. W. 705.

Instructions not objectionable within rule. An instruction that the jury is not bound to believe anything to be a fact simply because a witness has stated it to be so, providing the jury believe from all the testimony that the witness is mistaken or has testified falsely, was not objectionable as authorizing the jury to disregard the testimony of a witness, if he has testified falsely, without requiring that the testimony be "knowingly and willfully" false. Devaney v. Otis Elevator Co., 95 N. E. 990, 251 Ill. 28.

Palpable falsity. An instruction which tells the jury that, before they should disregard the testimony of a witness, they should believe that such witness has palpably testified falsely, is erroneous, as requiring too high a degree of proof of falsity. West Chicago St. Ry. Co. v. Moras, 111 Ill. App. 531.

"Willfully or corruptly." The phrases, "willfully and corruptly testifying falsely," and "willfully or corruptly testifying falsely," used in an instruction upon the question of the credibility of witnesses, are identical, and the use of either of them is proper. Hanchett v. Haas, 125 Ill. App. 111.

[9] McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

rily ground for reversal.[10] Either of the words "willfully," or "knowingly," [11] or "intentionally" [12] will be sufficient to comply with this rule.

It is further required that an instruction as to the effect of false testimony upon the credibility of a witness shall inform the jury that such testimony must have been given with regard to some material fact or issue.[13] This rule has been applied to an instruction that the testimony of one credible witness may be, or is, entitled to more weight than the testimony of many others whom the jury believe to be mistaken or to have knowingly testified untruthfully.[14] A failure, however, to expressly include the element of materiality in such an instruction will not be error, if all the testimony of the witness sought to be im-

10 Beck v. People, 115 Ill. App. 19.

11 Peterson v. Pusey, 86 N. E. 692, 237 Ill. 204; Owens v. Kansas City, St. J. & C. B. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39.

12 State v. Winney, 128 N. W. 680, 21 N. D. 72.

13 **Ala.** Montgomery v. State, 86 So. 132, 17 Ala. App. 469; Butler v. State, 77 So. 72, 16 Ala. App. 234; Patton v. State, 46 So. 862, 156 Ala. 23; Hill v. State, 41 So. 621, 146 Ala. 51.

Cal. People v. Ford, 143 P. 1075, 25 Cal. App. 388; Same v. Suhr, 143 P. 1088, 25 Cal. App. 805; People v. Plyler, 53 P. 553, 121 Cal. 160.

Ill. Vittum v. Drury, 161 Ill. App. 603; Cummins v. Cleveland, C., C. & St. L. Ry. Co, 147 Ill. App. 291; Clark v. O'Gara Coal Co., 140 Ill. App. 207; Bickerman v. Tarter, 115 Ill. App. 278.

Ind. Lemmon v. Moore, 94 Ind. 40.

Mich. Gerardo v. Brush, 79 N. W. 646, 120 Mich. 405.

Minn. State v. Henderson, 74 N. W. 1014, 72 Minn. 74.

Miss. Boykin v. State, 38 So. 725, 86 Miss. 481.

Mo. Lloyd v. Meservey, 108 S. W. 595. 129 Mo. App. 636.

N. M. Territory v. Lucero, 46 P. 18, 8 N. M. 543.

N. Y. Tucker v. Dudley, 111 N. Y. S. 700, 127 App. Div. 403.

N. D. First Nat. Bank v. Minneapolis & N. Elevator Co., 91 N. W. 436, 11 N. D. 280.

Instructions not improper within rule. An instruction that if the jury believe any witness has willfully sworn falsely as to any of the facts mentioned in the other instruction as bearing upon the claim sued on, or the defenses thereto, they are at liberty to entirely disregard his testimony, is not open to the objection that it does not confine the false swearing to material facts in evidence. Hart v. Hopson, 52 Mo. App. 177.

Permitting jury to say what are material facts. It was not error, as leaving to the jury to say what are material facts, to instruct them that in considering the credibility of a witness they may take into account any contradictory statement as to a material fact, made by such witness out of court, and that false testimony as to a material fact would justify them in disregarding the entire testimony of a witness. State v. Dent, 70 S. W. 881, 170 Mo. 398; State v. Hutchison (Mo. Sup.) 186 S. W. 1000.

14 Tri-City Ry. Co. v. Gould, 75 N. E. 493, 217 Ill. 317, reversing judgment 118 Ill. App. 602; Keller v. Hansen, 14 Ill. App. 640.

In North Dakota, however, such an instruction is not erroneous because it is not confined to material matters the view being taken that it is not an attempt to apply the maxim of "falsus in uno, falsus in omnibus." McGilvra v. Minneapolis, St. P. & S. S. M. Ry. Co., 159 N. W. 854, 35 N. D. 275.

peached is material,[15] nor will such omission be ground for reversal, if it appears that the alleged false testimony was as to a material matter.[16]

Instructions should not be so framed as to authorize the jury to disregard the entire testimony of a witness swearing falsely to some point, although on other material matters they may believe his testimony to be true,[17] and in some jurisdictions, in connection with an instruction that the jury may disregard entirely the testimony of a witness who has sworn falsely to a material fact, the jury should be given to understand that there is no rule of law that prevents them from giving the testimony of such a witness not shown to be false such weight as they may believe it to be justly entitled to.[18] Thus, in one jurisdiction the proper form of instruction is that, if the jury believe that any witness has given false testimony as to a material fact, they may disregard the whole of his testimony, or give it such weight on other points as they may think it entitled to, they being the exclusive judges of the weight of the testimony.[19]

[15] Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

[16] Butz v. Schwartz, 32 Ill. App. 156, affirmed 135 Ill. 180, 25 N. E. 1007.

[17] Little v. State, 39 So. 674, 145 Ala. 662; Burgess v. State, 158 S. W. 774, 108 Ark. 508; Taylor v. State, 102 S. W. 367, 82 Ark. 540; Davis v. State, 42 So. 541, 89 Miss. 119.

Instructions not improper within rule. A charge in a larceny prosecution that the jury were the judges of the weight of the evidence and credibility of the witnesses, and that if they believed a witness swore falsely they should disregard his testimony, and if they believed he swore falsely in part and truthful in part, they should disregard the part believed to be false and accept that believed to be true. Jackson v. State, 126 S. W. 843, 94 Ark. 169. In prosecution for murder, cautionary instruction that if jury believed that any witness had knowingly sworn falsely to any material fact they might reject all or any portion of such witness' testimony. State v. Barnes (Mo. Sup.) 204 S. W. 264.

[18] Siever v. Coffman, 92 S. E. 669, 80 W. Va. 420; Hansberger v. Sedalia Electric Ry., Light & Power Co., 82 Mo. App. 566.

In Iowa, an instruction that the jury may disregard the entire testimony of any witness if he has sworn falsely in relation to any material matter is properly qualified by adding that they are not bound to do so if they still believe it worthy of credit. State v. Baker, 89 Iowa, 188, 56 N. W. 425.

In Michigan, it is held that, while an instruction that the jury are under no obligation to believe any of the testimony of a witness who swears falsely as to one material fact is technically correct, it is safer to further instruct them, in the same connection, that the credibility of such a witness is exclusively a question for them, and that there is no rule of law which prevents their giving him credit as to such portions of his testimony as they believe to be true and credible. Hillman v. Schwenk, 36 N. W. 77, 68 Mich. 293.

[19] State v. Wilson, 83 S. E. 44, 74 W. Va. 772; State v. Clark, 63 S. E. 402, 64 W. Va. 625; Cobb v. Dunlevie, 60 S. E. 384, 63 W. Va. 398; State v. Thompson, 21 W. Va. 741.

§ 180. Corroboration of part of testimony not shown to be false

In some jurisdictions it is error to instruct that, if a witness knowingly and willfully gives false testimony as to a material matter, his entire testimony may or should be disregarded unless the instruction is limited to cases in which there is no corroboration of such testimony,[20] and in other jurisdictions an instruction which includes such a limitation or qualification is proper.[21] In Oklahoma, earlier cases to the contrary[22] have been overruled,[23] and an instruction permitting the jury to disregard the whole of the testimony of a witness who has testified falsely to any material question, except so far as his testimony may be corroborated, is now upheld; the instruction being construed to mean that, if the testimony of such witness is corroborated in some respects, then the jury should not arbitrarily disregard it. In jurisdictions where this rule prevails the approved form of instruction is that the jury may disregard the entire testimony of such a witness in so far as they believe it to be false,[24] and except so far as such testimony is corroborated by other credible

[20] **Ga.** Humphreys v. Smith, 66 S. E. 158, 133 Ga. 456.

Ill. Souleyret v. O'Gara Coal Co., 161 Ill. App. 60; Himrod Coal Co. v. Clingan, 114 Ill. App. 568; Szymkus v. Eureka Fire & Marine Ins. Co., 114 Ill. App. 401.

Mich. People v. Breen, 158 N. W. 142, 192 Mich. 39; Heddle v. City Electric Ry. Co., 70 N. W. 1096, 112 Mich. 547.

Minn. State v. Henderson, 74 N. W. 1014, 72 Minn. 74.

Wis. Beauregard v. State, 131 N. W. 347, 146 Wis. 280; Miller v. State, 81 N. W. 1020, 106 Wis. 156; Bratt v. Swift, 75 N. W. 411, 99 Wis. 579.

See People v. Binger, 124 N. E. 583, 289 Ill. 582.

Instructions not erroneous within rule. An instruction that the jury are judges of the credibility of witnesses, "and you are not bound to believe anything to be a fact because a witness has stated it to be so, provided you believe from all the evidence that such witness is mistaken, or has knowingly testified falsely," did not tell the jury to disbelieve a witness who was mistaken, or who has spoken falsely, without the qualification, "unless corroborated by other competent evidence." State v. Fenton, 70 P. 741, 30 Wash. 325.

[21] Trimble v. Territory, 71 P. 932, 8 Ariz. 273; Faulkner v. Territory, 30 P. 905, 6 N. M. 464; State v. Goff, 142 P. 564, 71 Or. 352; State v. Hillstrom, 150 P. 935, 46 Utah, 341.

Sufficiency of corroboration. An instruction that jury may entirely disregard testimony of any witness whom they believe has willfully sworn falsely to any material matter, unless it is corroborated by testimony or facts in evidence established to its satisfaction, did not tell jury that such corroboration must be practically proof absolute. Baird v. Gibberd, 189 P. 56, 32 Idaho, 796.

[22] Robarts v. State, 127 P. 894, 8 Okl. Cr. 394; Gilbert v. State, 127 P. 889, 8 Okl. Cr. 329; Rogers v. State, 127 P. 365, 8 Okl. Cr. 226; McKnight v. State, 122 P. 1118, 7 Okl. Cr. 235; Sims v. State, 120 P. 1032, 7 Okl. Cr. 7; Gibbons v. Territory, 115 P. 129, 5 Okl. Cr. 212; Rea v. State, 105 P. 381, 3 Okl. Cr. 269.

[23] Davis v. State (Okl. Cr. App.) 196 P. 146; Cole v. State (Okl. Cr. App.) 195 P. 901.

[24] Tartt v. Ramsey, 158 Ill. App. 468; St. Louis, P. & N. Ry. Co. v. Rawley, 106 Ill. App. 550.

evidence or by facts and circumstances appearing in the case.[25]

An instruction with respect to corroboration by other evidence will be erroneous, if it qualifies the word "evidence" by the word "competent," instead of the word "credible," or other equivalent word.[26] So it will be error in such an instruction to use the phrase corroborated "by other credible witnesses," instead of "by other credible evidence,"[27] and an instruction is erroneous which excludes corroboration by circumstances and documents,[28] or which requires corroboration by more than one witness,[29] and such an instruction is improper if it requires the entire testimony of such a witness to be corroborated to prevent the jury from rejecting it.[30]

In some jurisdictions the above qualification with respect to corroboration of a witness testifying falsely by other credible evidence is not required,[31] at least, where the instruction merely permits the entire testimony of such a witness to be disregard-

[25] Monk v. Caseyville Ry. Co., 202 Ill. App. 641; Osberg v. Cudahy Packing Co., 198 Ill. App. 551; Sherburne v. McGuire, 197 Ill. App. 486; Richardson v. Babcock, 96 N. W. 554, 119 Wis. 141.

The criticism of such an instruction made by some text-writers, that it is susceptible of the implication that if a witness who has given false testimony is corroborated as to other matters the jury will not be at liberty to reject all or a part of his testimony is considered by the Supreme Court of Utah as refined and abstruse rather than substantial and fundamental. State v. Morris, 122 P. 380, 40 Utah, 431.

In Georgia, it is held to be the better practice to instruct that the testimony of witnesses who have willfully sworn falsely as to a material matter is to be entirely rejected unless corroborated in a legal manner and that it is inaccurate to omit the word "entirely." Garland v. State, 53 S. E. 314, 124 Ga. 832.

Duty to inform jury that witness may be corroborated by circumstances. An instruction, that if any witness testified falsely to any material fact his entire testimony may be disregarded unless corroborated by other testimony, is not erroneous, because not informing the jury that it could be corroborated by circumstances, as the jury cannot have been misled. Pilgrim v. Brown, 150 N. W. 1, 168 Iowa, 177.

[26] Weston v. Teufel, 72 N. E. 908, 213 Ill. 291.

[27] Johnson v. Farrell, 74 N. E. 760, 215 Ill. 542; Dohmen Co. v. Niagara Fire Ins. Co. of City of New York, 71 N. W. 69, 96 Wis. 38.

Harmless error. In declaring the rule to a jury that, where a witness is found to have testified falsely in a material matter, his testimony may be disregarded in toto unless corroborated, it is well to say that the corroboration may be that of any credible evidence, or of facts and circumstances, rather than to confine it to other unimpeached "testimony," though in a case where there is no corroboration outside of the testimony, such an instruction is not substantially erroneous. Lyts v. Keevey, 5 Wash. 606, 32 P. 534.

[28] Niezorawski v. State, 111 N. W. 250, 131 Wis. 166.

[29] Weddemann v. Lehman, 111 Ill. App. 231; Junction Min. Co. v. Goodwin, 109 Ill. App. 144.

[30] Zoeller v. Schmitz, 172 Ill. App. 167.

[31] Britton v. City of St. Louis, 120 Mo. 437, 25 S. W. 366; Titterington v. State, 106 N. W. 421, 75 Neb. 153; State v. Raice, 123 N. W. 708, 24 S. D. 111.

ed,[32] and in one jurisdiction, under a statute, an instruction invades the province of the jury which informs them that they may disregard the entire testimony of such a witness, except as he is corroborated by other evidence; it being considered that the jury have the right to believe or disbelieve any part of such testimony, whether corroborated or not,[33] but in this jurisdiction it is also considered that, while an instruction containing such a qualification is technically wrong, it is not ordinarily a ground for reversal.[34] The jury should not be led to think that they have a discretion as to whether to reject testimony which they may believe to be false, and the above qualifying clause as to corroboration is inapplicable in the case of such a belief.[35]

I. Effect of Making Contradictory Statements

Invading province of jury, see ante, §§ 23, 24.

§ 181. Necessity of instructions

The general rule is that, where there is a sufficient basis in the evidence, a party is entitled on request to a charge that, if the jury believe that a witness has made statements in conflict with his testimony as to material facts, they may consider such contradiction in determining his credibility,[36] and in a proper case it will be error to refuse to charge that a witness may be impeached by showing that at other times and places he has made statements materially different from his testimony on the stand, and that where a witness is shown to have made such contradictory statements the jury may disregard his testimony, except so far as corroborated.[37] Where testimony of a witness is in direct con-

[32] Minich v. People, 9 P. 4, 8 Colo. 440.

[33] State v. Kanakaris, 169 P. 42, 54 Mont. 180; State v. Penna, 90 P. 787, 35 Mont. 535.

[34] State v. Penna, 90 P. 787, 35 Mont. 535; State v. Lee, 87 P. 977, 34 Mont. 584.

[35] Spick v. State, 121 N. W. 664, 140 Wis. 104.

[36] **Ala.** Birmingham Ry., Light & Power Co. v. Cockrum, 60 So. 304, 179 Ala. 372; Bennett v. State, 49 So. 296, 160 Ala. 25; Wilkerson v. State, 37 So. 265, 140 Ala. 165; Harris v. State, 96 Ala. 24, 11 So. 255.

Colo. Clammer v. Eddy, 92 P. 722, 41 Colo. 235.

N. Y. Lennon v. New York Cent. & H. R. R. Co., 65 Hun, 578, 20 N. Y. S. 557.

Implied contradiction. It is error to refuse to charge that a person who attaches his name as a witness to a will impliedly certifies that the testator is competent to make a will, and while the law will permit him to subsequently testify to the contrary, yet the jury in weighing his testimony may consider the fact of such implied contradiction. Stark v. Cress, 4 Ohio App. 92.

[37] People v. Corey, 97 P. 907, 8 Cal. App. 720; Owens v. State, 32 So. 152, 80 Miss. 499; State v. Chandler, 112 P. 1087, 57 Or. 561.

Application of rule to prosecuting witness. Where the verdict de-

tradiction to his testimony on a former trial, it is error to refuse an instruction that, if the jury believe the former testimony, they must ignore the testimony in the instant case.[38]

§ 182. Propriety and sufficiency of instructions

An instruction which permits the jury to disregard the testimony of a witness, except as he is corroborated, on account of having made contradictory statements as to material matters, without requiring the jury to believe that he has knowingly and willfully testified falsely as to such matters, is erroneous,[39] as is an instruction which authorizes the impeachment of a witness because of conflicting statements with respect to immaterial matters.[40] It is not improper to instruct that testimony as to contradictory statements of a witness is uncertain and somewhat unreliable,[41] and instructions that the jury may disregard the entire testimony of a witness who has been contradicted, although they do not believe the contradicting evidence,[42] or although the uncontradicted part of his testimony is undisputed, or whether any of it is corroborated or not,[43] are erroneous. On the other hand, it is error to instruct that testimony as to contradictory statements of a witness is not to be considered for the purpose of proving that he has sworn falsely.[44]

pends upon the evidence of the prosecuting witness alone, and the defense proved that, on several occasions, she had made statements materially conflicting with her testimony, the court should, as a part of the law applicable to the case, charge the legal principles controlling the application and effect of the impeaching evidence. Henderson v. State, 1 Tex. App. 432.

[38] O'Leary v. Buffalo Union Furnace Co., 91 N. Y. S. 579, 100 App. Div. 136.

[39] Godair v. Ham Nat. Bank, 80 N. E. 407, 225 Ill. 572, 116 Am. St. Rep. 172, 8 Ann. Cas. 447.

Instructions held not improper. A charge in a criminal case that, if the testimony of a witness differed from testimony previously given by him on another occasion, it was the duty of the jury to consider that fact and to determine how his credibility was affected thereby, but that the mere fact that there was a discrepancy in the testimony of the witness on the two occasions did not justify the jury in immediately rejecting his evidence, and that they must consider the variance and determine whether it affected his credibility, was proper. State v. Rosa, 62 A. 695, 72 N. J. Law, 462.

[40] Seawright v. State, 49 So. 325, 160 Ala. 33; Cobb v. State, 22 So. 506, 115 Ala. 18; Fleck v. Welpert, 195 Ill. App., 57.

[41] Thorp v. Town of Brookfield, 36 Conn. 320; State v. Roberts, 63 Vt. 139, 21 A. 424.

[42] Maxwell v. State, 65 So. 732, 11 Ala. App. 53.

[43] Moran v. People, 45 N. E. 230, 163 Ill. 372.

[44] Cline v. State, 27 S. W. 128, 33 Tex. Cr. R. 482; Howard v. State, 25 Tex. App. 686, 8 S. W. 929.

Rule where witness testifies that he does not remember making conflicting statements. Where a witness for the prosecution testified that he did not remember statements testified to have been made by him to another witness conflicting with his testimony on the trial, and did not de-

Instructions should not be so framed as to be likely to lead the jury to think that the fact that a witness has made contradictory statements may be considered on the question of the guilt or innocence of an accused.[45] On the contrary, it is proper to charge that such impeaching testimony cannot be considered as tending to establish guilt, or any fact in the case.[46] A charge in a criminal case that contradictory statements of a witness upon material points may be sufficient to cause a reasonable doubt of the guilt of the defendant is properly refused, as incomplete and unintelligible,[47] but it is reversible error to refuse to charge that proof of such contradictory statements may be sufficient to raise a reasonable doubt as to the truth of the testimony of the witness making them.[48]

J. Singling out Particular Witnesses or Classes of Witnesses for Comment as to Credibility

§ 183. Rule that such instructions are improper

Invading province of jury, see ante, § 27.

The right of the court to single out a party who has taken the witness stand for the purpose of instructing as to his credibility has been treated in a preceding section.[49] With respect to witnesses other than parties the weight of authority supports the proposition that as a general rule, the court has no right to single out a particular witness for the purpose of commenting on matters affecting his credibility or telling the jury what they may consider in determining the weight to be given to his testimo-

sire to change or explain his testimony, it was not error to charge that testimony as to such statements was introduced to show the witness not worthy of credit, and did not show such statements to be true or untrue, and it was for the jury to weigh the evidence, and that such a statement was a declaration made outside the court, and was not original evidence. Bondurant v. State, 27 So. 775, 125 Ala. 31.

[45] State v. Davis, 74 Iowa, 578, 38 N. W. 424.

[46] Olds v. State, 33 So. 296, 44 Fla. 452; Hunter v. State, 129 S. W. 125, 59 Tex. Cr. R. 439.

[47] Rose v. State, 42 So. 21, 144 Ala. 114; Cobb v. Same, 22 So. 506, 115 Ala. 18; Crawford v. State, 21 So. 214, 112 Ala. 1.

Instructions held argumentative. A charge that, if the guilt of a prisoner depends on the testimony of a certain witness, proof of contradictory statements or declarations of that witness made as to a material point may be sufficient to raise a reasonable doubt of defendant's guilt and warrant an acquittal, was argumentative, and properly refused. Jackson v. State, 34 So. 188, 136 Ala. 22. A charge that any contradictory statement made by a witness may be sufficient to cause a reasonable doubt is argumentative, and violates common sense. McClain v. State, 62 So. 241, 182 Ala. 67.

[48] Williams v. State, 21 So. 993, 114 Ala. 19.

[49] Ante, § 164.

ny,[50] the general instructions covering the credibility of all witnesses being a sufficient rule for the guidance of the jury in determining the credibility of any witness,[51] and such an instruction is properly refused.[52] The charge of the court is decidedly

[50] **Fla.** Roberts v. State, 72 So. 649, 72 Fla. 132.

Ill. Hoffman v. Stephens, 109 N. E. 994, 269 Ill. 376; People v. Mendelson, 106 N. E. 249, 264 Ill. 453, L. R. A. 1915C, 627; Harroun v. Benton, 197 Ill. App. 138; Wolf v. Mattox, 193 Ill. App. 482; People v. Carter, 188 Ill. App. 22; People v. Dietmeyer, 164 Ill. App. 405; Tanner v. Clapp, 139 Ill. App. 353; Parlin & Orendorff Co. v. Finfrouck, 65 Ill. App. 174.

Mo. Fitzsimmons v. Commerce Trust Co. (App.) 200 S. W. 437; State v. Westbrook, 171 S. W. 616, 186 Mo. App. 421.

Mont. White v. Chicago, M. & P. S. Ry. Co., 143 P. 561, 49 Mont. 419.

Okl. Brumbaugh v. State, 150 P. 88, 11 Okl. Cr. 596; Heacock v. State, 112 P. 949, 4 Okl. Cr. 606.

Tenn. Cooper v. State, 138 S. W. 826, 123 Tenn. 37.

Wis. Schutz v. State, 104 N. W. 90, 125 Wis. 452.

Where several witnesses testify to the same facts the court cannot single out a particular witness, and instruct the jury what conclusion to come to if they do not believe him. People v. Simpson, 48 Mich. 474, 12 N. W. 662.

Instructions improper within rule. A charge: "It is therefore important for you to determine whether [a certain witness] is testifying to the truth. * * * If he is testifying to the truth, then the effect of this contract is entirely destroyed. * * * These parties, being interested, take the stand and testify positively to those facts." Seitz v. Starks, 108 N. W. 354, 144 Mich. 448. An instruction that, if S. testified at a former trial with reference to material matter at variance with his testimony on the present trial, the fact tended to impeach him, and, unless his testimony was corroborated, the jury could disregard it entirely, etc. Matthews v. Granger, 63 N. E. 658, 196 Ill. 164, affirming judgment 96 Ill. App. 536.

Comment on conduct of witness on stand. An instruction is not objectionable for the reason merely that it points out a witness by name and directs the jury to take into consideration his conduct while testifying as affecting his testimony, for it will be presumed that the manner of the witness justified the instruction. Ammerman v. Teeter, 49 Ill. 400.

Instructions general in form. A general instruction as to the right of the jury to disregard the testimony of any witness who has willfully sworn falsely as to any material matter, unless corroborated, is not objectionable as aiming at the testimony of a particular witness. Healea v. Keenan, 91 N. E. 646, 244 Ill. 484.

Harmless error. It is not reversible error for the court to instruct the jury that the weight to be given the testimony of an uncontradicted witness is for them. Davis v. Coblens, 12 App. D. C. 51.

[51] Darneal v. State, 174 P. 290, 14 Okl. Cr. 540, 1 A. L. R. 638.

[52] **Ala.** Moore v. State, 72 So. 596, 15 Ala. App. 152; Bullington v. State, 69 So. 319, 13 Ala. App. 61. See Herring v. State, 71 So. 974, 14 Ala. App. 93.

Cal. People v. Emmons, 95 P. 1082, 7 Cal. App. 685; People v. Keith, 75 P. 304, 141 Cal. 686.

Ill. Helbig v. Citizens' Ins. Co., 84 N. E. 897, 234 Ill. 251, affirming judgment Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115; Employers' Liability Assur. Corp. of London, England, v. Kelly-Atkinson Const. Co., 195 Ill. App. 620; Wolf v. City of Venice, 152 Ill. App. 585.

Ind. Leseuer v. State, 95 N. E. 239, 176 Ind. 448.

Minn. State v. Meyers, 155 N. W. 766, 132 Minn. 4; Krahn v. J. L. Owens Co., 145 N. W. 626, 125 Minn. 83, 51 L. R. A. (N. S.) 650.

Mo. State v. Kelley, 90 S. W. 834,

better and wiser when couched in impersonal and general language than it would be if it points out by name a particular witness.[53] In Missouri it is held,[54] practically overruling earlier cases,[55] that the court has no right to single out a particular witness, whether he is a party to the suit or not, call attention to his interest, and tell the jury to be careful how they give credence to what he may say.

An instruction which singles out a class of witnesses,[56] or the witnesses for one side,[57] and calls the attention of the jury to matters affecting their credibility, is erroneous, and in criminal cases instructions on the credibility of witnesses should apply alike to all the witnesses, whether they are for the state or the defendant.[58] Under this doctrine, when the test of interest is applied, it should extend to all witnesses who are interested, ei-

191 Mo. 680; State v. Pollard, 74 S. W. 969, 174 Mo. 607.

Mont. State v. McClellan, 59 P. 924, 23 Mont. 532, 75 Am. St. Rep. 558.

Wis. Loose v. State, 97 N. W. 526, 120 Wis. 115.

[53] Woodard v. State, 63 S. E. 573, 5 Ga. App. 447.

[54] State v. Shellman (Mo. Sup.) 192 S. W. 435; Stetzler v. Metropolitan St. Ry. Co., 109 S. W. 666, 210 Mo. 704.

[55] O'Neill v. Blase, 68 S. W. 764, 94 Mo. App. 648.

[56] People v. O'Brien, 119 N. Y. S. 788, 135 App. Div. 85.

Testimony of impeaching witnesses. It was error to instruct that testimony of impeaching witnesses should be weighed as that of other witnesses, and when impeaching witnesses testify falsely, the jury might disregard entirely their testimony in so far as false, and give to the testimony of the witnesses attacked such weight and credence as is deserved. Babb v. State, 163 P. 259, 18 Ariz. 505, Ann. Cas. 1918B, 925.

Comparative credibility of different classes of witnesses. No witness is to be discredited merely because of his race or color; and, where counsel have asserted that comparatively little credit is to be attached to the evidence of ignorant and semibarbarous Indian witnesses, there is no error in the court's saying that both white men and Indians lie, and that the evidence of both is entitled to the same credit, and such credibility is to be determined by the same rules of law, when this is coupled with a correct statement of the jury's right to consider the intelligence, appearance, apparent candor, opportunities of knowledge, etc., of each witness. Shelp v. United States (C. C. A. Alaska) 81 F. 694, 26 C. C. A. 570.

[57] Waters v. People, 50 N. E. 148, 172 Ill. 367.

Harmless error. An instruction, on a trial for murder, that the jury, in considering the evidence of the witnesses for defendant, might consider their interest in the result of the trial and their feelings towards defendant, etc., although it should have included all the witnesses in the case, is not reversible error where there were other instructions of similar import, which included all the witnesses. Belt v. People, 97 Ill. 461.

[58] State v. Rogers, 163 P. 912, 30 Idaho, 259; Fletcher v. State, 101 P. 599, 2 Okl. Cr. 300, 23 L. R. A. (N. S.) 581.

Instructions held proper within rule. A cautionary instruction in a murder trial as to the credibility of witnesses that in hearing their testimony the jury may take into consideration his or her interest, feeling for, or relation to defendant was not erroneous, as not including state's witnesses, since it would embrace antagonism as well as friendship. State v. Garrett, 207 S. W. 784, 276 Mo. 302.

ther as parties, agents, or servants of the parties or otherwise,[59] and an instruction which singles out the witnesses for one side, and calls the attention of the jury to the effect of their interest upon their credibility, without referring to the witnesses for the other side who are also interested, is erroneous.[60]

It is improper to instruct that the jury may consider the effect of the fact of the employment of any witness by either party, when the only witnesses so employed are those called by one of the parties.[61] So an instruction laying down the rule of "falsus in uno, falsus in omnibus," should apply alike to all witnesses, whether for the plaintiff or the defendant.[62] However, the use of the masculine gender in referring to witnesses will not render an instruction erroneous, as being applicable only to a particular witness or to witnesses of the male sex.[63]

§ 184. Rule that such instructions may be given

In some jurisdictions cautionary instructions with respect to the credibility of a particular witness rest largely in the discretion of the court.[64] In other jurisdictions it is considered that

[59] City of Dixon v. Scott, 81 Ill. App. 368, affirmed 54 N. E. 897, 181 Ill. 116.

Instructions not improper within rule. An instruction that in passing on the testimony of all the witnesses the jury may consider any interest which such witnesses may feel is not objectionable as singling out witnesses, and calling special attention to their credibility. Chicago & A. R. Co. v. Anderson, 46 N. E. 1125, 166 Ill. 572, judgment affirmed 67 Ill. App. 386. An instruction to consider the interest of named witnesses in the result of the action is not erroneous, where the court in such connection names practically all the witnesses interested. In re Paulson's Estate, 150 N. W. 914, 128 Minn. 277. Where the attorney for plaintiff testified on behalf of his client, and the attorney for defendant testified on behalf of the defendant, an instruction that an attorney is a competent witness, and his testimony must not be disregarded simply because he is an attorney testifying in behalf of his client, is not objectionable as casting discredit on one of the witnesses for defendant. King v. Hanson, 99 N. W. 1085, 13 N. D. 85.

[60] Phœnix Ins. Co. v. La Pointe, 118 Ill. 384, 8 N. E. 353; Zapel v. Ennis, 104 Ill. App. 175.

[61] Ovens v. Chicago City Ry. Co., 171 Ill. App. 647.

[62] People v. Arlington, 63 P. 347, 131 Cal. 231; Thomas v. Gates, 58 P. 315, 126 Cal. 1; State v. Dunn, 168 N. W. 2, 140 Minn. 308; Argabright v. State, 69 N. W. 102, 49 Neb. 760.

[63] Morello v. People, 80 N. E. 903, 226 Ill. 388; State v. Clark, 163 N. W. 250, 180 Iowa, 477; Marek v. State, 94 S. W. 469, 49 Tex. Cr. R. 428.

Directing attention to accused. In a prosecution for embezzlement, where the prosecuting witness was a woman, and accused testified in his own behalf, an instruction that the jury are the sole judges of the credibility of the witnesses, and that they should consider all the circumstances under which any witness testified, his demeanor, his interest in the case, and the manner in which he might be affected by the verdict, was not erroneous in directing special attention to the credibility of accused, without requiring the same attention to the credibility of the prosecuting witness. People v. Goodrich, 96 N. E. 542, 251 Ill. 558.

[64] People v. Breen, 158 N. W. 142, 192 Mich. 39; Heddle v. City Electric Ry. Co., 70 N. W. 1096, 112 Mich.

in a proper case it is not erroneous to single out a particular witness and charge as to the effect of giving false testimony,[65] and in some jurisdictions, under some circumstances, it may be error not to call the attention of the jury to the credibility of a particular witness and matters bearing thereon.[66]

Where only a single witness is sought to be impeached, it is not improper to specifically refer to such witness in an instruction on the testimony of witnesses who have been successfully impeached.[67] In such a case a general instruction as to the right to believe or disbelieve the testimony of a witness who has been impeached is not improper, as bringing into prominence the evidence of the single witness against whom impeaching testimony has been presented.[68]

Where a rule of law relates solely to the credibility of a particular class of witnesses, as prosecuting witnesses, an instruction which, in declaring such rule of law, incidentally names the prosecuting witness, is not erroneous, as singling out his testimony for special treatment.[69]

547; People v. Wallin, 22 N. W. 15, 55 Mich. 497.

The fact that a witness testifies to matters to which he did not testify when sworn on a former trial of the case does not call for an instruction cautioning the jury as to his credibility, where he explains that he was not questioned regarding such matters on the previous trial. Reiser v. Portere, 63 N. W. 1041, 106 Mich. 102.

[65] Langowski v. Wisconsin Cent. R. Co., 141 N. W. 236, 153 Wis. 418; Bunce v. McMahon, 6 Wyo. 24, 42 P. 23. See Cunningham v. Springer, 82 P. 232, 13 N. M. 259, affirmed 27 S. Ct. 301, 204 U. S. 647, 51 L. Ed. 662.

[66] Kelly v. State, 72 So. 573, 15 Ala. App. 63; Harrison v. State, 68 So. 532, 12 Ala. App. 284; Branch v. State, 64 So. 507, 10 Ala. App. 94; Commonwealth v. House, 72 A. 804, 223 Pa. 487, reversing judgment 36 Pa. Super. Ct. 363; Fineburg v. Second & Third Streets Pass. Ry. Co., 37 A. 925, 182 Pa. 97.

Cases in which such an instruction held necessary. Where, in an action for injury to a woman while boarding a car, three witnesses whose credibility was unimpeached testified that the signal to start the car was not given by the conductor, but by an unauthorized passenger standing on the back platform, the passenger himself being one of the witnesses, and to the contrary there was only the testimony of the woman's husband, which was weakened on cross-examination, it was held that it was the the duty of the judge to call the jury's attention to the fact that the husband's statement was unsupported and to caution them against an arbitrary or capricious disregard of the weight of evidence for defendant. Cohen v. Philadelphia Rapid Transit Co., 77 A. 500, 228 Pa. 243. Where there are circumstances to show that the witnesses for the people are guilty of the crime charged, and that they conspired to testify falsely against defendant for the purpose of shielding themselves, the court should direct the attention of the jury thereto, and to the claim of the defendant arising therefrom. People v. Marks, 90 Mich. 555, 51 N. W. 638.

[67] Shaw v. State, 29 S. E. 477, 102 Ga. 660; Stevens v. People, 74 N. E. 786, 215 Ill. 593.

[68] State v. Feeley, 92 S. W. 663, 194 Mo. 300, 3 L. R. A. (N. S.) 351, 112 Am. St. Rep. 511.

[69] People v. Akey, 124 P. 718, 163 Cal. 54.

CHAPTER XII

INSTRUCTIONS ON PRESUMPTIONS AND INFERENCES

A. Presumptions and Inferences in Civil Cases

§ 185. Inferences in general.
186. Presumption of innocence.
187. Necessity of request for instructions.

B. Presumptions in Criminal Cases

1. *Presumption of Innocence*

188. Necessity of instructions.
189. Sufficiency of instructions on presumption of innocence.
190. Instructions as to duration of presumption of innocence.
191. Instructions as to nature and purpose of such presumption.

2. *Other Presumptions and Inferences Than That of Innocence*

192. Presumptions and inferences favorable to defendant.
193. Unfavorable presumptions.
194. Presumption that one intends the natural and proximate cconsequences of his acts.
195. Inferences from possession of stolen goods.
196. Inferences from flight of accused.

C. Failure to Produce, and Suppression or Fabrication of, Evidence

197. Rule in civil cases.
198. Rule in criminal cases.

D. Failure of Party in Civil Case to Testify

199. In general.

E. Failure of Accused to Testify

200. Propriety of instructions at common law.
201. Propriety and necessity of instructions under statutes.
202. Cautioning jury against considering failure to testify.

Instructions criticized as invading province of jury, see ante, §§ 58–62.

A. Presumptions and Inferences in Civil Cases

§ 185. Inferences in general

As has been shown in a preceding chapter,[1] the question of what inferences of fact shall be drawn from the evidence is entirely for the jury and the court cannot be required to instruct the jury to consider whether certain inferences may not be drawn from a particular state of facts they may find to exist.[2] However, the court may lay down general rules to guide the jury in their de-

[1] Ante, §§ 58–62.

[2] Farrell v. G. O. Miller Co., 178 N. W. 566.

liberations, and in a proper case instructions may be required that fraud is not to be presumed,[3] that no presumption of negligence arises from the mere fact of an accident,[4] that a defendant, charged with negligently injuring another, is presumed to have complied with relevant statutes,[5] as to presumptions arising from a failure to object to an account rendered,[6] or as to presumptions from the failure of a party to object to a proposed course of action for the purpose of determining the facts at issue.[7]

A delay in bringing action may be such or may be under such circumstances as to entitle defendant to an instruction that the jury may or should consider it in determining whether an alleged debt has been in some manner satisfied.[8] It is proper to tell the jury that they are the sole judges of the facts, and that it is for them to determine who is telling the truth and what inferences shall be drawn from the testimony. Such an instruction is not too indefinite and uncertain as placing no limit upon the jury in drawing inferences from the facts.[9] Where the circumstances of the case are such as to call for the application of the rule that a condition once shown to exist is presumed to continue until the contrary is shown, the court should ordinarily, in stating such rule, inform the jury that such presumption is one of fact, which may be rebutted by circumstantial as well as direct evidence.[10]

§ 186. Presumption of innocence

Where the issues in a civil suit involve a charge of wrongdoing or an accusation of crime against a party, the court should not ignore, in its instructions, the presumption of innocence, as by directing the jury to presume the continuance of a course of conduct in violation of law,[11] although the court is not required to instruct as to the presumption of innocence, if the jury are told that the presumption of law is against wrongdoing,[12] and it has been held that an instruction that the law presumes that the person so accused is innocent is erroneous, as directing the jury to look for more conclusive proof than in ordinary civil cases.[13] In

[3] Price v. Heath, 41 Hun (N. Y.) 585.

[4] Latremouille v. Bennington & R. Ry. Co., 22 A. 656, 63 Vt. 336.

[5] Thayer v. Glynn, 106 A. 834, 93 Vt. 257.

[6] Johnson v. McCampbell, 11 Heisk. (Tenn.) 27.

[7] Schlesinger v. Springfield Fire & Marine Ins. Co., 58 N. Y. Super. Ct. 112, 9 N. Y. Supp. 727.

[8] Habenthal v. Gibbons, 150 N. W. 1067, 168 Iowa, 630.

[9] People v. Williams, 175 N. W. 187, 208 Mich. 586.

[10] Atchison, T. & S. F. Ry. Co. v. Lloyd, 75 P. 478, 68 Kan. 369.

[11] Rathbun v. White, 107 P. 309, 157 Cal. 248.

[12] Hale v. Matthews, 118 Ind. 527, 21 N. E. 43.

[13] State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison, 187 S. W. 23, 268 Mo. 239, quashing record (App.) Rice v. Detroit Fire & Marine Ins. Co. of Detroit, Mich., 176 S. W. 1113.

such a case, in the absence of a request for an instruction on the presumption of innocence, it will usually not be error to fail to give it.[14]

§ 187. Necessity of request for instructions

In a civil case the general rule is that the court need not instruct as to a presumption of fact or legal inference unless specially requested so to do.[15] Thus the failure to explain the doctrine of res ipsa loquitur cannot be complained of, in the absence of a request embodying the instruction desired.[16]

B. Presumptions in Criminal Cases

1. Presumption of Innocence

§ 188. Necessity of instructions

As a general rule the defendant in a criminal prosecution is entitled to have the jury instructed that he is presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt,[17] and in some jurisdictions the duty so.

[14] Treschman v. Treschman, 61 N. E. 961, 28 Ind. App. 206.

[15] **Ga.** Charleston & W. C. R. Co. v. Brown, 79 S. E. 932, 13 Ga. App. 744; Brooks v. Griffin, 73 S. E. 752, 10 Ga. App. 497; Randall v. State, 60 S. E. 328, 3 Ga. App. 653.

Ind. Cleveland, C., C. & St. L. Ry. Co. v. Lynn, 98 N. E. 67, 177 Ind. 311, modifying judgment on rehearing 95 N. E. 577.

Iowa. Pfarr v. Standard Oil Co., 157 N. W. 132, 176 Iowa, 577.

Tex. Dupree v. Alexander, 68 S. W. 739, 29 Tex. Civ. App. 81.

[16] Isley v. Virginia Bridge & Iron Co., 53 S. E. 841, 141 N. C. 220; Lyles v. Brannon Carbonating Co., 52 S. E. 233, 140 N. C. 25.

[17] **Ala.** Amos v. State, 26 So. 524, 123 Ala. 50; Harris v. State, 26 So. 515, 123 Ala. 69; Rogers v. State, 23 So. 82, 117 Ala. 192; Bryant v. State, 23 So. 40, 116 Ala. 445.

D. C. Fields v. United States, 27 App. D. C. 433, certiorari denied and writ of error dismissed 27 S. Ct. 543, 205 U. S. 292, 51 L. Ed. 807.

Fla. Long v. State, 28 So. 775, 42 Fla. 509.

Ga. Finch v. State, 100 S. E. 793, 24 Ga. App. 339; Innes v. State, 93 S. E. 229, 20 Ga. App. 719.

Ill. People v. Israel, 109 N. E. 969, 269 Ill. 284.

Ind. Line v. State, 51 Ind. 172; Fisher v. State, 28 N. E. 565, 2 Ind. App. 365.

Mich. People v. Yund, 128 N. W. 742, 163 Mich. 504; People v. De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863.

Minn. State v. Sailor, 153 N. W. 271, 130 Minn. 84.

Mo. State v. Hardelein, 70 S. W. 130, 169 Mo. 579.

N. Y. People v. Van Houter, 38 Hun, 168.

Okl. Jenkins v. State, 145 P. 500, 11 Okl. Cr. 168.

Tex. Dugan v. State, 216 S. W. 161, 86 Tex. Cr. R. 130; Pierce v. State (Cr. App.) 22 S. W. 587; Mace v. State, 6 Tex. App. 470; Stapp v. State, 1 Tex. App. 734.

Wash. State v. Mayo, 85 P. 251, 42 Wash. 540, 7 Ann. Cas. 881.

Wis. Fosdahl v. State, 89 Wis. 482, 62 N. W. 185.

Instructions held improperly refused. A defendant is entitled to a charge that his innocence must be

to instruct rests upon the court in cases of misdemeanor, where intent is not an element of the crime, as well as in all other cases,[18] and the refusal to give such an instruction will ordinarily constitute reversible error.[19]

In some jurisdictions the refusal of such an instruction constitutes error, although the court has instructed that the jury cannot convict if they have a reasonable doubt of the guilt of the defendant.[20] In other jurisdictions, however, an omission to charge on the presumption of innocence is not reversible error, where the jury is fully instructed on the law of reasonable doubt.[21]

presumed until the case proved against him is, in all its material circumstances, beyond any reasonable doubt; that to find him guilty, as charged, the evidence must be so strong and cogent as to show defendant's guilt to a moral certainty. Salm v. State, 89 Ala. 56, 8 So. 66. It is error to refuse to instruct the jury that "the law presumes the defendant to be innocent of the commission of any crime, and this presumption continues in his favor throughout the trial of the cause, step by step, and you cannot find the accused guilty of the crimes covered by the indictment until the evidence in the cause satisfies you, beyond a reasonable doubt, of his guilt; and, so long as you or any one of you have a reasonable doubt as to the existence of any one of the elements necessary to constitute the several crimes above defined, the accused cannot be convicted of such crime." Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33, following Castle v. Same, 75 Ind. 146. On a trial for homicide, the refusal to charge that the jury must start out in the trial with the presumption that accused is innocent, which presumption must be overcome by evidence so convincing that the jury can say beyond any reasonable doubt that accused is guilty, was erroneous. People v. Stewart, 42 N. W. 662, 75 Mich. 21.

Inferences from finding indictment. An instruction that the mere fact of an indictment found is no evidence of defendant's guilt, and that the presumption of innocence continues with the defendant until the jury are convinced beyond a reasonable doubt of his guilt, was improperly refused where no similar instruction was given. People v. Krittenbrink, 109 N. E. 1005, 269 Ill. 244. The court, on the request of accused, must charge that the finding of the indictment did not create a presumption of guilt, where the district attorney stated that the grand jury had heard the evidence and had found the indictment. State v. Atkins, 67 So. 926, 136 La. 844.

Conflicting presumptions. There cannot be two presumptions in a criminal case; and so it is not erroneous to refuse an instruction that the presumption of innocence will prevail over the presumption of a criminal purpose. State v. Blaine, 124 P. 516, 45 Mont. 482.

[18] People v. Potter, 89 Mich. 353, 50 N. W. 994.

[19] Fowler v. State, 45 So. 913, 155 Ala. 21; Reeves v. State, 29 Fla. 527, 10 So. 901; Gardner v. State, 87 S. E. 150, 17 Ga. App. 410; Gentry v. State, 66 So. 982, 108 Miss. 505; Hampton v. State, 1 Tex. App. 652.

[20] Gentry v. State, 66 So. 982, 108 Miss. 505; Franklin v. State, 92 Wis. 269, 66 N. W. 107.

Effect of defining reasonable doubt. It is error to refuse to charge that accused is presumed innocent until proven guilty beyond a reasonable doubt, though the court gave an instruction defining a reasonable doubt. State v. Harrison, 57 P. 647, 23 Mont. 79.

[21] State v. Douglas, 167 S. W. 552, 258 Mo. 281; State v. Dudley, 149 S. W. 449, 245 Mo. 177; State v. Maupin, 93 S. W. 379, 196 Mo. 164.

In some jurisdictions this is the rule, if the attention of the court is not called to such omission,[22] and where the court has charged that the law presumes the defendant to be innocent, and that the burden is on the state to prove his guilt, it will ordinarily not be error to refuse additional instructions still further elucidating and emphasizing the rule of such presumption.[23]

The court need not charge on the presumption of innocence, where the only question is whether the defense of insanity has been established by satisfactory proof.[24] In some jurisdictions the rule is stated to be that the mere omission to charge on the presumption of innocence is not error, in the absence of a request so to charge.[25] In other jurisdictions a request is not necessary to make it the duty of the court to charge that the defendant enters upon his trial with the presumption of innocence in his favor, and that such presumption remains with him throughout the trial, until his guilt is established by proof.[26]

§ 189. Sufficiency of instructions on presumption of innocence

Instructions which tend to disparage the presumption of innocence are erroneous,[27] and instructions which in effect require the jury, before acquitting, to believe that the defendant is innocent,

[22] Sylvia v. U. S. (C. C. A. Tenn.) 264 F. 593; State v. Smith, 65 Conn. 283, 31 A. 206; People v. Ostrander, 110 Mich. 60, 67 N. W. 1079, following Same v. Smith, 92 Mich. 10, 52 N. W. 67, and Same v. Graney, 91 Mich. 646, 52 N. W. 66; Commonwealth v. Russogulo, 106 A. 180, 263 Pa. 93.

See People v. Parsons, 105 Mich. 177, 63 N. W. 69. Compare People v. Macard, 73 Mich. 15, 40 N. W. 784.

[23] State v. Linhoff, 97 N. W. 77, 121 Iowa, 632; State v. Edie, 147 Mo. 535, 49 S. W. 563.

Refusal to charge that such presumption is not a mere form. Where the court charged the jury in a criminal case that "every person is presumed by the law to be innocent, and the burden is on the government to prove beyond a reasonable doubt that the defendants are guilty as charged in the indictment," it was not error to refuse to charge further that "such presumption of innocence is not a mere form which the jury may disregard at its pleasure, but a substantial part of the law of the land and binding upon the jury in this case." Garst v. United States (C. C. A. Va.) 180 F. 339, 103 C. C. A. 469.

[24] Commonwealth v. Wheeler, 92 A. 718, 246 Pa. 528.

[25] Hutto v. State, 7 Tex. App. 44; Frye v. Same, 7 Tex. App. 94.

[26] Finch v. State, 100 S. E. 793, 24 Ga. App. 339.

[27] People v. Gerold, 107 N. E. 165, 265 Ill. 448, Ann. Cas. 1916A, 636.

Instructions not improper within rule. An instruction which, after stating the rule as to presumption of innocence, adds that in doubtful cases this presumption is sufficient to turn the scale in favor of the defendant, and that, unless the jury find accused guilty beyond a reasonable doubt, he is entitled to an acquittal. State v. Knapp, 71 N. E. 705, 70 Ohio St. 380, 1 Ann. Cas. 819, reversing judgment 25 Ohio Cir. Ct. R. 571. A part of an instruction on the burden of proof and presumption of innocence, to the effect that, if accused "is the man who is to blame you must say so, if he is not to blame you must say so." State v. Aurand, 136 P. 1139, 76 Wash. 529.

are erroneous, as depriving him of the benefit of such presumption,[28] as is an instruction that, if the jury are unable to reconcile all the evidence with the theory of the innocence of the defendant, they should find him guilty;[29] but an instruction that such presumption is a piece of evidence to be taken into consideration and given such weight as the jury think it ought to have is not objectionable as allowing the jury to disregard the presumption.[30] Where there is a statute enunciating the rule of the presumption of the innocence of one accused of crime, an instruction on such presumption which follows the language of the statute will ordinarily be sufficient.[31]

It is proper to instruct that the defendant is presumed to be innocent until his guilt is proven by competent evidence beyond a reasonable doubt, and that if the jury have a reasonable doubt of his guilt they will acquit him.[32] Such an instruction is not

[28] Vaughn v. State, 130 P. 1100, 9 Okl. Cr. 121; Hedden v. State, 103 P. 737, 2 Okl. Cr. 588.

[29] Territory v. Baca, 71 P. 460, 11 N. M. 559.

[30] State v. Rossi, 102 A. 1030, 92 Vt. 187.

[31] People v. Lumsden, 125 N. Y. S. 1079, 141 App. Div. 158, judgment reversed 94 N. E. 859, 201 N. Y. 264.

[32] **Okl.** Berry v. State, 111 P. 676, 4 Okl. Cr. 202, 31 L. R. A. (N. S.) 849.

Tex. McDowell v. State, 155 S. W. 521, 69 Tex. Cr. R. 545; Flournoy v. State, 122 S. W. 26, 57 Tex. Cr. R. 88; Adams v. State, 84 S. W. 231, 47 Tex. Cr. R. 347; Gaines v. State (Cr. App.) 20 S. W. 397; Johnson v. State (Cr. App.) 20 S. W. 368.

Failure to include element of competency of evidence. A charge that "defendant is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt" is not erroneous because the word "legal," as used in the statute, is omitted before the word "evidence." Williams v. State, 35 Tex. Cr. R. 606, 34 S. W. 943. Giving an instruction that every person is presumed innocent until his guilt has been established beyond a reasonable doubt was not error because of failure to state that the guilt must be proven by competent evidence, where all the evidence admitted was competent, and in other instructions the jury had been fully instructed as to the essentials of the crime charged, and that they must be proven beyond a reasonable doubt. Dalzell v. State, 53 P. 297, 7 Wyo. 450.

Use of "shown" in place of "proved." Use of the word "shown" in place of the word "proved" in a charge that accused is presumed to be innocent until his guilt is "shown" by evidence beyond reasonable doubt, does not render the instruction erroneous. State v. Cox, 175 S. W. 50, 264 Mo. 408.

Use of word "unless" instead of "until." An instruction that "everyone accused of crime is by law presumed to be innocent unless the contrary" is proved by the evidence beyond a reasonable doubt was not erroneous for using the word "unless" instead of "until." People v. Warfield, 103 N. E. 979, 261 Ill. 293, reversing judgment 172 Ill. App. 1.

Other illustrations of proper or sufficient instructions on presumption of innocence. A statement that all the presumptions of the law, independent of the evidence, are in favor of innocence, and that every person is presumed to be innocent until he is proven guilty. Everett v. People, 75 N. E. 188, 216 Ill. 478. A charge that the law raises no presumption against the prisoner, but every presumption is in favor of his innocence; and, in order to convict, every material fact necessary to con-

objectionable as depriving the defendant of the right to have the jury know that he is in fact as well as in law presumed to be in-

stitute the crime must be proved beyond a reasonable doubt, and that, if they entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it was their duty to acquit. Burgess v. Territory, 19 P. 558, 8 Mont. 57, 1 L. R. A. 808. A charge that it was not for defendant to prove his innocence, that the prosecution must satisfy the jury beyond a reasonable doubt of defendant's guilt, and that defendant must be acquitted unless his guilt was strictly and impartially proven. People v. Graney, 91 Mich. 646, 52 N. W. 66, distinguishing People v. Potter, 89 Mich. 353, 50 N. W. 994, People v. Macard, 73 Mich. 15, 40 N. W. 784, and People v. Murray, 72 Mich. 10, 40 N. W. 29. An instruction that defendant was presumed to be innocent, and the burden was on the state to remove the legal presumption of innocence by proving the guilt of accused beyond a reasonable doubt, was sufficiently comprehensive. McBeth v. State, 50 S. E. 931, 122 Ga. 737. Instruction that accused is presumed to be innocent and entitled to an acquittal in case of a reasonable doubt. State v. Anthony, 124 P. 475, 62 Or. 141. An instruction that every person charged with crime is presumed to be innocent until proven guilty by competent evidence, and that reasonable certainty is all that can be obtained. Thigpen v. State, 76 S. E. 596, 11 Ga. App. 846. Charges that defendant enters into the trial with a presumption of innocence, which is a fact to be considered as evidence, and should not be disregarded, and that the burden is on the state to convince the jury of defendant's guilt to the exclusion of every reasonable doubt and by evidence that overcomes the presumption of innocence. Neilson v. State, 40 So. 221, 146 Ala. 683. A charge that a criminal prosecution begins with the presumption that the defendant, although accused, is innocent, and that to overcome this legal presumption the evidence must be clear and convincing, and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty. Holt v. United States, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment United States v. Holt (C. C. Wash.) 168 F. 141. An instruction that on a plea of not guilty a presumption of innocence arises, that such presumption "goes with you in your retirement," and that the jury must "examine the evidence by the light of that presumption." People v. Winthrop, 50 P. 390, 118 Cal. 85. Charges that "the law presumes every man innocent of the crime charged, * * * and this presumption abides with him throughout the entire trial, and should be borne in mind at each successive step in your deliberations as to your verdict," and that the burden of proof rests on the prosecution to prove the guilt of the accused "beyond a reasonable doubt." People v. Willett, 105 Mich. 110, 62 N. W. 1115. A charge that "the jury start with the presumption that the defendants are not guilty until the evidence satisfies you differently, but, when the evidence * * * satisfies you beyond any reasonable doubt, the evidence introduced by the government and the evidence of the defendants, when you are satisfied on that evidence that the defendants are guilty, then you should say so; otherwise, you say the case is not proved, and return a verdict of not guilty." Commonwealth v. Clancy, 187 Mass. 191, 72 N. E. 842. Instruction that defendant is presumed to be innocent and the burden is on the state to establish his guilt, not with mathematical precision, but to a moral and reasonable certainty and beyond a reasonable doubt. Ponder v. State, 90 S. E. 365, 18 Ga. App. 703.

Illustrations of instructions held insufficient. An instruction that accused goes to trial with "the presumption of law" in his favor. Thurman v. State, 81 S. E. 796, 14 Ga. App. 543. An instruction that, for the purpose of the trial and before any evidence is heard, a presumption

nocent until his guilt is so established,[33] or as failing to charge that the burden of proving guilt is on the state.[34] But it is error to merely charge that the defendant is presumed to be innocent until his guilt is established by legal evidence.[35]

§ 190. Instructions as to duration of presumption of innocence

It is proper to instruct in a criminal case in nearly all jurisdictions that the presumption of the innocence of the defendant attends him to the end of the trial, or until a verdict is reached, and will prevail, unless it is overcome by evidence which convinces the jury beyond a reasonable doubt of his guilt,[36] and such an instruction should be given on request.[37] Accordingly it is

of the innocence of the accused arises, and that, independent of evidence, accused is presumed to be innocent, which presumption attends him throughout the trial. People v. Maughs, 86 P. 187, 149 Cal. 253. An instruction that it is the duty of the jury to presume that accused is not guilty and give him the benefit of the presumption throughout the trial "until evidence shall have been introduced which * * * is sufficient to establish the guilt of defendant beyond all reasonable doubt, and if such evidence be not introduced, then defendant should have the benefit of such presumption throughout all stages of the trial" is erroneous as authorizing the jury, if they deem the evidence establishes guilt beyond a reasonable doubt, to consider the evidence offered by defendant without any regard to the presumption of innocence. Flynn v. People, 78 N. E. 617, 222 Ill. 303.

[33] Hughes v. State, 67 S. W. 104, 43 Tex. Cr. R. 511.

[34] Pritchett v. State, 90 S. E. 492, 18 Ga. App. 737; Huggins v. State, 60 S. W. 52, 42 Tex. Cr. R. 364; Slade v. State, 29 Tex. App. 381, 16 S. W. 253; Zwicker v. State, 27 Tex. App. 539, 11 S. W. 633.

[35] Mitchell v. State, 101 P. 1100, 2 Okl. Cr. 442.

[36] Paxton v. State, 157 S. W. 396, 108 Ark. 316; Hodge v. State, 43 S. E. 255, 116 Ga. 852; Richardson v. State, 68 S. E. 518, 8 Ga. App. 26; State v. Krug, 12 Wash. 288, 41 P. 126; Emery v. State, 78 N. W. 145, 101 Wis. 627.

Instructions held not objectionable as argumentative. A charge that the defendant entered the trial with the presumption of innocence in his favor, and that it remained with defendant throughout the trial and until the state overcame the same and established his guilt beyond a reasonable doubt, the burden of proof being on the state to establish each of the material allegations of the indictment to a reasonable certainty, is not argumentative. Clay v. State, 60 S. E. 1028, 4 Ga. App. 142.

[37] Townsend v. State, 82 S. E. 253, 14 Ga. App. 757; Reddick v. State, 74 S. E. 901, 11 Ga. App. 150; Farley v. State, 127 Ind. 419, 26 N. E. 898.

Instructions held objectionable within rule. An instruction that accused was presumed to be innocent, "and that presumption remained until such time as the minds of the jury are convinced from the evidence that he is guilty. You are to just start out, and just say, without regard to the indictment: 'Now, we have got to start out on the proposition that this man is innocent. Now, has the state proved his guilt, and proved it beyond a reasonable doubt?'"—was erroneous, as permitting the jury to discard the presumption before they had agreed upon a verdict. People v. Ambach, 93 N. E. 310, 247 Ill. 451. An instruction that, if the jury find that accused did not sell or assist in the sale of certain liquor, to acquit was erroneous as substantially instructing against the presumption of innocence until guilt has been established beyond a reasonable doubt. Remillard v. State, 137 P. 370, 10 Okl. Cr. 438, reversing judgment on rehearing 133 P. 1132, 10 Okl. Cr. 438.

Instructions held not improper

error to instruct, as in violation of the above rule, that all presumptions yield to the facts, and that the jury are not to presume anything where they have facts on which to act,[38] or to instruct that the presumption of innocence continues until such time in the progress of the cause as the jury may be satisfied beyond a reasonable doubt,[39] or to instruct that the presumption of innocence should cease to influence the minds of the jury the moment they are reasonably convinced that the evidence is sufficient to overcome such presumption,[40] or to instruct that the presumption of innocence goes with the defendant through the case until it is submitted to the jury.[41] On the other hand, an instruction that the presumption of innocence remains with the defendant throughout the trial is not objectionable, on the ground that it does not expressly continue such presumption until the verdict is rendered,[42] and where instructions as to reasonable doubt and the presumption of innocence are given, and there has been no effort to shift the burden of proof, it is proper to refuse a charge that such presumption remains through the entire case.[43]

In one jurisdiction it is held to be error to instruct that the presumption of the innocence of the defendant goes with him throughout the trial,[44] the theory in this jurisdiction being that such presumption terminates on the introduction of evidence which convinces the jury beyond a reasonable doubt of the guilt of the defendant.[45]

within rule. The court's instructing that the accused was presumed to be innocent, and was not required to prove himself innocent, until a prosecution had proven his guilt beyond a reasonable doubt, does not deprive accused of the presumption of innocence at some time in the trial, where it was further stated that the presumption abided with accused throughout the trial of the case, until the evidence convinced the jury to the contrary beyond all reasonable doubt. People v. Arlington, 63 P. 347, 131 Cal. 231. An instruction in a murder trial that throughout the trial accused was presumed to be innocent, and that the presumption should prevail unless overcome by evidence of guilt beyond a reasonable doubt, was not objectionable as implying that one witness' testimony early in the trial might overcome the presumption. Rigsby v. State, 91 N. E. 925, 174 Ind. 284. An instruction that there can be no presumption to begin with against accused; that he comes clothed with the presumption of innocence—is not objectionable as implying that the presumption might be changed during the trial, before the jury are satisfied beyond a reasonable doubt of accused's guilt. State v. Cline, 132 N. W. 160, 27 S. D. 573.

[38] Howell v. State, 53 So. 954, 98 Miss. 439.

[39] Bush v. State, 168 P. 508, 19 Ariz. 195.

[40] Horn v. Territory, 56 P. 846, 8 Okl. 52.

[41] People v. McNamara, 94 Cal. 509, 29 P. 953.

[42] People v. James, 90 P. 561, 5 Cal. App. 427.

[43] Brown v. State, 53 S. W. 866, 41 Tex. Cr. R. 232.

[44] Strickland v. State, 44 So. 90, 151 Ala. 31; Beiser v. State, 65 So. 312, 10 Ala. App. 86.

[45] Williams v. Same, 40 So. 405, 144 Ala. 14; Bell v. State, 37 So. 281, 140 Ala. 57.

§ 191. Instructions as to nature and purpose of such presumption

In some jurisdictions the accused is entitled to an instruction that the legal presumption of his innocence is in the nature of evidence, or of an instrument of proof to be weighed with other evidence in determining the question of his guilt.[46] In California such an instruction is not necessary,[47] and in other jurisdictions it is not error, or at least not prejudicial error, to refuse to give it, where the court has fully instructed on the presumption of innocence in accordance with the rule set forth in the preceding section.[48]

It is not improper for the court to instruct that the rule as to the presumption of the innocence of the defendant in a criminal case is not intended to aid any one in fact guilty of a crime to escape his just punishment, but is a humane provision of the law to guard against the danger of punishing an innocent person.[49] An instruction, however, which merely says that such presumption is not intended to aid the escape of one who is in fact guilty, is erroneous, as tending to disparage the presumption of innocence.[50]

[46] Diamond v. State, 72 So. 558, 15 Ala. App. 33, certiorari denied Ex parte State, 73 So. 1002, 198 Ala. 694; Chaney v. State, 59 So. 604, 178 Ala. 44; Hayes v. State, 88 S. E. 752, 18 Ga. App. 68; Long v. State, 23 Neb. 33, 36 N. W. 310; State v. Marston, 72 A. 1075, 82 Vt. 250.

Instructions sufficient within rule. An instruction as to the presumption of innocence was not objectionable because it was charged that the presumption partakes "of the nature of evidence," instead of that the presumption is evidence. Holmes v. State, 118 N. W. 99, 82 Nev. 406. An instruction that the law presumes, and the jury must presume, defendant to be innocent until he is proved guilty beyond a reasonable doubt by competent evidence, sufficiently indicates that the presumption of innocence is equivalent to so much evidence in behalf of defendant, at least, where no request for a more specific instruction was made. State v. Wolfley, 98 P. 337, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412, denying rehearing 89 P. 1046.

[47] People v. Moran, 77 P. 777, 144 Cal. 48.

[48] Summerlin v. State (Ga. App.) 103 S. E. 832; State v. Hudspeth, 60 S. W. 136, 159 Mo. 178; McVey v. State, 77 N. W. 1111, 57 Neb. 471; Bartley v. State, 73 N. W. 744, 53 Neb. 310.

[49] People v. Searbak, 92 N. E. 286, 245 Ill. 435; Turner v. State, 1 N. E. 869, 102 Ind. 425; State v. Medley, 54 Kan. 627, 39 P. 227; State v. Keith, 53 Mo. App. 383.

[50] People v. Gerold, 107 N. E. 165, 265 Ill. 448, Ann. Cas. 1916A, 636; State v. Romeo, 128 P. 530, 42 Utah, 46.

2. *Presumptions and Inferences Other Than Those of Innocence*

Presumptions and burden of proof as to defense of insanity, see post, §§ 328, 329.

§ 192. Presumptions and inferences favorable to defendant

Where applicable, presumptions of law which are favorable to the accused should be given to the jury.[51] Thus, in a prosecution of one for a criminal offense against his wife, the defendant is entitled to a charge that he is to be accorded, not only the ordinary presumption of innocence, but the added and equally favorable presumption which arises from the matrimonial relation.[52] It has been held, however, that the presumption arising from the failure of the defendant to flee, being a commonplace matter, need not be given to the jury,[53] and, although the court may be authorized to comment on the evidence, the defendant is not entitled to have the court call the attention of the jury particularly to certain portions of the testimony and suggest to them certain inferences of fact to be drawn therefrom.[54]

§ 193. Unfavorable presumptions

Presumptions of law that are against the accused should not ordinarily be given in the charge,[55] and it is error to refuse to instruct that no inference can arise against the accused from the silence of a witness,[56] or from the fact that the defendant refused to allow his house to be searched without a warrant.[57] Since, however, as to collateral facts affecting the main question of guilt, the presumption of law is often against the accused,[58] it is proper to refuse to instruct that nothing is to be presumed or taken by implication against him.[59]

[51] Snowberger v. State, 126 S. W. 878, 58 Tex. Cr. R. 530; Coker v. State, 128 S. W. 137, 59 Tex. Cr. R. 241.

[52] State v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

[53] Cobb v. State, 22 So. 506, 115 Ala. 18; People v. Herrera, 163 P. 879, 32 Cal. App. 610; Thomas v. State, 36 So. 161, 47 Fla. 99.

[54] State v. Quigley, 58 A. 905, 26 R. I. 263, 67 L. R. A. 322, 3 Ann. Cas. 920.

[55] Snowberger v. State, 126 S. W. 878, 58 Tex. Cr. R. 530.

Presumption arising from sudden death. In the prosecution of a husband for killing his wife, based wholly on circumstantial evidence, it is error to refuse an instruction that the mere fact that deceased died suddenly is not proof that her death was the result of a criminal act; but the state must prove such to be the fact, and without such proof it must be presumed that she died from natural causes. State v. Moxley, 102 Mo. 374, 14 S. W. 969; Id., 102 Mo. 374, 15 S. W. 556.

[56] People v. Hall, 12 N. W. 665, 48 Mich. 482, 42 Am. Rep. 477.

[57] Murdock v. State, 68 Ala. 567.

[58] Thalheim v. State, 20 So. 938, 38 Fla. 169.

[59] Gass v. State, 32 So. 109, 44 Fla. 70.

An instruction that the fact of the indictment,[60] or of the presence of the accused in the courtroom,[61] furnishes no evidence of his guilt, while proper, is not necessary, at least in the absence of a request therefor.[62]

§ 194. Presumption that one intends the natural and proximate consequences of his acts

It is proper to instruct in some jurisdictions in a criminal case that one is presumed to have intended the natural, probable, and usual consequences of his acts,[63] if the instruction is so framed as to indicate that such presumption is not conclusive,[64] and in one jurisdiction it is proper to instruct, under a statute, that a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another.[65] In other jurisdictions, however, an instruction that every sane man is presumed to intend the natural and probable consequences of his acts is considered erroneous.[66]

§ 195. Inferences from possession of stolen goods

Invading province of jury, see ante, § 61.

In a proper case the court may,[67] and should,[68] charge on the effect of the possession of property recently stolen as evidence of the crime of larceny or burglary. The court may be required to instruct in relation to the explanation given by defendant of his possession of stolen property, if such explanation is a reasonable one,[69] and one found in possession of stolen goods and ac-

[60] Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; State v. Baker, 136 Mo. 74, 37 S. W. 810; Same v. Donnelly, 130 Mo. 642, 32 S. W. 1124; Same v. Pratt, 121 Mo. 566, 26 S. W. 556; Same v. Brown, 115 Mo. 409, 22 S. W. 367; Crane v. State, 123 S. W. 422, 57 Tex. Cr. R. 476.

Contra—State v. Hollingsworth, 56 S. W. 1087, 156 Mo. 178.

[61] State v. Shaw, 94 A. 434, 89 Vt. 121, L. R. A. 1915F, 1087.

[62] Brooks v. State, 90 S. E. 989, 19 Ga. App. 3.

[63] People v. Webster, 109 P. 637, 13 Cal. App. 348; Krchnavy v. State, 43 Neb. 337, 61 N. W. 628; People v. Meadows, 92 N. E. 128, 199 N. Y. 1, affirming judgment 121 N. Y. S. 17, 136 App. Div. 226.

[64] State v. Taylor, 50 S. E. 247, 57 W. Va. 228; Weisenbach v. State, 119 N. W. 843, 138 Wis. 152.

[65] People v. McGlade, 72 P. 600, 139 Cal. 66; People v. Botkin, 98 P. 861, 9 Cal. App. 244.

[66] Coulter v. State, 161 S. W. 186, 110 Ark. 209; Rogers v. Commonwealth, 96 Ky. 24, 27 S. W. 813; State v. Schaefer, 88 P. 792, 35 Mont. 217; Thomas v. State, 125 S. W. 35, 57 Tex. Cr. R. 452.

[67] State v. Ryan, 85 N. W. 812, 113 Iowa, 536; Williams v. State (Tex. Cr. App.) 33 S. W. 371.

[68] State v. Randolph, 166 P. 555, 85 Or. 172; Coleman v. State, 199 S. W. 473, 82 Tex. Cr. R. 332; Robertson v. State, 26 S. W. 508, 33 Tex. Cr. R. 366; Coward v. State, 24 Tex. App. 590, 7 S. W. 332.

[69] Wilson v. State, 129 S. W. 836, 59 Tex. Cr. R. 623; Gather v. State (Tex. Cr. App.) 81 S. W. 717; Carter v. State (Tex.) 12 S. W. 740.

See Brooks v. State, 47 S. W. 640, 39 Tex. Cr. R. 622; Wright v. State, 35 Tex. Cr. R. 470, 34 S. W. 273;

cused of their larceny or of the burglary of the premises from which the goods were stolen is entitled to have his theory of how he came into the possession of the goods submitted to the jury, however improbable his evidence in support of such theory may seem to the trial court.[70]

Instructions with respect to the effect of the possession of stolen property as evidence of guilt,[71] or as to the effect of an explanation of such possession, must be predicated upon the evidence.[72] Such a charge is not necessary, where defendant denies that he had possession of the stolen goods,[73] nor where the defendant does not attempt to account for his possession of the stolen property,[74] and it has been held that a charge on recent possession of stolen goods,[75] or a charge on the explanation by defendant of his possession,[76] is only required when such explanation is offered at the time his title or possession is first called in question. A charge as to effect of possession is not erroneous for failure to qualify possession by "unexplained," when defendant makes no attempt to explain his possession.[77] In some jurisdictions the court need not grant a special request to instruct on the effect of the possession of property recently stolen, if it has given a full charge on circumstantial evidence.[78]

The presumption of guilt arising from the possession of recently stolen property being one of fact the court should carefully instruct the jury as to its nature and proper scope, and how they may consider it as evidence in view of the facts of the case.[79] The proper instruction in most jurisdictions is that the possession of recently stolen property, if unexplained, is a circumstance

Conners v. State, 31 Tex. Cr. R. 453, 20 S. W. 981; Navarrow v. State (Tex. App.) 17 S. W. 545; Miller v. State, 18 Tex. App. 34.

[70] Bond v. State, 23 Tex. App. 180, 4 S. W. 580; Heath v. State, 7 Tex. App. 464.

[71] People v. Abbott, 34 P. 500, 4 Cal. Unrep. 276; Brantley v. State, 41 S. E. 695, 115 Ga. 229; State v. Williams, 94 N. W. 255, 120 Iowa, 36; State v. James, 92 S. W. 679, 194 Mo. 268. 5 Ann. Cas. 1007; Wilson v. State (Tex. Cr. App.) 34 S. W. 284.

[72] State v. McClain, 106 N. W. 376, 130 Iowa, 73; Kinkead v. State, 135 S. W. 573, 61 Tex. Cr. R. 651; Diseren v. State, 127 S. W. 1038, 59 Tex. Cr. R. 149; Jackson v. State, 28 Tex. App. 143, 12 S. W. 701.

[73] People v. Carey, 84 N. W. 1087, 125 Mich. 535; Richardson v. State (Tex. Cr. App.) 42 S. W. 996.

[74] McGee v. State, 155 S. W. 246, 69 Tex. Cr. R. 580; Dixon v. State, 136 S. W. 462, 62 Tex. Cr. R. 53; Holland v. State, 134 S. W. 693, 61 Tex. Cr. R. 201; Ellison v. State (Tex. Cr. App.) 72 S. W. 188; Baldwin v. State, 31 Tex. Cr. R. 589, 21 S. W. 679.

[75] Gilford v. State, 87 S. W. 698, 48 Tex. Cr. R. 312.

[76] Jones v. State, 132 S. W. 476, 60 Tex. Cr. R. 426; Smotherman v. State, 83 S. W. 838, 47 Tex. Cr. R. 309.

[77] State v. Guffey, 163 N. W. 679, 39 S. D. 84.

[78] Bonners v. State (Tex. Cr. App.) 35 S. W. 650.

[79] State v. Harrington, 96 S. E. 892, 176 N. C. 716; Boyd v. State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908.

to be considered by the jury the same as any other fact, and given such weight as they may deem it entitled to in connection with all the other evidence.[80] An instruction that the unexplained possession of recently stolen property is a circumstance to be considered by the jury in arriving at their verdict, as tending to show the larceny of the property by defendant, is erroneous in some jurisdictions.[81] On the other hand, an instruction so framed as to be likely to mislead the jury into the belief that they cannot draw the presumption of guilt as a matter of fact from the unexplained possession of recently stolen goods is properly refused.[82] In some jurisdictions it is proper to instruct that such possession is a circumstance tending to show guilt, but not of itself sufficient to warrant conviction,[83] and in other jurisdictions an instruction that the unexplained possession of recently stolen goods raises a presumption of fact that the possessor is guilty of the theft is not erroneous.[84] Such an instruction would seem to invade the province of the jury, but, as explained elsewhere,[85] while the presumption in question is denominated one of fact, it is, in jurisdictions which permit such an instruction, regarded as of such an inevitable nature that the law attaches to it definite evidential consequences. In one jurisdiction, where this view is entertained,[86] it is held that either of the terms, "presumption of law" or "presumption of fact" may be used to express the same thought, for they are identical in meaning.

Where the chief inculpatory fact relied on by the state in a prosecution for larceny is the possession by defendant of the stolen property soon after the theft, the court should charge, on request, that such possession is not of itself sufficient to warrant a conviction;[87] but it is proper to refuse an instruction that mere possession of stolen property by accused is not prima facie evidence of his guilt, if there is proof of other facts tending to show his guilt.[88]

[80] State v. White, 92 P. 829, 76 Kan. 654, 14 L. R. A. (N. S.) 556; Territory v. Caldwell, 98 P. 167, 14 N. W. 535; State v. Vierck, 120 N. W. 1098, 23 S. D. 166, 139 Am. St. Rep. 1040; State v. Peach, 40 A. 732, 70 Vt. 283.

[81] Johnson v. State, 96 S. W. 45, 50 Tex. Cr. R. 116; Robinson v. State, 106 P. 24, 18 Wyo. 216.

[82] Bellamy v. State, 17 So. 560, 35 Fla. 242.

[83] People v. Gibson, 116 P. 987, 16 Cal. App. 347.

[84] Holliday v. State, 98 S. E. 386, 23 Ga. App. 400; Latty v. State, 91 S. E. 942, 19 Ga. App. 621; Temples v. State, 89 S. E. 600, 18 Ga. App. 510; Murray v. State (Miss.) 36 So. 541; State v. Good, 132 Mo. 114, 33 S. W. 790; State v. Robbins, 65 Mo. 443.

[85] Ante, § 63.

[86] State v. Kelly, 11 N. W. 635, 57 Iowa, 644.

[87] Dreyer v. State, 11 Tex. App. 503.

[88] Hicks v. State, 99 Ala. 169, 13 So. 375; Knickerbocker v. People, 43

In a proper case the court may be required to charge that the possession of recently stolen property is only a circumstance against the defendant, and that, if the defendant gives a reasonable explanation of such possession, consistent with his innocence, it will then devolve upon the state to prove the falsity of such explanation, in default of which proof the jury will not consider such possession as a criminating circumstance,[89] and where the evidence furnishes such a reasonable explanation, the court should instruct that, if the evidence offered in explanation raises a reasonable doubt of the guilt of defendant, the jury should acquit him.[90] So, if possession of recently stolen property is the only inculpatory fact relied on by the state, it will be proper to instruct that, if the defendant has given a reasonable and probable explanation, consistent with innocence, of such possession, the defendant should be acquitted, unless the state shows the explanation to be false.[91] A charge in effect that, if the defendant is shown to have been in possession of the stolen property soon after the theft, the jury must find a verdict of guilty, unless the defendant proves the innocent possession of the goods, takes away from the jury the question whether the evidence of the defendant in explanation of his possession, may not have raised in the minds of the jury a reasonable doubt as to his guilt, and is therefore erroneous.[92]

An instruction on the presumption arising from the possession of stolen property must be predicated on the assumption that the possession was recent.[93] If it is not clear that the possession by defendant of stolen goods was recent after the theft, the court should explicitly instruct that, unless the jury find that such possession was recent, they cannot indulge in any presumption therefrom of the guilt of defendant.[94] In submitting to the jury the effect of the unexplained possession by defendant of recently stolen property, the court should require the consideration of all the circumstances for and against him, such as the fact that the possession by defendant was open, and that his reputation was good.[95]

N. Y. 177; Ingalls v. State, 48 Wis. 647, 4 N. W. 785.

[89] Coleburn v. State, 133 S. W. 882, 61 Tex. Cr. R. 26. See Hayes v. State, 35 S. W. 983, 36 Tex. Cr. R. 146.

[90] State v. Anderson, 77 S. E. 238, 162 N. C. 571; Knight v. State (Tex. Cr. App.) 65 S. W. 88.

[91] Hart v. State, 3 S. W. 741, 22 Tex. App. 563. See Johnson v. Commonwealth (Ky.) 15 S. W. 671.

[92] State v. Lax, 59 A. 18, 71 N. J. Law, 386.

[93] Mance v. State, 62 S. E. 1053, 5 Ga. App. 229.

[94] Boyd v. State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; Curlin v. State, 23 Tex. App. 681, 5 S. W. 186.

[95] State v. Sasseen, 75 Mo. App. 197; Brown v. State, 151 N. W. 924, 97 Neb. 862; State v. Fitzgerald, 47

§ 196. Inferences from flight of accused

Invading province of jury, see ante, § 62.

It is proper to charge that the flight of a person accused of a crime for which he is being prosecuted is a circumstance to be considered by the jury in connection with the other evidence in the case in determining whether he is guilty, and given such weight as the jury may think it entitled to,[96] and in some jurisdictions it is not improper to charge that flight is a circumstance

A. 403, 72 Vt. 142. See People v. Farrington, 74 P. 288, 140 Cal. 656.

[96] **Ariz.** Nevarez v. State (Ariz.) 196 P. 449.

Cal. People v. Easton, 82 P. 840, 148 Cal. 50; People v. Giancoli, 74 Cal. 642, 16 P. 510.

Iowa. State v. O'Meara, 177 N. W. 563.

Kan. State v. Thomas, 51 P. 228, 58 Kan. 805.

La. State v. Anderson, 46 So. 357, 121 La. 366.

Instructions held proper within rule. An instruction, in a prosecution for burglary, that, if defendant fled, that would be a circumstance of guilt that the jury might consider with other facts on the issue of guilt, unless his flight had been explained satisfactorily to the jury and they should find that he fled for some other reason than the consciousness of guilt. Hall v. State, 66 S. E. 390, 7 Ga. App. 115. An instruction, on the trial of an indictment against a man who had not been seen after the time at which the offense charged was committed until he was brought from another state under a requisition from the Governor, the judge instructed the jury that, if the defendant fled because he was charged with the crime, it was a suspicious circumstance, which he was called upon to explain, but that they must find that it was a flight; that the burden of proof was not shifted, but remained throughout upon the commonwealth; and that, even if the defendant could not explain his flight, they need not necessarily find him guilty. Commonwealth v. Annis, 15 Gray (Mass.) 197. An instruction: "Flight is considered as evidence of guilt. It is your privilege to look on this testimony in that light. * * * You may also look on it as evidence of fear * * * of summary punishment at the hands of his pursuers. Weigh it carefully and give it the effect it reasonably should have." Commonwealth v. Berchine, 32 A. 109, 168 Pa. 603. When the fact that accused fled immediately after the homicide is proved, it is not error for the presiding judge to charge that such flight is a circumstance tending to show guilt; that it is only a slight circumstance, which may be explained, and, if explained to the satisfaction of the jury, should not be considered as a circumstance against him. Hudson v. State, 28 S. E. 1010, 101 Ga. 520. Where, in a prosecution for homicide, the court charged that flight immediately after the commission of a crime, if the jury found, from the evidence, that defendant fled, or after a crime has been committed with which he is charged, is a circumstance in establishing his guilt, not sufficient in itself to establish guilt, but which the jury may consider in determining the possibilities for or against him, the weight to be attached to which is a matter for the jury, it was held that the instruction was not erroneous on the ground that it failed to instruct as to the weight to be given to the fact of flight. State v. Stentz, 74 P. 588, 33 Wash. 444. A charge on a trial for murder that flight was a circumstance that the jury must consider like any other fact, that because a man fled from the scene of homicide was not conclusive that he was guilty, but that when flight was proven the jury must take that circumstance and consider it as any other evidence and determine why he fled, and that when they had so determined they should

which is prima facie an indication of guilt,[97] or which, unexplained, raises an inference of guilt akin to the presumption deemed to arise upon the fabrication of false evidence,[98] where it is further stated that such presumption is not conclusive.[99] In other jurisdictions it is error to charge that the flight of an accused raises a presumption against him.[1] Instructions tending to prevent the jury from considering flight as any evidence of guilt are ordinarily properly refused.[2]

Where an instruction on flight as tending to show a consciousness of guilt is given, it should contain the qualification that the accused knows he is charged with a crime,[3] and when the facts tend to show that the purpose of the defendant in going away was not to avoid arrest, the instructions on flight should be so framed as to include all the circumstances, that the defendant may have the benefit of such explanatory facts,[4] although, in the absence of anything to explain the apparent flight of the de-

give to that circumstance the weight they thought it ought to have in determining the case, and that the mere circumstance that a man fled was not of itself sufficient to convict, but that the jury should give it such weight as they thought it ought to have in relation to the other circumstances, was not subject to the objection that it was not sufficiently comprehensive in that the jury might find that defendant's flight was not for the purpose of eluding arrest, but to save his own life, in which event it could not be considered as indicative of guilt. Thomas v. State, 59 S. E. 246, 129 Ga. 419.

[97] State v. Matheson, 103 N. W. 137, 130 Iowa, 440, 114 Am. St. Rep. 427, 8 Ann. Cas. 430; State v. Richards, 102 N. W. 439, 126 Iowa, 497; State v. McLaughlin, 50 S. W. 315, 149 Mo. 19; State v. Hunt, 43 S. W. 389, 141 Mo. 626; State v. Ma Foo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414.

Instructions proper within rule. On a trial for felonious assault, where the evidence shows that defendant left the state immediately after the assault, as he had previously intended to do, it is not error to charge that flight raises the presumption of guilt, where the jury are further instructed that defendant has a right to show other good reasons for leaving, and that they shall consider the evidence that he had already made arrangements to leave on that day. State v. Potter, 108 Mo. 424, 22 S. W. 89. An instruction that flight raises the presumption of guilt, and that, if defendant fled the country, the jury might consider it in determining his guilt or innocence, but that they should not consider such leaving as a flight if defendant left on his own proper and legitimate business, and not for the purpose of avoiding arrest or trial, is unobjectionable, where defendant, after the commission of the crime, left for another state. State v. Jackson, 95 Mo. 623, 8 S. W. 749.

[98] State v. Harrington, 94 A. 623, 87 N. J. Law, 713.

[99] State v. Walker, 98 Mo. 95, 9 S. W. 646; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

[1] Sheffield v. State, 43 Tex. 378.

[2] Mitchell v. State, 30 So. 348, 129 Ala. 23; Bodine v. State, 29 So. 926, 129 Ala. 106; People v. Giancoli, 74 Cal. 642, 16 P. 510; Smith v. State, 63 Ga. 168.

[3] People v. Jones, 117 P. 176, 160 Cal. 358.

[4] State v. Schmulbach, 147 S. W. 966, 243 Mo. 533; State v. Harris, 134 S. W. 535, 232 Mo. 317; State v. Fairlamb, 121 Mo. 137, 25 S. W. 895; State v. Hogg, 129 P. 115, 64 Or. 57.

fendant, the court is not required to charge that the circumstances explaining flight may be considered.[5]

Instructions on flight as a circumstance tending to show guilt must be based on the evidence.[6] Evidence that defendant left the jurisdiction shortly after the crime of which he is accused was committed,[7] or that he escaped from jail, where he was awaiting trial for the offense charged against him,[8] may authorize such

[5] State v. Deatherage, 77 P. 504, 35 Wash. 326. See State v. Walker, 98 Mo. 95, 9 S. W. 646.

[6] **Cal.** People v. Choy Ah Sing, 84 Cal. 276, 24 P. 379.

Colo. Orin v. People, 188 P. 1114, 68 Colo. 1.

Ga. Jones v. State, 51 S. E. 312, 123 Ga. 129.

Mo. State v. Goodwin (Sup.) 217 S. W. 264; State v. Kyles, 153 S. W. 1047, 247 Mo. 640; State v. Hopper, 44 S. W. 272, 142 Mo. 478; State v. Evans, 39 S. W. 462, 138 Mo. 116, 60 Am. St. Rep. 549.

Illustrations of cases in which evidence held sufficient to warrant instruction on flight. Where, on a trial for rape, there was evidence that accused left the scene of the crime and remained away a day and a half, and a witness testified that accused had stated that he left soon after prosecutrix went to a neighbor, and that he left because he was afraid that there might be trouble, there was evidence of flight sufficient to warrant an instruction that evidence of flight might be considered as corroborating the prosecutrix as to the identity of her assailant. State v. Ralston, 116 N. W. 1058, 139 Iowa, 44. Where there was evidence tending to connect defendant with a theft, and he left the state three days after, and did not return until brought back under arrest, an instruction on flight was justified. State v. Alley, 128 N. W. 343, 149 Iowa, 196. In homicide, evidence of police officers who had known defendant for years that they could not find him around his usual haunts after the crime, and after tracing him for some time they found him in a hospital under an assumed name, is sufficient, in the absence of explanatory facts, to authorize the submission of the question of flight to the jury. State v. White, 87 S. W. 1188, 189 Mo. 389. In a prosecution for homicide, where it appeared that defendant while driving his team upon a highway had run down a bicyclist and killed him, and that thereafter, instead of keeping the main road, he turned off into an obscure road and sought to avoid meeting or being recognized by other persons, and changed his course, and that his companions separated from him and left him, no one going back to render assistance to the injured person, an instruction on the weight to be given to the evidence of flight was justified by the evidence. State v. Stentz, 74 P. 588, 33 Wash. 444. Defendant's statement to the officer who arrested him that he was trying to get away, in connection with an admission that he had assaulted prosecutrix, justified the giving of an instruction as to flight, and its bearing on the case. State v. Harrison, 149 N. W. 452, 167 Iowa, 334. Where, in a prosecution for larceny, the evidence showed that immediately after the commission of the crime defendant, instead of returning home as he said he would, went out of the state, where he remained for several months; that when he returned to the state he did not return to his home town, but to a neighboring town, where he was arrested, and when arrested he stated to the arresting officer that he "ought to have known better than to have come back," it was held that the evidence warranted an instruction on flight. State v. Soper, 106 S. W. 3, 207 Mo. 502.

[7] State v. O'Meara (Iowa) 177 N. W. 563; State v. Robinson, 152 N. W. 590, 170 Iowa, 267.

[8] Patterson v. State, 100 S. E. 641, 24 Ga. App. 239.

an instruction. In some jurisdictions it is held that a charge on the presumptions arising from flight is erroneous, if it is necessary to submit to the jury the question of whether or not the evidence in fact showed the flight of defendant.[9]

C. Failure to Produce, and Suppression or Fabrication of, Evidence

§ 197. Rule in civil cases

Under some statutory provisions relating to the failure of a party to produce evidence, or to furnish the best evidence bearing on issues of fact, it is proper for the court to instruct as to the presumption arising where one, who has evidence in his power to repel or explain a charge, fails to present it,[10] and to comment upon the failure of a party to call witnesses having knowledge concerning the matters in dispute,[11] and under such a provision it is held in one jurisdiction that the court should instruct the jury that, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.[12]

In jurisdictions where no constitutional or statutory restrictions against commenting on the evidence exist, and in some other jurisdictions, the court may in civil cases comment on the failure of a party to produce available evidence, or to call witnesses as to a material fact peculiarly within their knowledge,[13] and may tell the jury that they may consider such failure,[14] and that they may draw such inferences therefrom as are reasonable,[15] or that they may infer that the evidence not produced would not help the case of the party failing to produce it,[16] or that the jury will be warranted in accepting as true testimony adverse to a party who fails to controvert it by summoning witnesses having knowledge of the facts,[17] or that the jury may take

[9] Fountain v. State, 101 S. E. 294, 149 Ga. 519, reversing judgment 98 S. E. 178, 23 Ga. App. 113, opinion of Supreme Court conformed to by 101 S. E. 712, 24 Ga. App. 558.

[10] Moye v. Reddick, 93 S. E. 256, 20 Ga. App. 649.

[11] Sesler v. Montgomery (Cal.) 19 P. 686.

[12] Stamm v. Wood, 168 P. 69, 86 Or. 174.

[13] Ripley v. Second Ave. R. Co. (Super. N. Y.) 8 Misc. Rep. 449, 28 N. Y. S. 683; Collins v. Leafey, 124 Pa. 203, 16 A. 765, 23 Wkly. Notes, Cas. 264; Frick v. Barbour, 64 Pa. 120.

[14] Griggs v. Saginaw & F. Ry. Co., 162 N. W. 960, 196 Mich. 258; Goodstein v. Brooklyn Heights R. Co., 74 N. Y. S. 1017, 69 App. Div. 617; Hartman v. Pittsburg Incline-Plane Co., 11 Pa. Super. Ct. 438.

[15] Young v. Corrigan (D. C. Ohio) 208 F. 431.

[16] Robinson v. Doe, 112 N. E. 1007, 224 Mass. 319.

[17] Perlman v. Shanck, 182 N. Y. S. 767, 192 App. Div. 179.

such testimony most strongly against the party thus failing to controvert it,[18] and in some jurisdictions it may be error to refuse such an instruction,[19] and the general rule is that the court may in its discretion refuse to instruct that no unfavorable inferences shall be drawn from a failure to produce evidence.[20] On the other hand, it is error to instruct as to the presumption arising from the failure of a party to testify or to produce a witness, where the party or witness is not shown to possess peculiar knowledge of the facts in issue,[21] or where a witness not called has disclaimed all knowledge of the matter in issue,[22] and instructions are erroneous which permit the jury to indulge in any speculation with respect to what a witness whom a party has failed to call would have testified to.[23] The court should not charge as to the inferences to be drawn from the failure of a party to produce evidence, where it does not appear that he could have produced the evidence, or there are circumstances operating apparently to prevent such production,[24] or where it does not appear that witnesses not called are under the control of one party more than of another,[25] or where such party relies upon

[18] Perlman v. Schanck, 182 N. Y. S. 767, 192 App. Div. 179.

[19] Werr v. Kohles, 83 N. Y. S. 128, 86 App. Div. 122.

In Michigan, while counsel has the right to make proper comments to the jury upon the absence of a material witness for the opposing party, he cannot call upon the court to instruct the jury that such absence militates against such party. Cross v. Lake Shore & M. S. Ry. Co., 37 N. W. 361, 69 Mich. 363, 13 Am. St. Rep. 399.

[20] Closson v. Bligh, 83 N. E. 263, 41 Ind. App. 14; Taylor v. Chicago, St. P. & K. C. Ry. Co., 76 Iowa. 753. 40 N. W. 84; Appeal of Anderson, 165 N. W. 732, 199 Mich. 240; Cox v. Norfolk & C. R. Co., 35 S. E. 237, 126 N. C. 103.

[21] Carter v. Chambers, 79 Ala. 223.

Action by assignee. Where an action is prosecuted by the assignee of a claim, who has no knowledge whatever of the facts in issue, and who is fully represented by his attorneys in the conduct of the trial, it is error to charge that his absence during the trial should be taken into consideration by the jury. Hitchcock v. Davis, 87 Mich. 629, 49 N. W. 912.

[22] Fitzpatrick v. Woodruff, 47 N. Y. Super. Ct. 436.

[23] Perlman v. Schanck, 182 N. Y. S. 767. 192 App. Div. 179.

[24] **Cal.** Lawyer v. Los Angeles Pac. Co., 138 P. 920, 23 Cal. App. 543.

Ga. Harrison v. Kiser, 79 Ga. 588, 4 S. E. 320.

Ind. Bump v. McGrannahan, 111 N. E. 640, 61 Ind. App. 136.

N. Y. Santiago v. John E. Walsh Stevedore Co., 137 N. Y. S. 611, 152 App. Div. 697; Carney v. New York City Ry. Co. (Sup.) 102 N. Y. S. 485, 52 Misc. Rep. 499; Rooder v. Interurban St. Ry. Co. (Sup.) 96 N. Y. S. 255. 48 Misc. Rep. 519.

Tex. Parlin & Orendorff Co. v. Miller, 60 S. W. 881, 25 Tex. Civ. App. 190.

Failure to call incompetent witness. A defendant, in an action where his wife is not a competent witness in his behalf, is entitled to an instruction that such is the fact, without the modification that, if she had been offered as a witness, plaintiff could have waived objection to her competency. Fourth Nat. Bank v. Nichols, 43 Mo. App. 385.

[25] Flynn v. New York Elevated R. Co., 50 N. Y. Super. Ct. 375.

the improbability of the evidence produced by his adversary.[26] The court should not permit the jury to draw unfavorable inferences from the failure of a party to produce a witness who, mistakenly or corruptly, may be willing to testify to facts favorable to such party.[27] So it is proper to refuse such an instruction, where a witness whom a party fails to call would give cumulative testimony only.[28]

It is proper to caution the jury against being influenced by the fact that a party has invoked the confidential relation of physician and patient, and refused to call the physician to testify to facts, knowledge of which was acquired by him in such relation,[29] or that the jury shall not draw unfavorable inferences against a party for omitting to call his attorney as a witness,[30] or that the jury must find their verdict upon the evidence actually adduced, and not upon conjectures arising from a seeming withholding of testimony,[31] and it is error to refuse to tell the jury that the mere fact that a party offers no evidence does not warrant them in drawing unfavorable inferences against him.[32]

A party, desiring an instruction as to inferences arising from the suppression of evidence, a failure to call witnesses, or the failure to produce the best evidence available, should request it,[33] and such an instruction must be based upon the evidence.[34]

Witness competent for either party. Where a person whose evidence would be competent for either party to an action was in court during the trial, and equally accessible to both parties, it is error to charge that the jury could draw an unfavorable inference against one of the parties for failing to call such person as a witness. Bates v. Morris, 101 Ala. 282, 13 So. 138.

[26] Smith v. Chicago City Ry. Co., 165 Ill. App. 190.

[27] Miller v. Dayton, 57 Iowa, 423, 10 N. W. 814.

[28] Akalitis v. Philadelphia & Reading Coal & Iron Co. (C. C. A. N. Y.) 239 F. 299, 152 C. C. A. 287; Brown v. Town of Swanton, 37 A. 280, 69 Vt. 53.

Failure of party to testify. Where plaintiff establishes by competent evidence his cause of action, he may decline to testify, and his omission to state the amount of his damages does not require the court in the instructions to comment unfavorably on that fact. Westing v. Chicago, B. & Q. R. Co., 127 N. W. 1076, 87 Neb. 655.

[29] Mortimer v. Daub, 98 N. E. 845, 52 Ind. App. 30.

[30] Freeman v. Fogg, 82 Me. 408, 19 A. 907.

[31] Bank of Statesville v. Pinkers, 83 N. C. 377.

[32] Simon v. Griffin Wheel Co., 168 Ill. App. 533.

[33] Jones v. Boston & N. St. Ry., 98 N. E. 506, 211 Mass. 552; Paverman v. Joline (Sup.) 120 N. Y. S. 64.

[34] **Cal.** In re Moore's Estate, 182 P. 285, 180 Cal. 570; Thomas v. Gates, 58 P. 315, 126 Cal. 1.

Ga. Central of Georgia Ry. Co. v. Bernstein, 38 S. E. 394, 113 Ga. 175; Anderson v. Southern Ry. Co., 33 S. E. 644, 107 Ga. 500.

N. Y. Kaplan v. Interborough Rapid Transit Co. (Sup.) 165 N. Y. S. 216; Freyhan v. Kahn (Sup.) 159 N. Y. S. 640; Robinson v. Metropolitan St. Ry. Co., 92 N. Y. S. 1010, 103 App. Div. 243.

§ 198. Rule in criminal cases

In some jurisdictions it is not improper to instruct in a criminal case that, if evidence which will explain or rebut certain facts or circumstances operating against the defendant is peculiarly within his knowledge or reach, and is not accessible to the state, the fact that he fails to produce it may be taken into consideration in determining his guilt or innocence,[35] where the court preserves the constitutional right of the defendant that no inference shall be drawn from his failure to testify,[36] and such an instruction is not objectionable as a comment on the failure of the defendant to testify in his own behalf.[37] In other jurisdictions a contrary rule prevails and it is held error for the court to charge that the failure of the defendant to produce evidence within his reach is a proper matter for the consideration of the jury,[38] or to charge that, if a party does not offer the most satisfactory evidence within his power to produce, the evidence offered by him should be viewed with distrust,[39] or to charge in general terms that the omission to produce evidence within a party's reach to repel an accusation raises a presumption that it is well founded;[40] it being held in one jurisdiction that such a charge is, where the defendant has introduced no testimony, in derogation of his privilege to make a statement which the jury may believe if it sees fit.[41] In one jurisdiction, where the defendant in a criminal case can use his wife as a witness if she consents, it is not improper to instruct that, while a wife is not a competent witness against her husband, the defendant has a right to call her if he so desires;[42] but it is error for the court to go on and still further instruct that the failure of the defendant to call her may be considered as a circumstance against him.[43]

In some jurisdictions, if it does not appear that the accused, if innocent, has it in his power to produce evidence controverting or explaining the testimony against him, except by testifying in his own behalf, the court is bound to charge on request that the

[35] State v. Grebe, 17 Kan. 458; Commonwealth v. Brownell, 145 Mass. 319, 14 N. E. 108; State v. Callahan, 69 A. 957, 76 N. J. Law, 426, judgment affirmed 73 A. 235, 77 N. J. Law, 685.

[36] Commonwealth v. Johnson, 85 N. E. 188, 199 Mass. 55.

Contra—Commonwealth v. Harlow, 110 Mass. 411.

[37] State v. Rodman, 62 Iowa, 456, 17 N. W. 663.

[38] Clem v. State, 42 Ind. 420, 13 Am. Rep. 369; Knowles v. People, 15 Mich. 408.

[39] People v. Charles, 99 P. 383, 9 Cal. App. 338.

[40] Jones v. State, 82 S. E. 470, 14 Ga. App. 811; Mills v. State, 65 S. E. 368, 133 Ga. 155.

[41] Wilson v. State, 70 S. E. 193, 8 Ga. App. 816.

[42] Rhea v. Territory, 105 P. 314, 3 Okl. Cr. 230.

[43] Stutsman v. Territory, 54 P. 707, 7 Okl. 490.

failure of the accused to produce any evidence is not to be considered by the jury,[44] and the court may be required to charge that the failure of an alleged coconspirator to testify raises no presumption that his testimony, if given, would be against the defendant.[45] On the other hand, it is proper, in some jurisdictions, to refuse to charge that the failure of the accused to offer any evidence other than his own shall not be considered a circumstance against him,[46] or that the failure of the accused to call his coindictees as witnesses shall not be considered by the jury.[47] Where the court has charged that no presumption is to be drawn against the defendant because of his failure to testify, it is not error in some jurisdictions to refuse to further charge that the jury should draw no inference against him because of his failure to procure witnesses to show where he was on the day of the crime.[48] Ordinarily the court has discretion to refuse to charge that the failure of the state to produce witnesses to certain facts to testify to them will operate against the contentions of the state or is a matter to be considered by the jury.[49] The circumstances may be such, however, that it will be error to

[44] Ormsby v. People, 53 N. Y. 472. Compare People v. Hummel, 104 N. Y. S. 308, 119 App. Div. 153.

Absence of evidence on which to base instruction. Instructions to the effect that no inference could be drawn against accused for his failure to produce witnesses who were beyond the reach of process, or could have been called by the prosecution as readily as by the defendant, were properly refused, where there was no evidence to which they applied. People v. Bond, 125 N. E. 740, 291 Ill. 74.

[45] People v. Glass, 112 P. 281, 158 Cal. 650.

[46] Carter v. State, 118 P. 264, 6 Okl. Cr. 232.

[47] State v. Hogan, 88 N. W. 1074, 115 Iowa, 455; State v. White, 87 P. 137, 48 Or. 416.

[48] Taylor v. Commonwealth, 90 Va. 109, 17 S. E. 812.

[49] Commonwealth v. Farrell, 137 Mass. 579; Commonwealth v. Schmous, 162 Pa. 326, 29 A. 644; State v. Buckman, 52 A. 427, 74 Vt. 309. See State v. Hayden, 107 N. W. 929, 131 Iowa, 1.

Failure to produce witnesses unfriendly to the state. Where the state introduced only circumstantial evidence of defendant's guilt, while eyewitnesses of the homicide were present in court, but were unfriendly to the state, a charge that the state was required to introduce the best evidence obtainable, and that, if it was probable that there were eyewitnesses by whom the state could have proven the act of killing, it was the duty of the state to produce such evidence, and that, if it did not do so, defendant could not be convicted on circumstantial evidence, was properly refused. McCandless v. State, 62 S. W. 745, 42 Tex. Cr. R. 655.

Failure to produce witness accessible to defendant. Where the state in a prosecution for homicide omitted to introduce a witness who was present at the place of the homicide, but was not shown to have seen the killing, which witness was in court accessible to the defendant, the court did not err in refusing to charge statute, relating to the presumption arising from a failure to produce evidence. Harper v. State, 59 S. E. 792, 129 Ga. 770.

refuse to instruct that the jury may consider the failure of the state to put on the stand witnesses present in court.[50]

It is proper to charge, where there is evidence to support it, that the act of the defendant in knowingly invoking false evidence may be considered against him,[51] but to justify such an instruction there must be something more than a mere contradiction between the testimony of the defendant and that of the witnesses against him[52] and it is error to instruct that such an act will raise a strong presumption of guilt.[53]

D. Failure of Party in Civil Case to Testify

§ 199. In general

In civil cases in some jurisdictions courts frequently with entire propriety comment on the failure of a party to testify in a case,[54] and in some jurisdictions it is proper for the court to permit the jury to draw inferences unfavorable to a party, having knowledge of the facts in controversy, from his failure to be present at the trial and testify.[55] But an instruction which permits unfavorable inferences to be drawn against one for claiming the protection of a statute which precludes the adverse party in an action by or against a personal representative from testifying is erroneous,[56] and it is error to authorize adverse inferences from the failure of a party to take the stand, where it does not appear that he knows the truth of the transaction in question, and any evidence that he could give would be purely negative,[57] and where the plaintiff has failed to make out his case, it is error to tell the jury that they may consider the fact that the defendant has not been called to deny the allegations of the plaintiff.[58] In some ju-

[50] People v. Fiori, 108 N. Y. S. 416, 123 App. Div. 174; People v. Smith, 99 N. Y. S. 118, 113 App. Div. 396.

[51] Allen v. United States, 17 S. Ct. 154, 164 U. S. 492, 41 L. Ed. 528.

[52] State v. Vance, 80 Ala. 356; Beck v. State, 80 Ala. 1.

[53] Sater v. State, 56 Ind. 378.

[54] Steltemeier v. Barrett, 122 S. W. 1095, 145 Mo. App. 534.

Refusal to give reason for failure of party to testify. In an action by an administrator on a note, a requested instruction that, as defendant could not testify to any transaction with decedent showing payment, his failure to explain any matter connected with his payment should not be considered against him, was properly refused as prejudicing the plaintiff for exercising a lawful right; no comment having been made on his failure to testify thereto. Steltemeier v. Barrett, 122 S. W. 1095, 145 Mo. App. 534.

[55] Plunkett v. Levengston (C. C. A. Ill.) 258 F. 889, 169 C. C. A. 609; Wilson v. Northwestern Nat. Life Ins. Co., 114 N. W. 251, 103 Minn. 35; Brooks v. Steen, 6 Hun (N. Y.) 516.

[56] Ludlow v. Pearl's Estate, 55 Mich. 312, 21 N. W. 315.

[57] Emory v. Smith, 54 Ga. 273.

[58] American Underwriters' Ass'n v. George, 97 Pa. 238.

risdictions it is not proper for the court in any way to call the attention of the jury to the failure of a party to testify in his own behalf.[59]

E. Failure of Accused to Testify

§ 200. Propriety of instructions at common law

At common law, where the defendant in a criminal case does not take the witness stand in his own behalf, the trial court may call the attention of the jury to his failure to deny inculpatory facts which, if false, he must know to be so,[60] and this rule applies where the accused, on voluntarily testifying for himself, omits to explain incriminating circumstances as to which he is informed.[61]

§ 201. Propriety and necessity of instructions under statutes

In many jurisdictions, by force of statutory provisions, it is error for the court to call the attention of the jury to the failure of an accused to avail himself of his privilege to testify, or to make any allusion to such failure, except by way of caution against drawing any adverse inference therefrom.[62] Such a stat-

[59] Moore v. Wright, 90 Ill. 470.

[60] **N. J.** State v. Frank, 102 A. 1054, 91 N. J. Law, 718, affirming judgment 100 A. 606, 90 N. J. Law, 78; State v. Connors, 94 A. 812, 87 N. J. Law, 419; State v. Schlosser, 89 A. 522, 85 N. J. Law, 165, judgment affirmed 91 A. 1071, 86 N. J. Law, 374; State v. Di Benedetto, 82 A. 521, 82 N. J. Law, 168, judgment affirmed 85 A. 1135, 83 N. J. Law, 792; State v. Callahan, 73 A. 235, 77 N. J. Law, 685, affirming judgment 69 A. 957, 76 N. J. Law, 426; State v. Skillman, 70 A. 83, 76 N. J. Law, 464, judgment affirmed 76 A. 1073, 77 N. J. Law, 804; State v. Twining, 64 A. 1073, 1135, 73 N. J. Law, 683, affirming judgment 62 A. 402, 73 N. J. Law, 402, and judgment affirmed Twining v. State of New Jersey, 29 S. Ct. 14, 211 U. S. 78, 53 L. Ed. 97; State v. Banusik, 64 A. 994, 84 N. J. Law, 640; State v. Wines, 46 A. 702, 65 N. J. Law, 31.

Pa. Commonwealth v. Chickerella, 96 A. 129, 251 Pa. 160.

[61] Caminetti v. United States, 37 S. Ct. 192, 242 U. S. 470, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168, affirming judgments Diggs v. Same (C. C. A. Cal.) 220 F. 545, 136 C. C. A. 147, and Hays v. Same (C. C. A. Okl.) 231 F. 106, 145 C. C. A. 294.

[62] **Cal.** People v. Andrade, 154 P. 283, 29 Cal. App. 1.

Mich. People v. Peterson, 131 N. W. 153, 166 Mich. 10.

Minn. State v. Richman, 173 N. W. 718, 143 Minn. 314.

Mo. Steltemeier v. Barrett, 122 S. W. 1095, 145 Mo. App. 534.

Neb. Lamb v. State, 95 N. W. 1050, 69 Neb. 212.

N. Y. People v. Fitzgerald, 50 N. E. 846, 156 N. Y. 253, reversing judgment 46 N. Y. S. 1020, 20 App. Div. 139; Ruloff v. People, 45 N. Y. 213; In re Ruloff, 11 Abb. Prac. (N. S.) 245.

Okl. McLaughlin v. State, 169 P. 657, 14 Okl. Cr. 192; Holmes v. State, 162 P. 446, 13 Okl. Cr. 113.

Instructions erroneous within rule. Instruction that, if weaker evidence is offered when stronger evidence was within the party's power, the evidence offered should be viewed with distrust, was erroneous, where accused offered no evidence. People v. Carroll, 128 P. 4, 20 Cal. App. 41. To instruct that the jury shall not give defendant's failure to testify "any unfair consideration" implies

ute does not prevent the court from calling attention to the privilege of the defendant to refuse to testify, if it seems that the jury may be misled, provided it is made clear that nothing preju-

that they may give it a fair consideration, and can consider it so long as they do not do so unfairly. People v. Mitchell, 129 N. W. 698, 164 Mich. 583. Under the statute providing that a defendant in a criminal case is not to be prejudiced by his failure to testify in his own behalf, where, in a prosecution for larceny, the defendant was not sworn as a witness, it was legal error to charge that the failure of defendant to take the stand does not create a presumption against him, but that, when he does take the stand in his own behalf, he can be subjected to all forms of cross-examination, like any other witness in the case. People v. Ryan, 105 N. Y. S. 160, 120 App. Div. 275. Where the only evidence connecting the defendant with the offense of keeping intoxicating liquors with intent to sell them was, in effect, that he was seen in a room adjoining the barroom in which the liquors were kept, and the defendants offered no evidence, it was error for the court to read to the jury a charge, given in another case on a different state of facts, to the effect that an inference of guilt may be drawn from failure to offer explanatory evidence, when it is apparent that such evidence, if it exists, is within the power of the accused, although such charge is qualified by the statement that the explanatory evidence referred to must be evidence other than defendant's own testimony. Commonwealth v. Maloney, 113 Mass. 211.

Instructions not erroneous within rule. A charge, on the trial of an indictment for the violation of the oleomargarine act, as follows: "Now, gentlemen, the only question for you to determine is whether or not this testimony is to be relied upon. It is not contradicted in any way. No witnesses were called here to controvert what has been said by these witnesses (referring to witnesses for the commonwealth), and it will be for you to take the testimony and see whether the product that was bought as oleomargarine was the same analyzed by the chemists and contained coal tar dye, and then whether the chemists here, without being contradicted in any way, are to be relied upon as truthful witnesses." Commonwealth v. McDermott, 37 Pa. Super. Ct. 19. An instruction that accused may make such statement as he deems proper in his defense as to which he is not subject to cross-examination without his consent. Harper v. State, 59 S. E. 792, 129 Ga. 770. On a trial for larceny, a statement "that no attempt had been made by defendant to explain his possession of the property," when borne out by the evidence, will not be construed as a comment on defendant's failure to take the stand in his own behalf. State v. Preston, 77 Mo. 294. The instruction on the trial of B. and N., of whom B. only testified, that a defendant may testify or not, as he pleases, and that when a defendant testifies the same rules are to apply to him as to other witnesses, cannot be complained of by N. as a violation of the statute against reference to or comment on the subject of a defendant not testifying. People v. Spira, 106 N. E. 241, 264 Ill. 243. An instruction to the jury that the failure of accused to testify does not relieve the state from the obligation to produce evidence which will establish guilt beyond a reasonable doubt is not such a reference to the refusal of accused to testify as to require reversal of a judgment of guilty. Tate v. State, 81 N. E. 973, 76 Ohio St. 537, 10 Ann. Cas. 949, affirming judgment 29 Ohio Cir. Ct. R. 410. Where, in a prosecution for grand larceny, there was evidence that defendant, fraudulently representing himself to be in control of a corporation owning certain lands, obtained money from prosecuting witnesses, a charge that "now defendant has not taken the stand, and you must not pay any attention whatever to that. We are not here to save fools from the consequences of their folly; the duty as to that rests with the Almighty"—was not prejudicial to-

dicial to him may be assumed from his failure to testify.[63] A reference to certain testimony for the prosecution as being uncontradicted does not, in itself, constitute an improper comment on the failure of the accused to testify;[64] it not being plain that no one but the defendant could have disputed such testimony.[65] In some jurisdictions a charge referring to the right of the defendant to testify and his failure to exercise his privilege is not error, when accompanied by the statement that the jury should not consider such failure or take it as a circumstance against the defendant.[66]

§ 202. Cautioning jury against considering failure to testify

In a number of jurisdictions the court should charge on request that the failure of the defendant to testify creates no presumption against him, and is to be excluded altogether from the consideration of the jury,[67] there being an express statutory re-

defendant as referring to his failure to testify in his own behalf. People v. Langley, 100 N. Y. S. 123, 114 App. Div. 427.

Effect of provision concerning unsworn statements. In Wyoming, in which jurisdiction the statute permits the defendant to elect either to be sworn and examined as a witness or to make a statement without being sworn, a statutory provision that no reference to, or comment upon, the neglect or refusal of the accused to make an unsworn statement shall be made, is held to prevent comment upon the failure of the defendant to testify under oath where he has elected to make an unsworn statement. Anderson v. State (Wyo.) 196 P. 1047.

[63] State v. Dodson, 136 N. W. 789, 23 N. D. 305.

[64] Sidebotham v. United States (C. C. A. Mont.) 253 F. 417, 165 C. C. A. 159.

[65] Shea v. United States (C. C. A. Ohio) 251 F. 440, 163 C. C. A. 458, writ of certiorari denied 39 S. Ct. 132, 248 U. S. 581, 63 L. Ed. 431.

[66] **Neb.** Ferguson v. State, 72 N. W. 590, 52 Neb. 432, 66 Am. St. Rep. 512.

Tex. O'Hara v. State, 124 S. W. 95, 57 Tex. Cr. R. 577; Davis v. State, 114 S. W. 366, 54 Tex. Cr. R. 236; Fine v. State, 77 S. W. 806, 45 Tex. Cr. R. 290; Fulcher v. State, 28 Tex. App. 465, 13 S. W. 750.

Vt. State v. O'Grady, 65 Vt. 66, 25 A. 905.

[67] **Ala.** Thomas v. State, 36 So. 734, 139 Ala. 80.

Ark. Threet v. State, 161 S. W. 139, 110 Ark. 152.

Ill. People v. Michael, 117 N. E. 193, 280 Ill. 11; Farrell v. People, 133 Ill. 244, 24 N. E. 423.

Iowa. State v. Carnagy, 76 N. W. 805, 106 Iowa, 483.

Kan. State v. Goff, 61 P. 683, 62 Kan. 104, reversing judgment 61 P. 680, 10 Kan. App. 286; State v. Evans, 58 P. 240, 9 Kan. App. 889.

Me. State v. Landry, 85 Me. 95, 26 A. 998.

Mich. People v. Provost, 107 N. W. 716, 144 Mich. 17, 8 Ann. Cas. 277.

Miss. Haynes v. State, 27 So. 601; Funches v. State, 87 So. 487.

N. M. Territory v. Donahue, 113 P. 601, 16 N. M. 17.

Wash. State v. Gustafson, 152 P. 335, 87 Wash. 613; State v. Hanes, 147 P. 193, 84 Wash. 601; Linbeck v. State, 1 Wash. 336, 25 P. 452.

Instructions held sufficient on this point. An instruction "that defendant's failure to testify must not be referred to in the argument of the cause, or commented upon, referred to, or in any manner considered by the jury in determining the case." Beavers v. State, 58 Ind. 530. An instruction that no inference of guilt "should" arise in the jury's mind

quirement that the court so instruct in some jurisdictions,[68] and the fact that at the time of an improper reference by the prosecuting attorney to the failure of the defendant to take the stand the court tells the jury that no advantage can be taken by the state of such failure does not justify it in afterwards refusing to give an explicit instruction that no inference can be drawn against him because of such failure.[69]

In most jurisdictions, whether requested to give such an instruction or not, it is proper for the court to caution the jury against drawing any inferences unfavorable to the defendant from his failure to testify.[70] The failure to give such a cautionary in-

from defendant's silence is not ground for reversal for failure to use the mandatory word "shall." State v. Krug, 12 Wash. 288, 41 P. 126.

[68] Thrawley v. State, 55 N. E. 95, 153 Ind. 375; Neal v. State, 175 N. W. 669, 104 Neb. 56; State v. Myers, 8 Wash. 177, 35 P. 580, 756; Leonard v. Territory, 2 Wash. T. 381, 7 P. 872.

Instructions sufficiently complying with the statute. An instruction stating that the "statute expressly declares that defendant's neglect to testify shall not create any presumption against him." State v. Mitchell, 72 P. 707, 32 Wash. 64. An instruction that, "while the statute * * * provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly makes it the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his own behalf, and the court so instructs." State v. Deatherage, 77 P. 504, 35 Wash. 326.

[69] People v. Messer, 111 N. W. 854, 148 Mich. 168.

[70] **U. S.** (C. C. A. Tenn.) Robilio v. United States, 259 F. 101, 170 C. C. A. 169.

Ala. Brandes v. State, 65 So. 307, 10 Ala. App. 239.

Ga. Stephens v. State, 94 S. E. 69, 21 Ga. App. 151.

Idaho. State v. Levy, 75 P. 227, 9 Idaho, 483.

Iowa. State v. Weems, 96 Iowa, 426, 65 N. W. 387.

Kan. State v. Olsen, 127 P. 625, 88 Kan. 136; State v. Skinner, 34 Kan. 256, 8 P. 420.

La. State v. Johnson, 23 So. 199, 50 La. Ann. 138.

Mass. Commonwealth v. Brown, 45 N. E. 1, 167 Mass. 144.

Mich. People v. Murphy, 108 N. W. 1009, 145 Mich. 524; People v. Murnane, 182 N. W. 62, 213 Mich. 205.

Mo. State v. De Witt, 84 S. W. 956, 186 Mo. 61.

Mont. State v. Fuller, 85 P. 369, 34 Mont. 12, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648.

Neb. Lillie v. State, 100 N. W. 316, 72 Neb. 228.

N. M. State v. Graves, 157 P. 160, 21 N. M. 556.

N. D. State v. Wisnewski, 102 N. W. 883, 13 N. D. 649, 3 Ann. Cas. 907; State v. Currie, 102 N. W. 875, 13 N. D. 655, 69 L. R. A. 405, 112 Am. St. Rep. 687.

Ohio. Sullivan v. State, 9 Ohio Cir. Ct. R. 652.

S. D. State v. Carlisle, 132 N. W. 686, 28 S. D. 169, Ann. Cas. 1914B, 395.

Tex. Willingham v. State, 136 S. W. 470, 62 Tex. Cr. R. 55; Kinkead v. State, 135 S. W. 573, 61 Tex. Cr. R. 651; Dougherty v. State, 128 S. W. 398, 59 Tex. Cr. R. 464; Matthews v. State, 122 S. W. 544, 57 Tex. Cr. R. 328; Cravens v. State (Cr. App.) 103 S. W. 921; Herndon v. State, 99 S. W. 558, 50 Tex. Cr. R. 552; McCoy v. State (Cr. App.) 81 S. W. 46; Lounder v. State, 79 S. W. 552, 46 Tex. Cr. R. 121; Grant v. Same, 70 S. W. 954, 44 Tex. Cr. R. 311; Pearl v. Same, 63 S. W. 1013, 43 Tex. Cr. R. 189; Parker v. Same, 49 S. W. 80, 40 Tex. Cr. R. 119; Unsell v. Same (Cr. App.) 45 S. W. 902; Guinn v. State, 45 S. W. 694, 39 Tex. Cr. R. 257.

struction will not, however, ordinarily constitute error, in the absence of a request therefor,[71] and in some jurisdictions it is proper to refuse such a request;[72] it being considered that the statutes prohibiting comment on the failure of the accused to testify justify such refusal.[73]. In two jurisdictions it is held that the defendant is entitled to absolute silence upon the subject of his failure to testify, and that the giving of such a cautionary instruction will constitute positive error.[74] In Oklahoma such an instruction, while regarded as improper,[75] is not considered fundamentally erroneous, and in the absence of any objection or exception properly taken, will not be cause for reversal.[76]

Vt. State v. Rossi, 102 A. 1030, 92 Vt. 187; State v. Cameron, 40 Vt. 555.

Instructions held sufficient on this head. An instruction that it was not incumbent on defendant to testify in his own behalf; that a failure to do so was not even a circumstance against him, and no presumption of guilt could be indulged by the jury on account of his failure; nor could the same be considered by the jury for any purpose—was sufficient, without a further statement that the jury should not discuss, comment on, or in any way allow it to influence them in arriving at their verdict. Anderson v. State, 110 S. W. 54, 53 Tex. Cr. R. 341. In a trial for homicide, a charge that the law allows defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part, and the jury will not mention, discuss, or even refer to the fact that defendant failed to testify, was proper, and not objectionable as not in terms instructing the jury that they could not consider defendant's failure to testify. Singleton v. State, 124 S. W. 92, 57 Tex. Cr. R. 560.

[71] **Cal.** People v. Rogers, 126 P. 143, 163 Cal. 476; People v. Flynn, 73 Cal. 511, 15 P. 102.

Colo. Matthews v. People, 6 Colo. App. 456, 41 P. 839.

Conn. State v. Williams, 96 A. 370, 90 Conn. 126.

Ga. Bargeman v. State, 88 S. E. 591, 17 Ga. App. 807.

Ind. Felton v. State, 139 Ind. 531, 39 N. E. 228; Foxwell v. State, 63 Ind. 539.

Iowa. State v. Stevens, 67 Iowa, 557, 25 N. W. 777.

Kan. State v. Younger, 78 P. 429, 70 Kan. 226; City of Holton v. Bimrod, 55 P. 505, 8 Kan. App. 265.

Mich. People v. Warner, 104 Mich. 337, 62 N. W. 405.

Neb. Metz v. State, 46 Neb. 547, 65 N. W. 190.

N. D. State v. Lesh, 145 N. W. 829, 27 N. D. 165.

Or. State v. Magers, 58 P. 892, 36 Or. 38.

Tex. Bosley v. State, 153 S. W. 878, 69 Tex. Cr. R. 100; Adams v. State (Cr. App.) 105 S. W. 497; Torey v. State, 56 S. W. 60, 41 Tex. Cr. R. 543; Prewitt v. Same, 53 S. W. 879, 41 Tex. Cr. R. 262; Morrison v. State, 51 S. W. 358, 40 Tex. Cr. R. 473.

[72] **Cal.** People v. Romero, 121 P. 698, 17 Cal. App. 680.

Idaho. State v. Gruber, 115 P. 1, 19 Idaho, 692.

Okl. Conley v. State, 179 P. 480, 15 Okl. Cr. 531; Dunn v. State, 176 P. 86, 15 Okl. Cr. 245.

Wyo. Leslie v. State, 65 P. 849, 10 Wyo. 10; Id., 69 P. 2, 10 Wyo. 10.

[73] State v. Gifford (Mo. Sup.) 186 S. W. 1058; State v. Taylor, 168 S. W. 1191, 261 Mo. 210; State v. Robinson, 117 Mo. 649, 23 S. W. 1066.

[74] Tines v. Commonwealth, 77 S. W. 363, 25 Ky. Law Rep. 1233; State v. Pearce, 56 Minn. 226, 57 N. W. 652.

In California it is held that the giving of such an instruction is not proper practice. People v. Ruef, 114 P. 54, 14 Cal. App. 576.

[75] McLaughlin v. State, 169 P. 657, 14 Okl. Cr. 192.

[76] Russell v. State (Okl. Cr. App.) 194 P. 242.

CHAPTER XIII

INSTRUCTIONS ON BURDEN OF PROOF

§ 203. Necessity and propriety.
204. Necessity of request for instructions.
205. Sufficiency of instructions.
206. Shifting burden of proof.
207. Effect of erroneous instruction.

Propriety of instructions on burden of proof as to alibi, see post, § 336.

§ 203. Necessity and propriety

While in one jurisdiction it is considered to be the better practice not to refer specially to the burden of proof, but to simply frame the instructions so as to indicate such burden, and to tell the jury to decide as they believe from the evidence the fact to be,[1] the general rule is that instructions telling the jury upon whom the burden of proof rests are proper,[2] and should be given both in civil[3] and in criminal cases,[4] if a request is made therefor.[5]

[1] Bannon v. Louisville Trust Co., 150 S. W. 510, 150 Ky. 401; Musselam v. Cincinnati, N. O. & T. P. Ry. Co., 104 S. W. 337, 126 Ky. 500, 31 Ky. Law Rep. 908; Henning v. Stevenson, 80 S. W. 1135, 118 Ky. 318, 26 Ky. Law Rep. 159; Mills v. Louisville & N. R. Co., 76 S. W. 29, 116 Ky. 309, 25 Ky. Law Rep. 488; Macon v. Paducah St. Ry. Co., 62 S. W. 496, 23 Ky. Law Rep. 46, 110 Ky. 680; Ragsdale v. Ezell, 15 Ky. Law Rep. (abstract) 495; Louisville & N. R. Co. v. Hofgesang, 13 Ky. Law Rep. (abstract) 829; Tabler v. Jones, 12 Ky. Law Rep. (abstract) 189.

[2] **Conn.** Coogan v. Lynch, 89 A. 906, 88 Conn. 114.

Ill. Zink v. National Council, Knights and Ladies of Security, 199 Ill. App. 376; McMahon v. Scott, 132 Ill. App. 582.

Md. Meyer v. Frenkil, 82 A. 208, 116 Md. 411, Ann. Cas. 1913C, 875.

Tex. Chittim v. Martinez, 58 S. W. 948, 94 Tex. 141.

Wis. Illinois Steel Co. v. Paczocha, 119 N. W. 550, 139 Wis. 23.

[3] Buttrill Guano Co. v. Curry, 92 S. E. 521, 147 Ga. 11; Levy v. Jarrett (Tex. Civ. App.) 198 S. W. 333; Boswell v. Pannell, 180 S. W. 593, 107 Tex. 433, modifying judgment (Civ. App.) 146 S. W. 233; Irvin v. Johnson, 98 S. W. 405, 44 Tex. Civ. App. 436.

Special issues. The court should charge on the issues involved, including the burden of proof, though the case is submitted on special issues. Goree v. Uvalde Nat. Bank (Tex. Civ. App.) 218 S. W. 620; Texas Baptist University v. Patton (Tex. Civ. App.) 145 S. W. 1063.

[4] Lane v. State, 85 Ala. 11, 4 So. 730; McGuire v. State, 13 Smedes & M. (Miss.) 257; Gammel v. State, 163 N. W. 854, 101 Neb. 532, opinion modified on rehearing 166 N. W. 250, 101 Neb. 532; Orner v. State, 143 S. W. 935, 65 Tex. Cr. R. 137; Lensing v. State (Tex. Cr. App.) 45 S. W. 572.

Burden of showing competency to commit crime. In a prosecution of a person between the ages of 10 and 14 years, it was error to refuse an instruction that the burden was on the state to prove accused's competency to commit the crime, though the court instructed that, in determining his mental responsibility and knowledge of good and evil, the jury should consider all the circumstances, and acquit if they had a reasonable doubt. Brown v. State, 78 S. E. 352, 12 Ga. App. 722.

[5] Clouston v. Maingault, 150 S. W. 858, 105 Ark. 213; Johnson v. Chicago City Ry. Co., 166 Ill. App. 79;

Particularly should such an instruction be given where the circumstances are such as to place the burden of proof upon the defendant as to certain matters.[6] The state of the evidence or the circumstances of the case may, however, make it proper to refuse a charge on the burden of proof,[7] or there may be such admissions by one party or the other as to make it harmless error to refuse to so instruct.[8] So it is proper to refuse such a charge where the evidence is practically uncontradicted, or conclusively proves the fact in issue,[9] or where the question is simply one as to the credibility of conflicting witnesses.[10]

Where the court has charged that the plaintiff, in order to recover, must make out his case by a preponderance of the evidence, it is not error to refuse a further charge that the burden is on him to prove his case by the evidence,[11] and the trial judge is under no obligation to make known his views of the relative condition of the parties as to the burden of proof at every stage of the proceedings.[12]

Berger v. St. Louis Storage & Commission Co., 116 S. W. 444, 136 Mo. App. 36; Franklin v. Friehofer Vienna Baking Co., 58 A. 82, 71 N. J. Law, 112; McCormick v. City of New York, 147 N. Y. S. 917, 162 App. Div. 539.

[6] Stevens v. Pendleton, 53 N. W. 1108, 94 Mich. 405; McIninch v. Evans, 133 N. W. 187, 90 Neb. 243; Crugley v. Grand Trunk Ry. Co. (N. H.) 108 A. 293; Smith v. Smith (Tex. Civ. App.) 200 S. W. 540.

[7] St. Louis Southwestern Ry. Co. of Texas v. Preston (Tex. Civ. App.) 228 S. W. 928; Producer's Oil Co. v. State (Tex. Civ. App.) 213 S. W. 349; Davis v. Davis, 49 S. W. 726, 20 Tex. Civ. App. 310; Howard v. Britton, 71 Tex. 286, 9 S. W. 73.

[8] Dillard v. Louisville & N. R. Co., 2 Lea (Tenn.) 288.

[9] In re Yetter's Estate, 55 Minn. 452, 57 N. W. 147; Milmo Nat. Bank v. Convery (Tex. Civ. App.) 49 S. W. 926.

[10] Texas & N. O. R. Co. v. Syfan (Tex. Civ. App.) 43 S. W. 551.

[11] City of Victoria v. Victoria County (Tex. Civ. App.) 115 S. W. 67; Houston Ice & Brewing Co. v. Nicolini (Tex. Civ. App.) 96 S. W. 84; Galveston City Ry. Co. v. Chapman, 80 S. W. 856, 35 Tex. Civ. App. 551; Western Union Tel. Co. v. Bowles (Tex. Civ. App.) 76 S. W. 456; Houston & T. C. R. Co. v. Dotson, 38 S. W. 642, 15 Tex. Civ. App. 73.

Effect of instruction requiring clear and unequivocal proof. In an action for personal services, where the jury were instructed that the contract must be established by clear and unequivocal proof, it is not error to refuse to give another instruction putting the burden on plaintiff to prove the existence of the contract. Rudy v. Rudy, 33 Ohio Cir. Ct. R. 359.

Failure to request more specific instructions. An instruction, concerning the burden of proof, that plaintiff must prove the affirmative issues tendered by his complaint by a preponderance of evidence, is sufficient when no further instruction is requested. Nichol v. Laumeister, 102 Cal. 658, 36 P. 925.

[12] Hovey v. Hobson, 55 Me. 256; Mears v. Mears, 15 Ohio St. 90.

§ 204. Necessity of request for instructions

In the absence of any request for instructions on the burden of proof, it will ordinarily not be error to fail to give them,[13] and where the court has laid down in general terms the rule as to preponderance of the evidence, the failure to give more specific instructions on the burden of proof is not error, in the absence of a request therefor.[14] So where the court correctly charges as to the general burden of proof, its failure to instruct as to the shifting of the burden which may arise during the case is not error, unless a request has been made for such an instruction,[15] but, where affirmative matter is set up in an answer, the court, on its own motion, should instruct the jury that as to such matter the burden of proof is upon the defendant,[16] and a positive

[13] **Cal.** Wyatt v. Pacific Electric Ry. Co., 103 P. 892, 156 Cal. 170.

Conn. Miles v. Strong, 36 A. 55, 68 Conn. 273.

Ga. Purity Extract & Tonic Co. v. Holmes-Hartsfield Co., 92 S. E. 548, 20 Ga. App. 105; Lazenby v. Citizens' Bank, 92 S. E. 391, 20 Ga. App. 53; Western Union Telegraph Co. v. Travis, 86 S. E. 221, 144 Ga. 110; Martin v. Gibbons, 80 S. E. 522, 14 Ga. App. 136; Whittle v. Central of Georgia Ry. Co., 74 S. E. 1100, 11 Ga. App. 257; Johnson v. Reeves, 66 S. E. 1081, 133 Ga. 822; Southern Ry. Co. v. Wright, 64 S. E. 703, 6 Ga. App. 172.

Ill. Drury v. Connell, 52 N. E. 368, 177 Ill. 43.

Iowa. D. M. Osborne & Co. v. Ringland & Co., 98 N. W. 116, 122 Iowa, 329; Harvey v. City of Clarinda, 82 N. W. 994, 111 Iowa, 528; Reizenstein v. Clark, 73 N. W. 588, 104 Iowa, 287.

Ky. Anderson v. Baird, 40 S. W. 923.

Mass. Nicholson v. Feindel, 107 N. E. 353, 219 Mass. 490.

Mich. Donovan v. Bromley, 71 N. W. 523, 113 Mich. 53.

Minn. In re Paulson's Estate, 150 N. W. 914, 128 Minn. 277.

Mo. Denny v. Brown (Sup.) 193 S. W. 552; Eminence Realty & Brokerage Co. v. Randolph (App.) 180 S. W. 25.

S. D. Frye v. Ferguson, 6 S. D. 392, 61 N. W. 161.

Tenn. Shelby County v. Fisher, 194 S. W. 576, 137 Tenn. 507.

Tex. San Antonio & A. P. Ry. Co. v. Moerbe (Civ. App.) 189 S. W. 128; Hall v. Ray (Civ. App.) 179 S. W. 1135; Franklin v. International & G. N. Ry. Co. (Civ. App.) 174 S. W. 333; McKee v. Garner (Civ. App.) 168 S. W. 1031; Texas Baptist University v. Patton (Civ. App.) 145 S. W. 1063; Louisiana & T. Lumber Co. v. Dupuy, 52 Tex. Civ. App. 46, 113 S. W. 973.

Wis. Coppins v. Town of Jefferson, 105 N. W. 1078, 126 Wis. 578.

Evidence not conflicting. Failure to instruct the jury that the burden of proof was on plaintiff, and that before he could recover he must produce a fair preponderance of the testimony, is not error when the evidence is not conflicting, and no such instruction is requested by defendant. Smith v. Chicago, M. & St. P. Ry. Co., 60 Iowa, 512, 15 N. W. 303.

[14] Brandon v. Pritchett, 66 S. E. 247, 133 Ga. 480; Central of Georgia Ry. Co. v. Manchester Mfg. Co., 64 S. E. 1128, 6 Ga. App. 254; Houston & T. C. R. Co. v. Lemair, 119 S. W. 1162, 55 Tex. Civ. App. 237; Wichita Land & Cattle Co. v. State, 80 Tex. 684, 16 S. W. 649.

[15] Albany Warehouse Co. v. Hillman, 94 S. E. 569, 147 Ga. 490.

[16] Whipple v. Preece, 56 P. 296, 18 Utah, 454.

In a will contest, where the court ruled at the beginning that the burden was on proponent, but charged

misdirection as to the burden of proof is ground for reversal, although no other instruction calling the attention of the court to such error is requested,[17] and in a criminal case, where the state has put in evidence the written statement of the defendant as to the manner of committing the act alleged to constitute the crime of which he is accused, the court, although not requested so to do, should charge that the burden is on the state to disprove such statement.[18]

§ 205. Sufficiency of instructions

Where a charge on the burden of proof is given, it should be so framed as to place the burden on the plaintiff to prove all the facts necessary to entitle him to recover,[19] and an instruction that the plaintiff has the burden of proving the material allegations of his complaint, without stating what allegations are material, will not warrant the refusal of a request for more specific instructions.[20] On the other hand, a requested charge that the plaintiff has the burden of proving the averments of his complaint, or some count thereof, is too exacting in its requirements,[21] and the court is not required to instruct that the burden of proving all the material allegations of the complaint is on the plaintiff, where some of the material allegations are admitted by the answer.[22] So an instruction requiring a plaintiff, in order to succeed, to prove facts the existence of which is presumed by law from the existence of the facts shown, is erroneous, as imposing a burden beyond that which the law exacts.[23] Where the case is submitted upon special issues, the court will sufficiently charge upon the burden of proof if it tells the jury to return an answer with respect to each of such issues in accordance with the preponderance of the evidence.[24]

that as to the issue of insanity only the burden was on protestant, its failing to charge as to the burden on the issue of undue influence was erroneous, though proponent's counsel did not request instruction. In re Hansen's Will, 167 P. 256, 50 Utah, 207.

[17] Gowdey v. Robbins, 3 App. Div. 353, 38 N. Y. S. 280.

[18] Casey v. State, 113 S. W. 534, 54 Tex. Cr. R. 584; Combs v. State, 108 S. W. 649, 52 Tex. Cr. R. 613.

[19] Metropolitan St. Ry. Co. v. Wishert (Tex. Civ. App.) 89 S. W. 460.

Proof of every ingredient of crime. That an instruction charges that it devolves on the government to prove "every material fact" necessary to constitute the offense, instead of "every material ingredient," does not constitute error. Guignard v. United States (C. C. A. S. C.) 258 F. 607, 170 C. C. A. 61.

[20] Riddle v. Russell, 79 N. W. 363, 108 Iowa, 591.

[21] Tutwiler v. Burns, 49 So. 455, 160 Ala. 386.

[22] Alms v. Conway, 78 Mo. App. 490.

[23] Dawson v. Wombles, 100 S. W. 547, 123 Mo. App. 340.

[24] Texas Power & Light Co. v. Bristow (Tex. Civ. App.) 213 S. W. 702.

In a criminal case in some jurisdictions an instruction that the defendant is presumed to be innocent until his guilt is established by legal evidence, and that if, after considering the entire case, the jury have a reasonable doubt of such guilt, they should acquit him, sufficiently informs the jury that the burden is on the state to prove guilt,[25] and the court is not obliged to state in each paragraph of its instructions that the state must prove its case and each element thereof beyond a reasonable doubt.[26]

Where the defendant sets up an affirmative defense, it is error to charge that the burden of proof is on plaintiff to establish the material allegations of his complaint, without stating that the burden of establishing the truth of the answer lies on defendant,[27] and where the defendant admits a prima facie case, and sets up an affirmative defense, it is proper to charge that the defendant must prove his defense by a preponderance of the evidence.[28] Where the defendant sets up more than one defense instructions with respect to the burden of proof resting on him should be so framed as not to require him to establish all of his defenses in order to prevent the plaintiff from recovering.[29] An instruction on the burden of proof does not involve the character of evidence necessary to discharge that burden, and cannot therefore be regarded as objectionable because it does not state that the jury may consider circumstantial as well as direct evidence upon the question at issue.[30]

§ 206. Shifting burden of proof

The phrase "burden of proof" has a double meaning. It is not improper to instruct that the burden of proof shifts from one party to the other, when that phrase is employed to express the

[25] Watts v. State, 92 S. E. 966, 20 Ga. App. 182; Day v. State, 21 Tex. App. 213, 17 S. W. 262.

See Varner v. State (Ga. App.) 108 S. E. 80.

[26] State v. Hart, 118 N. W. 784, 140 Iowa, 456.

[27] Stevens v. Stephens, 47 P. 76, 14 Utah, 255.

[28] Fisher v. Shands, 102 S. E. 190, 24 Ga. App. 743.

[29] Williamson v. Robinson, 111 N. W. 1012, 134 Iowa, 345; Liverpool & L. & G. Ins. Co. v. Joy, 62 S. W. 546, 26 Tex. Civ. App. 613, rehearing denied London & L. & G. Ins. Co. v. Same, 64 S. W. 786, 26 Tex. Civ. App. 613.

Instructions not improper within rule, when considered as a whole. Where the court distinctly charged that if plaintiff's alleged representations or any of them were false or untrue, defendant was justified in revoking the partnership contract, an instruction that defendant must establish the truth of the allegations of his affirmative defenses of incompetency, and plaintiff's fraudulent representations, etc., was not misleading as imposing on defendant the burden of proving all such averments. Ramsay v. Meade, 86 P. 1018, 37 Colo. 465.

[30] New Castle Bridge Co. v. Doty, 76 N. E. 557, 37 Ind. App. 84.

idea that it is incumbent upon a party at a certain stage of the trial to go forward with the evidence on a given question.[31] When, however, such phrase is used to convey the idea that a named litigant must establish a given proposition, it is not accurate to say that the burden of proof shifts at any point in the proceedings.[32]

In criminal cases the burden of proof does not shift, but remains upon the people during the whole trial.[33] It is therefore error for the court to instruct that, when the state has made out a prima facie case, it is then incumbent upon the defendant to restore himself to that presumption of innocence to which he was entitled at the commencement of the trial,[34] or that when, in the opinion of the jury, the evidence is sufficient to show the guilt of defendant beyond a reasonable doubt, the burden then rests upon him to establish his innocence.[35] In some jurisdictions the accused is entitled to an instruction declaring that the burden of proof never shifts to the defendant.[36] In other jurisdictions, if the usual instructions on reasonable doubt and presumption of innocence are given,[37] it is not error, unless the peculiar circumstances of the case require it,[38] to refuse an instruction that the burden never shifts to the defendant.

In criminal cases instructions should, in clear and unmistakable language, place the burden of proof upon the state to show every essential element of the offense charged, and an instruction which

[31] Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190.

[32] Hansen v. Oregon-Washington R. & Nav. Co., 188 P. 963, 97 Or. 190; Askay v. Maloney, 179 P. 899, 92 Or. 566.

Instructions not erroneous within rule. In action on accident policy involving issue of whether insured's death was due to accident or suicide where evidence thereon was purely circumstantial, instruction that presumption was in favor of accident was proper, and did not operate to shift burden of proof as to cause of death from plaintiff to defendant. Wilkinson v. Standard Accident Ins. Co. of Detroit, Mich., 180 P. 607, 180 Cal. 252. An instruction that the burden of proof was on plaintiff to establish the material allegations of his petition, but that this burden does not remain with the plaintiff on the question of an affirmative defense, was not erroneous, as instructing the jury that the burden of proof as to any issue tendered by the petition shifted, but merely that the burden of proof rested on defendant to establish its affirmative defense. City of McCook v. McAdams, 106 N. W. 988, 76 Neb. 1, reversed 110 N. W. 1005, 76 Neb. 1.

[33] People v. McWhorter, 93 Mich. 641, 53 N. W. 780.

[34] Commonwealth v. Kimball, 24 Pick. (Mass.) 366, 35 Am. Dec. 326; State v. McCluer, 5 Nev. 132; Chapman v. State, 1 Tex. App. 728.

[35] Caughman v. United States (C. C. A. S. C.) 258 F. 434, 169 C. C. A. 450.

[36] People v. Schultz-Knighten, 115 N. E. 140, 277 Ill. 238.

[37] Beeson v. State, 130 S. W. 1006, 60 Tex. Cr. R. 39.

[38] Hawkins v. State, 179 S. W. 448, 77 Tex. Cr. R. 520; Miller v. State, 144 S. W. 239, 65 Tex. Cr. R. 302; Phillips v. State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471.

is so framed or so involved as to be likely to mislead the jury into thinking that the burden is upon the defendant to prove the absence or nonexistence of any such essential element is cause for reversal.[39] An instruction that a doubt to justify acquittal must

[39] **U. S.** (C. C. A. Ky.) German v. United States, 120 F. 666, 57 C. C. A. 128.

Fla. Padgett v. State, 24 So. 145, 40 Fla. 451; Alvarez v. State, 27 So. 40, 41 Fla. 532.

Ga. Nixon v. State, 80 S. E. 513, 14 Ga. App. 261, following McDonald v. State, 77 S. E. 655, 12 Ga. App. 526.

Iowa. State v. Brady, 91 N. W. 801.

Neb. Chamberlain v. State, 115 N. W. 555, 80 Neb. 812; Snider v. State, 76 N. W. 574, 56 Neb. 309; Burger v. State, 34 Neb. 397, 51 N. W. 1027.

N. J. State v. Sandt (Sup.) 111 A. 651.

Okl. Adair v. State, 180 P. 253, 15 Okl. Cr. 619; Findley v. State, 162 P. 680, 13 Okl. Cr. 128; Courtney v. State, 152 P. 1134, 12 Okl. Cr. 169; Carter v. State, 152 P. 1132, 12 Okl. Cr. 164; Bauer v. State, 107 P. 525, 3 Okl. Cr. 529; Mumbrauer v. State, 106 P. 559, 3 Okl. Cr. 429; Frazier v. United States, 103 P. 373, 2 Okl. Cr. 657.

Pa. Commonwealth v. Greene, 75 A. 1024, 227 Pa. 86, 136 Am. St. Rep. 867.

Tex. Alexander v. State, 204 S. W. 644, 84 Tex. Cr. R. 75; Coy v. State, 171 S. W. 221, 75 Tex. Cr. R. 85; Maloney v. State, 125 S. W. 36, 57 Tex. Cr. R. 435; Harris v. State, 117 S. W. 839, 55 Tex. Cr. R. 469; Stewart v. State, 101 S. W. 800, 51 Tex. Cr. R. 223.

Wash. State v. Hatfield, 118 P. 735, 65 Wash. 550, Ann. Cas. 1913B, 895; State v. Pilling, 102 P. 230, 53 Wash. 464, 132 Am. St. Rep. 1080.

Wyo. Meldrum v. State, 146 P. 596, 23 Wyo. 12.

Instructions improper within rule. Instruction that, if jury found beyond a reasonable doubt that, when defendant killed deceased, the deceased was attempting to assault defendant, so as to endanger his life or to do him great bodily harm and if such danger then reasonably appeared to defendant, and he then killed deceased, it was in self-defense, and defendant should be acquitted. Slate v. State, 175 P. 843, 15 Okl. Cr. 201. An instruction, on the trial of a teacher for assaulting a scholar, that the teacher had the right to the exercise of moderate restraint over the scholar, and that if the teacher chastised the scholar, and used no more force than was necessary in the exercise of such restraint, he would not be guilty. Greer v. State (Tex. Cr. App.) 106 S. W. 359. A charge, in a murder case, that if the jury believe beyond a reasonable doubt that, a short time prior to the alleged killing of decedent by accused, decedent had assaulted accused, and that decedent abandoned the assault as far as he could, and accused then, under the immediate influence of sudden passion, which was produced by the assault, killed deceased, and if they find beyond a reasonable doubt that accused was not acting in self-defense, then he would be guilty only of manslaughter. Huddleston v. State, 112 S. W. 64, 54 Tex. Cr. R. 93, 130 Am. St. Rep. 875. An instruction that if the jury believed defendant was guilty of some grade of offense, but they had a reasonable doubt whether he was guilty of some grade of homicide or of an aggravated assault, then they must give defendant the benefit of the doubt and not find him guilty of a higher grade of offense than aggravated assault, if he was found guilty of that, or, if they found from the evidence that defendant was not guilty of any offense, they should return a verdict of not guilty. Grant v. State, 120 S. W. 481, 56 Tex. Cr. R. 411. An instruction, in a case of criminal prosecution for libel, that it was incumbent on defendant to satisfy them that the libel was not published with his knowledge or authority, and, unless he had so satisfied them, they should return a verdict of guilty. State v. Grinstead, 64 P. 49,

be reasonable, and unless it would cause a reasonable man to hesitate it is insufficient to warrant a verdict of not guilty, is erroneous, as intimating that guilt is a natural presumption, and

62 Kan. 593, affirming judgment 61 P. 976, 10 Kan. App. 78. A charge in a criminal case, in which intent was an essential ingredient of the offense, was erroneous, where, after correctly stating that the burden rested upon the government to prove such intent beyond a reasonable doubt, but that it might be inferred from the acts of the defendant, who was presumed to have intended the natural and probable consequences of his acts, it was further stated that, if the acts proven were such as to raise an inference of guilty intent, the burden was thrown upon defendant to rebut such inference by evidence sufficiently strong to satisfy the jury beyond a reasonable doubt that there was no guilty intent; and the error cannot be held harmless where the general instruction that the burden of proof rested on the government, and continued throughout the case, was qualified by the words, "subject to what will be thereafter said upon the question of proof of intent." McKnight v. United States (C. C. A. Ky.) 115 F. 972, 54 C. C. A. 358.

Instructions not improper within rule. An instruction that the presumption of innocence remains with accused till by competent evidence the state establishes guilt beyond a reasonable doubt. Van Syoc v. State, 96 N. W. 266, 69 Neb. 520. An instruction that, if defendant did not assault the prosecutrix, or if there was a reasonable doubt as to whether he assaulted her, he must be acquitted. Conger v. State, 140 S. W. 1112, 63 Tex. Cr. R. 312. An instruction that the burden of showing an alibi is on the defendant, but, if the testimony in the whole case raises a reasonable doubt of defendant's presence when the crime was committed, he should be acquitted. Rayburn v. State, 63 S. W. 356, 69 Ark. 177. An instruction on the defense of alibi, that if accused was elsewhere than at the place of the commission of the crime charged he was not guilty, and if on a consideration of the evidence the jury have a reasonable doubt as to whether accused was elsewhere than at the place of the commission of the crime at the time of its commission, a verdict of not guilty should be rendered. State v. Bateman, 95 S. W. 413, 196 Mo. 35. A charge, in a prosecution for burglary where an accomplice testified against accused, that if the accomplice broke into the house without the presence of accused and afterwards gave accused some of the property taken, accused could not be convicted, even if he knew that the accomplice had stolen the property, and unless the evidence showed beyond a reasonable doubt that accused did not so obtain the goods, if he had them, and that he was present at the entry into the house and agreed to the act, he must be acquitted, did not place the burden of proof on accused. Criner v. State, 109 S. W. 128, 53 Tex. Cr. R. 174. An instruction that, if the jury found, beyond a reasonable doubt, that while a congregation was assembled for religious worship accused willfully disturbed the congregation by loud talking, etc., he was guilty. Webb v. State, 140 S. W. 95, 63 Tex. Cr. R. 207. A charge, in a murder trial, that if accused in sudden passion, as explained in the charge, and not in self-defense, aroused by adequate cause, unlawfully shot decedent, he should be convicted of manslaughter. Oldham v. State, 142 S. W. 13, 63 Tex. Cr. R. 527. A charge, in a homicide case, that a perfect right of self-defense exists only where accused acted from necessity, and was not himself in the wrong, and where his conduct was not intended or reasonably calculated to produce the necessity which required his action, and that if he was in the wrong, or was violating the law, and because of his own wrong, and with intent to bring on the difficulty, he was thereby placed in a position where it became necessary for him to defend himself from attack, the law

that they must find a doubt from the evidence in order to justify acquittal.[40]

In a criminal case jurors are not called upon to pass upon the question of the innocence of the defendant,[41] and instructions which base his right to an acquittal on the belief of the jury in his innocence instead of his guilt are erroneous.[42] Thus instruc-

limits his right of self-defense, according to the degree of his own wrong, and if accused sought decedent, armed with a deadly weapon, with intent to kill him or inflict serious bodily harm upon him, and by acts done or words used with intent to provoke a difficulty with decedent, and reasonably calculated to provoke decedent to attack him, and decedent did attack him or made a demonstration reasonably indicating to accused, viewed from his point of view, that he was in danger of death or serious bodily harm, accused could not justify the killing on the ground of self-defense, and, if he killed decedent under such circumstances, he would be guilty of first or second degree murder, does not cast the burden upon accused of proving that he did not intend to provoke the difficulty. Keeton v. State, 128 S. W. 404, 59 Tex. Cr. R. 316. Where, on a trial for homicide, the court charged that the burden of proof rested on the prosecution, and if, on the evidence, the jury entertained a reasonable doubt of the guilt of accused, he should be acquitted, and that the burden of proof remained with the prosecution, the refusal to charge that, if accused believed himself to be in danger of bodily harm from decedent, he was justified in the killing, etc., was not erroneous, as placing on the accused the burden of convincing the jury that his testimony was true. People v. Mallon, 101 N. Y. S. 814, 116 App. Div. 425, 19 N. Y. Ann. Cas. 325, judgment affirmed 81 N. E. 1171, 189 N. Y. 520.

[40] McAllister v. State, 88 N. W. 212, 112 Wis. 496.

[41] McNair v. State, 14 Tex. App. 78.

[42] Moore v. State, 28 Tex. App. 377, 13 S. W. 152; Shamburger v. State, 24 Tex. App. 433, 6 S. W. 540; Wagner v. State, 17 Tex. App. 554; Brinkoeter v. State, 14 Tex. App. 67.

Instructions not improper within rule. A charge, in a prosecution for murder, that if the jury believed from the evidence or the want of it that defendant did not place strychnine in a syringe used by deceased, or that he did it without intent to poison and kill her, or that she did not die by poison, or if the jury had a reasonable doubt of either of these propositions they should acquit the defendant. Rice v. State, 94 S. W. 1024, 49 Tex. Cr. R. 569. An instruction that, where a homicide is proved beyond a reasonable doubt, the presumption is that it is murder in the second degree and if the state would elevate it to murder in the first degree it must prove the characteristics of that crime, and if defendant would reduce it to manslaughter the burden is on him, does not place on defendant the burden of proving he is not guilty of murder in the second degree. State v. Melvern, 72 P. 489, 32 Wash. 7. Where, on a trial for murder, the court charged as to what constituted manslaughter, and that to convict defendant of that offense the jury must find the necessary facts beyond a reasonable doubt, the charge was not objectionable as changing the burden of proof, and requiring defendant to prove manslaughter beyond a reasonable doubt before the jury could acquit him of murder, though manslaughter is a defense to the charge of murder. Spangler v. State, 61 S. W. 314, 42 Tex. Cr. R. 233. A charge in a prosecution for violation of a local option law that, if the evidence showed beyond a reasonable doubt that defendant accepted money from the prosecuting witness under an implied agreement to furnish him whisky, and, pursuant thereto, placed

tions which, instead of positively affirming the duty of the state to establish the guilt of the defendant, approach the question negatively and inform the jury that if they believe, or are satisfied, that the accused did not commit the crime charged,[43] or if they are satisfied with the contentions of the accused,[44] or if they believe from the evidence that certain essential facts have not been established,[45] they should acquit the defendant, are objectionable, as likely to lead the jury to think that he must prove his innocence. Instructions which require, in order to acquit an accused, that the facts relied upon by him as a defense be shown

whisky where he could get it, he was guilty, unless he acted as agent for witness in procuring the whisky, and had no pecuniary interest in the sale, in which case he was not guilty. Grimes v. State, 72 S. W. 589, 44 Tex. Cr. R. 503. An instruction in a trial for theft that if defendant, acting with another, committed the theft, he should be convicted, but, if he had no guilty connection with the taking, he should be acquitted. Alderman v. State (Tex. Cr. App.) 22 S. W. 1096. A charge, in a prosecution of a bailee of a horse for theft thereof, that if the bailor authorized or gave defendant his permission or consent to sell or otherwise dispose of the horse, or if the jury had a reasonable doubt thereof, they should acquit defendant. Smith v. State, 76 S. W. 434, 45 Tex. Cr. R. 251. A charge, where defendant, on indictment for larceny, seeks to establish an alibi, that the burden is on the state to establish beyond a reasonable doubt that the larceny was committed, and, when this is done, defendant must establish his alibi by a preponderance of the evidence, "and if the entire evidence on the whole case raises a reasonable doubt as to defendant's guilt" he must be acquitted, is not erroneous, as relieving the state of the burden of proving defendant's guilt beyond a reasonable doubt. State v. Van Winkle, 80 Iowa, 15, 45 N. W. 388.

[43] McNish v. State, 34 So. 219, 45 Fla. 83, 110 Am. St. Rep. 65; Williams v. State, 42 S. E. 745, 116 Ga. 525; Brady v. State, 115 P. 605, 4 Okl. Cr. xiii; Hodge v. State, 115 P. 379, 5 Okl. Cr. 703; Johnson v. State, 201 S. W. 177, 83 Tex. Cr. R. 49.

[44] State v. Kirkland, 101 S. E. 560, 178 N. C. 810.

[45] **Ark.** Lovejoy v. State, 62 Ark. 478, 36 S. W. 575.

Okl. Davis v. State (Cr. App.) 191 P. 1044.

Tex. Claunch v. State, 198 S. W. 307, 82 Tex. Cr. R. 114; Green v. State, 98 S. W. 1059, 49 Tex. Cr. R. 645; Cooper v. State, 89 S. W. 816, 48 Tex. Cr. R. 608; Rutherford v. State, 88 S. W. 810, 48 Tex. Cr. R. 431; Stanfield v. State, 62 S. W. 917, 43 Tex. Cr. R. 10; Johnson v. State, 30 Tex. App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930, following 29 Tex. App. 150, 15 S. W. 647; Lewis v. State, 29 Tex. App. 105, 14 S. W. 1008.

Instructions held erroneous within rule. Where, on a trial for violating the local option law, a witness testified that he went to a cold storage and filled out a blank for whisky; that defendant furnishing the blank stated that the witness could not obtain the whisky until it got there; that the witness went to a third person in another part of the house, informed him of his order, and asked if he could not obtain whisky; that the third person went to defendant and told him to let the witness have one of the third person's bottles; and that defendant handed to witness a bottle of whisky—an instruction that if the witness made an order for whisky through defendant, and borrowed whisky from the third person, and defendant took no part in such loan for the purpose of evading the law, defendant should be acquitted, was erroneous, as shifting the burden of proof and requiring defendant to prove a negative in order to establish

to the satisfaction of the jury,[46] or which authorize an acquittal if the jury find the facts relied upon as a defense,[47] are erroneous, as shifting the burden of proof to the defendant. On the issue of self-defense in a criminal case, a charge that the jury must find that the defendant was free from fault in bringing on the difficulty before he could set up self-defense misplaces the burden of proof on the issue.[48]

§ 207. Effect of erroneous instruction

An instruction misplacing the burden of proof will be cause for reversal, if the appellate court cannot say that prejudice to the complaining party did not result therefrom;[49] but the rule is otherwise where it appears that no such prejudice has resulted.[50]

his innocence. Randell v. State, 90 S. W. 1012, 49 Tex. Cr. R. 261.

[46] Trogdon v. State, 133 Ind. 1, 32 N. E. 725; State v. Castle, 46 S. E. 1, 133 N. C. 769; Potts v. Commonwealth, 73 S. E. 470, 113 Va. 732.

Compare State v. Carland, 90 N. C. 668.

Effect of statute. In a murder case, it was not error to charge a statutory provision that, upon trial for murder, the commission of the homicide by accused being proved, the burden of proving circumstances of mitigation, justification, or excuse devolves upon him, unless the proof of the prosecution tends to show that the crime committed only amounts to manslaughter, or that accused was justifiable or excusable. Lumpkin v. State, 115 P. 478, 5 Okl. Cr. 488. Provisions of a statute declaring that, "when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the act," should not be given in charging a jury, except in exceptional cases where the burden of proof rests upon the defendant to establish his defense. Thomas v. State, 14 Tex. App. 200.

[47] Stuart v. State, 124 S. W. 656, 57 Tex. Cr. R. 592.

Instructions not improper within rule. In a trial for assault with intent to murder, an instruction that, if from the acts or words of prosecutor there was created in the mind of accused a reasonable apprehension that she was in danger of losing her life or of suffering serious bodily harm, she had the right to defend herself from such danger viewed from her standpoint, etc., and that if accused committed the assault as a means of defense, believing that she was in danger of losing her life, etc., she should be acquitted, coupled with a charge that an accused is presumed to be innocent until his guilt is established beyond a reasonable doubt, was not erroneous, as shifting the burden of proof and requiring accused to establish affirmatively the facts constituting her defense. Edwards v. State, 125 S. W. 894, 58 Tex. Cr. R. 342.

[48] Brown v. State (Ala.) 39 So. 719.

[49] Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; McNutt v. Kaufman, 26 Ohio St. 127; Judge v. Masonic Mut. Ben. Ass'n, 30 Ohio Cir. Ct. R. 133.

[50] **Ala.** Ellis v. Allen, 80 Ala. 515, 2 So. 676.

Ga. Moore v. Brewer, 94 Ga. 260, 21 S. E. 460.

Mont. Donovan-McCormick Co. v. Sparr, 85 P. 1029, 34 Mont. 237.

Neb. Anderson v. Chicago, B. & Q. R. Co., 35 Neb. 95, 52 N. W. 840.

Tex. Texas & P. Ry. Co. v. Reed (Civ. App.) 32 S. W. 118; Crutcher v. Schick, 10 Tex. Civ. App. 676, 32 S. W. 75; Marsalis v. Patton, 83 Tex. 521, 18 S. W. 1070.

CHAPTER XIV

INSTRUCTIONS WITH REGARD TO PROBATIVE FORCE OF PARTICULAR CLASSES OF EVIDENCE

A. Opinion Evidence

§ 208. Nonexpert testimony.
209. Expert testimony.
210. Value of opinion evidence as dependent upon truth and materiality of facts on which opinion based.

B. Positive and Negative Testimony

211. Necessity and propriety of instructions as to relative weight.
212. Sufficiency of instructions.

C. Admissions and Confessions

1. *Admissions in Civil Cases*

213. Fact of admissions.
214. Weight of admissions.

2. *In Criminal Cases*

215. Necessity of instructions.
216. Propriety and sufficiency of instructions in general.
217. Instructions on issue of voluntary character of confessions.
218. Instructions on corroboration of confessions.
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221. Necessity or sufficiency of evidence as predicate for instructions.

D. Acts and Declarations of Co-conspirators

222. Propriety and sufficiency of instructions.
223. Declarations of alleged co-conspirator who has been acquitted.

A. Opinion Evidence

Invading province of jury, see ante, §§ 51, 56.

§ 208. Nonexpert testimony

The jury should give weight to the opinion of the nonexpert only as it is based upon the facts detailed by him, and an instruction is erroneous if it authorizes the jury to take into consideration the personal knowledge of the witness independent of such facts.[1]

§ 209. Expert testimony

The court should not cast discredit upon expert testimony,[2] and an instruction calculated to give the jury the impression

[1] Vannest v. Murphy, 112 N. W. 236, 135 Iowa, 123; In re Jones' Estate, 106 N. W. 610, 130 Iowa, 177.

[2] Bradley v. State, 31 Ind. 492.

that they are at liberty to reject, as they see fit, expert testimony given in answer to hypothetical questions, is erroneous.[3] In a criminal case the court cannot charge as a matter of law that opinion evidence must be received with caution, and that where there is an honest difference of opinion among experts the jury ought not to convict.[4] It is not improper, however, in some jurisdictions, under some circumstances, to warn the jury against the value to be given to expert testimony,[5] and the court may tell the jury to consider such evidence in the light of their common observation and experience,[6] and that they may disregard it if they deem it to be unreasonable.[7] In other jurisdictions the giving of instructions cautioning the jury to receive expert evidence with caution rests largely in the discretion of the trial court.[8]

The jury may be instructed to accept or reject expert testimony in the same manner as other testimony,[9] and the court may and should charge that the jury are to consider such testimony under the same rules of credit and discredit as are applied to other testimony, and that the opinions of experts neither establish nor tend to establish the truth of the facts upon which they are based, but that whether the matters testified to are true or false should be determined by the jury.[10]

[3] City of Rock Island v. Marshall, 104 N. E. 1006, 263 Ill. 133; Indianapolis Traction & Terminal Co. v. Taylor, 103 N. E. 812, 55 Ind. App. 309; Cohen v. Riesenberg (Sup.) 126 N. Y. S. 77, 69 Misc. Rep. 599; Lubbe v. Hilgert, 120 N. Y. S. 387, 135 App. Div. 227.

[4] Commonwealth v. Howard, 91 N. E. 397, 205 Mass. 128.

[5] Remfry v. Mutual Life Ins. Co. of New York (Mo. App.) 196 S. W. 775.

[6] Hayes v. Wagner, 77 N. E. 211, 220 Ill. 256, affirming judgment 113 Ill. App. 299.

[7] Buckalew v. Quincy, O. & K. C. Ry. Co., 107 Mo. App. 575, 81 S. W. 1176; State v. Darragh, 54 S. W. 226, 152 Mo. 522.

[8] Wood v. Los Angeles Traction Co., 82 P. 547, 1 Cal. App. 474; People v. Storke (Cal. Sup.) 60 P. 420, order reversed 60 P. 1090, 128 Cal. 486; People v. Smith, 106 Cal. 73, 39 P. 40.

[9] State v. Lyons, 37 So. 890, 113 La. 959.

[10] State v. Crane, 100 S. W. 422, 202 Mo. 54; State v. Wertz, 90 S. W. 838, 191 Mo. 569.

Instructions held proper within rule. Where defendant relied on insanity, an instruction that the opinion of an expert is subject to the same rules and tests as other evidence and if the opinions were utterly at variance with facts established by unimpeached evidence the opinion should be disregarded is not objectionable, as practically telling the jury to believe the experts unless their testimony was contradicted by unimpeachable testimony. State v. Bramlett, 103 S. E. 755, 114 S. C. 389.

Credibility of witness and opportunity for knowing facts. An instruction that the jury should consider the skill of the expert, and value his testimony accordingly, is too narrow, in that it gives undue prominence to the mere skill of the expert, and leaves out of view his credibility as exhibited by his conduct on the witness stand. Blough v. Par-

In the absence of a request for an instruction on the subject of expert testimony, the failure of the court to give such an instruction cannot ordinarily be urged as error.[11]

§ 210. Value of opinion evidence as dependent upon truth and materiality of facts on which opinion based

An instruction is erroneous, which implies that the answers of experts to hypothetical questions may be entitled to some weight, although the statements of fact assumed in such questions are found by the jury to be untrue.[12] It is not only proper to instruct that the opinions of experts expressed in such answers will be of little or no weight unless the jury find that the facts assumed in such questions are true,[13] but the jury should be instructed that the weight to be given to such answers must in the first place depend upon the truthfulness of the facts assumed,[14] and the court should charge that the party calling a witness so testifying must establish the premises included in the hypothetical question by a preponderance of the evidence.[15] Such an instruction should not authorize the jury to pass on the materiality of the facts and circumstances admitted in evidence and incorporated in such hypothetical question, as this would be, as

ry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560. There was no error in refusing to charge that the jury were to consider evidence of expert witnesses as they did evidence of other witnesses, and could believe it in preference to other evidence, if there was a conflict; the request leaving out any consideration of the credibility of the witnesses themselves or their opportunity for knowing the facts as to which they testified. Williams v. State, 51 S. E. 322, 123 Ga. 138.

11 **Colo.** Leitensdorfer v. King, 7 Colo. 436, 4 P. 37.

Ga. Godwin v. Atlantic Coast Line R. Co., 48 S. E. 139, 120 Ga. 747; Bertody v. Ison, 69 Ga. 317; City of Atlanta v. Champe, 66 Ga. 659.

Iowa. Paton v. Lund, 86 N. W. 296, 114 Iowa, 201; Long v. Travellers' Ins. Co., 85 N. W. 24, 113 Iowa, 259.

Mo. Weber v. Strobel, 194 S. W. 272.

12 West v. Knoppenberger, 26 Ohio Cir. Ct. R. 168.

Basis of opinions of nonexperts. In a proceeding to determine the sanity of M. the instruction that the value of opinions of nonexpert witnesses is measured by the facts disclosed by the testimony on which they are based, and, if they do not sustain the opinion, then it is of small weight, but, if they do, it is entitled to proportionately greater weight, was not erroneous as permitting consideration of the opinion of a witness, even though the jury found some of the facts upon which it was based untrue. Conway v. Murphy, 112 N. W. 764, 135 Iowa, 171.

13 State v. Saxon, 86 A. 590, 87 Conn. 5; Patterson v. Springfield Traction Co., 163 S. W. 955, 178 Mo. App. 250.

In California it has been held that such an instruction may be properly refused as embodying no principle of law. People v. Thompson, 117 P. 1033, 16 Cal. App. 748; People v. Kirby, 114 P. 794, 15 Cal. App. 264.

14 Woods v. Incorporated Town of Lisbon, 130 N. W. 372, 150 Iowa, 433; Spiers v. Hendershott, 120 N. W. 1058, 142 Iowa, 446.

15 Haas v. Kundtz, 113 N. E. 826, 94 Ohio St. 238.

has been heretofore shown,[16] to permit the jury to determine a question of law.

B. Positive and Negative Testimony

Power of courts to instruct jury as to comparative values of positive and negative testimony, see ante, § 57.

§ 211. Necessity and propriety of instructions as to relative weight

There is a seeming conflict of authority as to whether a party may be entitled under proper circumstances to an instruction that positive testimony should be accorded more weight than negative. As we have seen in a preceding chapter, such an instruction is regarded in many jurisdictions as an invasion of the province of the jury; but in jurisdictions where the court is allowed to comment on the evidence, it is not improper to so instruct, the matter resting largely in the discretion of the trial court.[17]

In some other jurisdictions such an instruction may be warranted, or a party may have a right to it, where the evidence on one side is purely negative, and not merely negative in form.[18]

[16] Burk v. Reese, 121 N. W. 1016, 143 Iowa, 496; Vannest v. Murphy, 112 N. W. 236, 135 Iowa, 123; Ball v. Skinner, 111 N. W. 1022, 134 Iowa, 298.

[17] Chicago Great Western Ry. Co. v. McDonough (C. C. A. Iowa) 161 F. 657, 88 C. C. A. 517; Cable v. Paine (C. C. Iowa) 8 Fed. 788, 3 McCrary, 169; Rhodes v. United States (C. C. A. Mo.) 79 F. 740, 25 C. C. A. 186.

Where there is positive evidence by those in charge of a train that the whistle was sounded at a crossing, and negative evidence of those within hearing that they did not hear it, the court should, on request, call the attention of the jury to the fact that the law gives a preference to positive over negative testimony. Pyne v. Delaware, L. & W. R. Co., 61 A. 817, 212 Pa. 143.

Testimony that a thing occurred against testimony that it did not occur. Instructing that positive evidence is entitled to more weight than negative always rests largely in the discretion of the court, and it is not error to decline to give such an instruction in a case in which witnesses have testified as positively on the one side that a thing did not occur as on the other side that it did. Denver & R. G. R. Co. v. Lorentzen (C. C. A. Colo.) 79 F. 291, 24 C. C. A. 592.

[18] **Ga.** Williams v. State, 99 S. E. 43, 23 Ga. App. 542; Chewning v. State, 88 S. E. 904, 18 Ga. App. 11; Heywood v. State, 77 S. E. 1130, 12 Ga. App. 643; Selman v. Malcom, 59 S. E. 85, 2 Ga. App. 770; Wood v. State, 58 S. E. 271, 1 Ga. App. 684; Moon v. State, 68 Ga. 687.

Kan. St. Louis & S. F. R. Co. v. Brock, 77 P. 86, 69 Kan. 448.

Wis. Canning v. Chicago & M. Electric Ry. Co., 157 N. W. 532, 163 Wis. 448.

Testimony as to whether defendant fired a gun. Where, on indictment for murder, it was material for the state to show that the prisoner fired the fatal shot, and several witnesses testified that when the fourth shot was fired the weapon was in the hands of the prisoner,

Thus the Wisconsin courts, defining negative testimony as the evidence of a witness, who had opportunity to see, hear, or know of an alleged occurrence, testified to have happened by some other witness, that he did not see, hear, or recollect it,[19] hold that in a proper case it will be error to refuse an instruction that positive testimony is to be preferred to negative.[20] In this and other jurisdictions it is held that evidence merely negative in form, by which is meant evidence which takes the form of recollection and positive denial based thereon, is affirmative in effect, and consequently does not fall within the above rule,[21] and that it is error in such case to instruct on the value of negative testimony as compared with positive.[22]

while he introduced a number of witnesses who were present, but testified that they did "not see the pistol and did not know in whose hands it was," an instruction defining positive and negative evidence, and charging that positive evidence was entitled to greater weight than negative testimony, was not error; the court having also charged that the jury were the sole judges of the faith and credit to be given to the testimony of each of the witnesses. State v. Murray, 51 S. E. 775, 139 N. C. 540.

Witnesses giving negative testimony not shown to have equal opportunity for knowledge. Giving an instruction that, other things being equal, affirmative testimony is entitled to more weight than negative testimony, and that, if a witness testifies he did see certain things, and another of equal credibility testifies he did not see such things, then, if everything else is equal, the witness testifying negatively is entitled to less credit than the one testifying affirmatively, is not error, where the witnesses giving the negative testimony are not shown to have been in as good position as the others to see. In re Wharton's Will, 109 N. W. 492, 132 Iowa, 714.

[19] Anderson v. Horlick's Malted Milk Co., 119 N. W. 342, 137 Wis. 569.

[20] Hildman v. City of Phillips, 82 N. W. 566, 106 Wis. 611.

Negative testimony as to collateral circumstances. Where the evidence as to whether a tannery was a nuisance covered several years, and the witnesses did not have equal knowledge as to its character, the jury should have been instructed that the "positive testimony" of one credible witness was "entitled to more weight than the testimony of several witnesses who testify negatively as to collateral circumstances, merely negative in their character, from which a negative may be inferred." Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

[21] **Ga.** Nelms v. State, 51 S. E. 588, 123 Ga. 575.

Ill. West Chicago St. R. Co. v. Mueller, 46 N. E. 373, 165 Ill. 499, 56 Am. St. Rep. 263, affirming judgment 64 Ill. App. 601; Great Western R. Co. v. Hanks, 25 Ill. 241.

N. Y. Cridler v. Colegrove, 5 N. Y. St. Rep. 232.

Wis. Anderson v. Horlick's Malted Milk Co., 119 N. W. 342, 137 Wis. 569; Kelley v. Schupp, 60 Wis. 76, 18 N. W. 725.

Testimony as to whether one was of temperate habits. There being no substantial contradictory statement as to the matter of drinking by insured prior to his application for insurance, but the real question being whether, conceding this, he was then intemperate, the testimony of witness, based on knowledge and observation as to whether he was temperate, does not call for an instruction on the weight to be given positive and negative testimony. Taylor v. Security Life & Annuity Co., 59 S. E. 139, 145 N. C. 383, 15 L. R. A. (N. S.) 583, 13 Ann. Cas. 248.

[22] Harper v. State, 81 S. E. 817, 14 Ga. App. 603; Peak v. State, 62 S. E.

A failure to charge on the relative values of positive and negative testimony will not be error, in the absence of a request for such an instruction,[23] and if there is no negative testimony in the case, such an instruction would be misleading, and therefore should not be given.[24]

§ 212. Sufficiency of instructions

In jurisdictions where the court is permitted to give instructions to the effect that positive is to be preferred to negative testimony, they should be based upon the hypothesis that the witnesses were equal in credibility and opportunity for knowledge.[25] The jury should also be told what constitutes negative testi-

665, 5 Ga. App. 56; Skinner v. State, 32 S. E. 844, 108 Ga. 747.

Positive testimony that crime was committed opposed by testimony supporting alibi. Where the evidence in behalf of the state in a criminal case consisted of the testimony of a witness or witnesses, who swore positively to the commission of the crime, and the evidence in behalf of the accused consisted of testimony tending to show an alibi, and to impeach the state's witness or witnesses, a charge on the law as to the relative value of positive and negative evidence was not applicable. Atkinson v. State, 37 S. E. 747, 112 Ga. 411.

[23] O'Pry v. State, 83 S. E. 228, 142 Ga. 600; Patterson v. State, 67 S. E. 816, 134 Ga. 264.

[24] Humphries v. State, 28 S. E. 25, 100 Ga. 260. See State v. Henson, 185 P. 1059, 105 Kan. 581; Fullerton Lumber Co. v. Hosford, 176 N. W. 1017, 42 S. D. 642.

[25] **U. S.** (C. C. A. N. Y.) Delaware, L. & W. R. Co. v. Devore, 114 F. 155, 52 C. C. A. 77.

Ariz. Babb v. State, 163 P. 259, 18 Ariz. 505, Ann. Cas. 1918B, 925.

Ga. McDuffie v. State, 101 S. E. 812, 24 Ga. App. 653; Estill v. Estill, 100 S. E. 365, 149 Ga. 384; Chamblee v. Farmers' & Merchants' Bank, 93 S. E. 239, 20 Ga. App. 527; Helms v. State, 72 S. E. 246, 136 Ga. 799; Selman v. Malcom, 59 S. E. 85, 2 Ga. App. 770; Wood v. State, 58 S. E. 271, 1 Ga. App. 684; Warrick v. State, 53 S. E. 1027, 125 Ga. 133; Minor v. State, 48 S. E. 198, 120 Ga. 490; Southern Ry. Co. v. O'Bryan, 42 S. E. 42, 115 Ga. 659.

Ill. Indiana, I. & I. R. Co. v. Otstot, 72 N. E. 387, 212 Ill. 429, affirming judgment 113 Ill. App. 37; Rockwood v. Poundstone, 38 Ill. 199.

Ind. Ohio & M. Ry. Co. v. Buck, 130 Ind. 300, 30 N. E. 19.

Kan. Smith v. Bush, 169 P. 217, 102 Kan. 150.

Wis. Suick v. Krom, 177 N. W. 20, 171 Wis. 254.

See Hess v. Williamsport & N. B. R. Co., 37 A. 568, 181 Pa. 492.

Instructions held sufficient within rule. An instruction that the existence of a fact testified to by one positive witness was rather to be believed than that it did not exist because many witnesses who had the same opportunity of observation swore that they did not see or know of its having transpired but that this did not apply when two persons had equal facilities for seeing or hearing a thing, and one swore that it occurred and the other that it did not, and that in passing on the question the jury should consider and pass on the credibility of the witnesses. Green v. State (Ga. App.) 105 S. E. 634. A charge that direct and positive evidence is rather to be believed than negative evidence, where the witnesses are of equal credibility, and that a witness who testifies positively to the occurrence of a fact is rather to be believed than many witnesses who testify that they did not see the occurrence, providing they are of equal credibility, and all have equal opportunity for knowing the facts

mony,[26] what character of testimony is to be weighed under the rule, and what attendant facts and circumstances should be considered,[27] and in one jurisdiction the jury should be informed in such connection of the distinction above pointed out between testimony essentially negative and testimony that a thing did not occur, as opposed to testimony that it did occur, and told that in the latter case the rule as to the preference of positive over negative testimony does not apply,[28] and it is proper to refuse to charge that mere negative evidence will not warrant the jury in disregarding the positive testimony of a single witness.[29]

C. Admissions and Confessions

1. *Admissions in Civil Cases*

§ 213. Fact of admissions

Testimony in a civil action as to the extrajudicial admissions of a party adverse to his claim presents two phases for the consideration of the jury—one, whether they were made; and the other, as to their effect.[30] With respect to such testimony the trial court may, and should, as the evidence renders useful and proper, instruct the jury concerning the degree of scrutiny and caution to be used in determining whether or not the alleged admissions were in truth made,[31] if care is taken by the court not

about which they testify, is not subject to the objection that the jury might understand therefrom that the witness swearing positively was not rather to be believed than the witnesses swearing negatively, if the former had better opportunity than the latter for knowing the facts. Lyens v. State, 66 S. E. 792, 133 Ga. 587. An instruction that positive testimony outweighs negative testimony, the witnesses being equally credible, sufficiently qualifies a charge on the subject of positive and negative testimony, in which the jury are told that the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist, because many witnesses swore they did not see or know of it having transpired. Wood v. State, 71 S. E. 500, 9 Ga. App. 365.

[26] Suick v. Krom, 177 N. W. 20, 171 Wis. 254.

[27] State v. McLeod, 89 P. 831, 35 Mont. 372.

[28] Benton v. State, 60 S. E. 116, 3 Ga. App. 453; Selman v. Malcom, 59 S. E. 85, 2 Ga. App. 770; Whitfield v. State, 58 S. E. 385, 2 Ga. App. 124; Wood v. State, 58 S. E. 271, 1 Ga. App. 684.

[29] Campbell v. New England Mut. Life Ins. Co., 98 Mass. 381; Dyer v. Lalor (Vt.) 109 A. 30.

[30] Gangi v. Fradus, 227 N. Y. 452, 125 N. E. 677.

[31] **U. S.** (C. C. A. Wash.) Frankfort Marine, Accident & Plate Glass Ins. Co. v. John B. Stevens Co., 220 F. 77, 135 C. C. A. 645.

Ga. Pitts v. Rape (App.) 104 S. E. 643; Mims v. Brook & Co., 59 S. E. 711, 3 Ga. App. 247; Stewart v. De Loach, 86 Ga. 729, 12 S. E. 1067.

Iowa. Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906.

Minn. Blume v. Chicago, M. & St. P. Ry. Co., 158 N. W. 418, 133 Minn. 348, Ann. Cas. 1918D, 297.

Mont. McCrimmon v. Murray, 117 P. 73, 43 Mont. 457.

to reflect any opinion or to lead the jury to deny to the testimony its proper weight,[32] and the jury are told that it is for them to determine the weight of such evidence according to the way it affects their own minds,[33] and it has been held that, where alleged verbal admissions were made in casual conversations with disinterested persons, it is error to refuse an instruction that testimony as to such admissions is of the weakest kind.[34]

§ 214. Weight of admissions

As is indicated in the foregoing statement of the rule as to the caution to be observed in determining whether an alleged admission was in fact made, the court should not unduly minimize the effect of testimony respecting admissions,[35] or deny to such evidence its natural and reasonable effect.[36] An instruction that all verbal admissions should be received with caution should be accompanied by the qualification that, when an admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature,[37] and it is error for the court to instruct as a rule of law that admissions of a party to a civil action are probatively weak evidence or have not

N. Y. Gangi v. Fradus, 227 N. Y. 452, 125 N. E. 452.

Or. Gleason v. Denson, 132 P. 530, 65 Or. 199; State v. Hanna, 57 P. 629, 35 Or. 195.

See Merrill v. Hole, 85 Iowa, 66, 52 N. W. 4.

Great caution. Where, in an action seeking to charge defendant as a partner upon an admission made by him under circumstances calling for an explicit admission or denial, his counsel requested an instruction to the jury that "admissions are the lowest class of proof, and should be received and considered by the jury with great caution," the action of the court in refusing to give such instruction, but substituting a charge that, "with respect to verbal admissions, they ought to be received with great caution" was held proper. Tozer v. Hershey, 15 Minn. 257 (Gil. 197).

[32] Hart v. Village of New Haven, 89 N. W. 677, 130 Mich. 181.

[33] Moore v. Dickinson, 39 S. C. 441, 17 S. E. 998.

[34] Grotjan v. Rice, 102 N. W. 551, 124 Wis. 253.

Contra—Gianini v. Cerini, 171 P. 1007, 100 Wash. 687.

[35] Scurlock v. City of Boone, 120 N. W. 313, 142 Iowa, 580.

Instructing as to dangerous character of evidence. Where a defense that there is nothing due on the note in suit is based on testimony of alleged admissions of plaintiff, and the jury are instructed that such testimony should be received with great caution, a request for an instruction that such evidence is the most dangerous that can be admitted in a court of justice, and the most liable to abuse, is properly refused. McCarty v. Scanlon, 41 A. 345, 187 Pa. 495, 43 Wkly. Notes Cas. 111.

[36] Brown v. Atlantic Coast Line R. Co., 64 S. E. 1012, 83 S. C. 53.

Instructions held proper. There was no error in charging that it was the duty of the jury to scan admissions, if proved, with care, but that, so scanning them, the jury should give them such weight as they thought such admissions entitled to. McBride v. Georgia Ry. & Electric Co., 54 S. E. 674, 125 Ga. 515.

[37] Hill v. Newman, 47 Ind. 187.

a high degree of quality in proof,[38] and where the evidence fairly shows verbal admissions by a party, and there is no claim that the witnesses testifying to them misunderstood them, it will be error to charge that such evidence is to be received with caution.[39] An instruction in a negligence case, covering not only statements of a party admissible as casual admissions, but also statements admissible as a part of the res gestæ, should be so framed as to point out the substantial difference between the two classes of statements, and so as to avoid misleading the jury into thinking that the res gestæ statements are to be viewed with caution.[40] A party is entitled to an instruction that admissions made by him are not conclusive against him,[41] although in the absence of a special request the judge is not bound to instruct as to the effect of an admission by either party.[42]

2. *In Criminal Cases*

Instructions on this head as invading province of jury, see ante, §§ 46–49.

§ 215. Necessity of instructions

There is no absolute inflexible rule which entitles the defendant in a criminal case to an instruction that evidence of admissions[43]

[38] Gangi v. Fradus, 227 N. Y. 452, 125 N. E. 677.

[39] Chrestenson v. Harms, 161 N. W. 343, 38 S. D. 360.

[40] John v. Pierce, 178 N. W. 297, 172 Wis. 44.

[41] Boswell v. Thompson, 49 So. 73, 160 Ala. 306.

[42] Wrightsville & T. R. Co. v. Lattimore, 45 S. E. 453, 118 Ga. 581.

[43] **Cal.** People v. Maljan, 167 P. 547, 34 Cal. App. 384; People v. Wagner, 155 P. 649, 29 Cal. App. 363; People v. Raber, 143 P. 317, 168 Cal. 316.

Mass. Commonwealth v. Howard, 91 N. E. 397, 205 Mass. 128; Commonwealth v. Galligan, 113 Mass. 202.

Mo. State v. Bobbst, 190 S. W. 257, 269 Mo. 214.

Instructions characterizing evidence as unreliable and unsatisfactory. The court properly refused to instruct the jury that "testimony concerning oral declarations of a party, whether they be threats or admissions or other declarations, is regarded by the law as unreliable and unsatisfactory, and the jury should be cautious before they give credence to such testimony," since such instruction does not fully state the law, and is misleading. Snodgrass v. Commonwealth, 89 Va. 679, 17 S. E. 238.

Instructions held properly refused in view of other instructions given. Where, on a prosecution for murder, the state proved contradictory statements made by defendant as to the manner and cause of decedent's death, and the court told the jury they were the sole judges of the facts and the weight to be given the testimony, it had amply protected defendant, and a further instruction cautioning them as to the weight to be given the testimony as to such statements was properly refused. State v. Coleman, 98 N. W. 175, 17 S. D. 594. There being indutiable evidence of the corpus delicti, and also evidence corroborative of the inculpatory admissions of defendant, it is not error to refuse to instruct that the admissions should be received with great caution, and

or confessions alleged to have been made by him, whether oral or otherwise, should be viewed with caution.[44] It is proper to give such an instruction,[45] but whether it shall be given rests largely in the discretion of the court, to be guided by the circumstances of each particular case.[46] Where admissions of a defendant were clear, distinct, and unequivocal, and it is not claimed that he did not make them in the manner and form testified to, or that they were of doubtful meaning, or were misunderstood, an instruction that such admissions should be received with caution is properly refused.[47] A statute making it the duty of the court on all proper occasions to instruct that evidence of the oral admissions of a party shall be viewed with caution does not require such an instruction where insanity is the defense,[48] and it has been held that a refusal to instruct in conformity with such a statute is not a ground for reversal, since it states a mere common-place within the general knowledge of jurors.[49]

The circumstances may be such, however, as to make it error for the court to fail or to refuse to caution the jury with respect

are not, unless corroborated, sufficient to warrant a conviction; the jury having been charged to weigh such admissions with caution, considering the liability of the witness to misunderstand defendant's language. State v. Walker, 98 Mo. 95, 9 S. W. 646.

[44] Burns v. State, 49 Ala. 370; Bobo v. State (Miss.) 16 So. 755; State v. Clump, 16 Mo. 385; Hardesty v. State, 146 N. W. 1007, 95 Neb. 839; State v. Patrick, 48 N. C. 443.

Warning against convicting on simple confession. The refusal of a judge, on a trial for murder, to instruct the jury that they ought not to convict on a simple confession for the reason that, if they believe the confession to be true, it was their duty to convict, is not error. State v. Graham, 68 N. C. 247.

[45] People v. Tibbs, 76 P. 904, 143 Cal. 10[illegible]; State v. Chappell, 78 S. W. 585, 179 Mo. 324.

[46] State v. Hardee, 83 N. C. 619.

Right to instruction where defendant contends that confession was mere idle talk. Where, in a prosecution for homicide, defendant admitted that he had made certain statements introduced in evidence as a confession, when he was not under arrest, and had not been accused of the crime, that he intended the person to whom the confession was made to understand that he was acknowledging his commission of the crime, his only contention being that he was intoxicated, and on that account was indulging in boastful talk, and that the statements made were mere idle vaporings, or part of a contest in telling yarns, it was not error for the court to refuse to charge that the confession of the prisoner out of court was a doubtful species of evidence, and should be acted upon by the jury with great caution. Horn v. State, 73 P. 705, 12 Wyo. 80.

[47] State v. Jackson, 73 N. W. 467, 103 Iowa, 702; Bode v. State, 113 N. W. 906, 80 Neb. 74.

[48] State v. Feister, 50 P. 561, 32 Or. 254.

Instruction to view with distrust. Under a statute declaring that evidence of the oral admissions of a party is to be viewed with "caution," it is not error to refuse an instruction that it be viewed with "distrust." People v. Sternberg, 111 Cal. 11, 43 P. 201.

[49] People v. Wardrip, 74 P. 744, 141 Cal. 229.

to evidence of alleged verbal statements or admissions by the defendant.[50] A cautionary instruction will usually be necessary, where the claimed admissions were made casually, in ordinary conversation, at a remote period of time,[51] or where statements made by the defendant at the time of being arrested are sought to be used against him as admissions.[52]

Where the evidence in a case outside of an alleged confession by the defendant is circumstantial, and hardly sufficient to authorize a conviction, it will constitute reversible error to refuse to charge that confessions must be voluntary, and made without hope of benefit or fear of injury, in order to support a conviction.[53] Where there is evidence tending to show that confessions of the defendant admitted in evidence were not voluntarily made, the failure or refusal of the court to instruct the jury to disregard such confessions, if they believe from all the evidence that they were not voluntary and were not true, will constitute error.[54]

It is ordinarily not error to refuse to instruct that evidence of admissions or confessions is of the weakest kind,[55] even where the evidence relates to admissions made in casual conversation with disinterested persons,[56] and in some jurisdictions it is proper to refuse an instruction that verbal admissions should be received with great caution, if not accompanied by the statement that, if such admissions are deliberately made and fully proven, they furnish evidence of a most satisfactory character.[57]

As a general rule, in the absence of a request for a special instruction the court need not expressly charge the jury to determine whether a confession has been made,[58] nor give instructions with respect to the effect of evidence of the confessions of a defend-

[50] Marzen v. People, 50 N. E. 249, 173 Ill. 43; Haynes v. State (Miss.) 27 So. 601; State v. Hendricks, 73 S. W. 194, 172 Mo. 654.

[51] State v. Smith, 157 S. W. 319, 250 Mo. 350; State v. Moxley, 102 Mo. 374, 14 S. W. 969.

[52] People v. McArron, 79 N. W. 944, 121 Mich. 1.

[53] Earp v. State, 55 Ga. 136.

[54] Ellis v. State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; Bozeman v. State, 215 S. W. 319, 85 Tex. Cr. R. 653; Paris v. State, 35 Tex. Cr. R. 82, 31 S. W. 855.

[55] Griner v. State, 49 S. E. 700, 121 Ga. 614; People v. Sweeney, 106 N. E. 913, 213 N. Y. 37, affirming judgment 146 N. Y. S. 637, 161 App. Div. 221.

Rule under statute. A requested instruction that verbal admissions ought to be received with great caution, that such evidence is subject to much imperfection, the party himself not having clearly expressed his own meaning or the witness having misunderstood him, is not justified by a statute providing that the jury is to be instructed that evidence of oral admissions of a party ought to be received with caution. People v. Buckley, 77 P. 169, 143 Cal. 375.

[56] State v. Glahn, 97 Mo. 679, 11 S. W. 260.

[57] Lipsey v. People, 81 N. E. 348, 227 Ill. 364.

[58] Cooper v. State, 77 S. E. 878, 12 Ga. App. 561.

ant;[59] but where the case of the state is entirely or chiefly dependent upon a confession, the court should of its own motion give appropriate instructions, and inform the jury that such confession must be corroborated in order to justify a conviction.[60] So, where it is doubtful whether any crime has been committed, the court should instruct that a confession of a defendant, made while in fear of mob violence, will not warrant a conviction, unless accompanied by other proof of the commission of the crime charged.[61]

§ 216. Propriety and sufficiency of instructions in general

It is proper to instruct the jury in effect to consider the circumstances under which a confession was made, and, if they find it to be voluntary, to give it such weight as they think it is fairly entitled to.[62] In some jurisdictions it is not error to charge that any statements by the defendant unfavorable to himself are presumed to be true.[63] In some jurisdictions it is not improper for the court, after calling the attention of the jury to the circumstances which may lessen the value of a confession as evidence, to charge, in substance, that confessions, when freely and voluntarily made, are a high order of evidence,[64] and in some jurisdic-

[59] **Cal.** People v. Fowler, 174 P. 892, 178 Cal. 657.

Ga. Jones v. State, 104 S. E. 425, 150 Ga. 628; Washington v. State, 100 S. E. 31, 24 Ga. App. 65; Mitchell v. State, 99 S. E. 889, 24 Ga. App. 135; Scarboro v. State, 99 S. E. 637, 24 Ga. App. 27; McDuffie v. State, 86 S. E. 821, 17 Ga. App. 342; Smith v. State, 76 S. E. 1016, 139 Ga. 230; Lindsay v. State, 76 S. E. 369, 138 Ga. 818; Rucker v. State, 58 S. E. 295, 2 Ga. App. 140.

Mo. State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

Wis. Bernhardt v. State, 82 Wis. 23, 51 N. W. 1009.

[60] Rucker v. State, 58 S. E. 295, 2 Ga. App. 140; Dunlap v. State, 98 S. W. 845, 50 Tex. Cr. R. 504.

[61] Polson v. Commonwealth (Ky.) 108 S. W. 844, 32 Ky. Law Rep. 1398.

[62] State v. Jordan, 87 Iowa, 86, 54 N. W. 63; Commonwealth v. Brown, 149 Mass. 35, 20 N. E. 458.

[63] State v. Hammontree (Mo. Sup.) 177 S. W. 367; State v. Cox, 173 S. W. 50, 264 Mo. 408; State v. Clow, 110 S. W. 632, 131 Mo. App. 548.

[64] People v. Borgetto, 99 Mich. 336, 58 N. W. 328.

Instructions proper within rule. A charge that, "if the confessions were freely and voluntarily given, they were the highest kind of evidence," at the same time telling the jury that "they should be weighed by them as any other testimony." Mercer v. State, 17 Ga. 146. An instruction that evidence of a confession should be examined by the jury with care, that the confession, if voluntarily made, uninfluenced by any threat or promise, is of great weight, but should not be considered unless freely made without undue influence either by the promise of advantage or threat of harm, was as favorable to defendant as the law warranted. State v. Bennett, 121 N. W. 1021, 143 Iowa, 214.

Confession proven by one witness only. On trial for murder, where the state relies in part on a confession which is proven by one witness only, an instruction that "when a confession is made, and stated to the jury by a credible witness,

tions it is not reversible error to charge that confessions of guilt, when deliberately made and precisely identified, are among the most satisfactory proofs obtainable,[65] or evidence of the highest character against the defendant, the jury being also told that they are to determine what weight should be given to the evidence.[66] In other jurisdictions, as has been shown in a preceding chapter,[67] such instructions are erroneous, as on the weight of the evidence.[68]

An instruction that admissions may be important and weighty evidence should tell the jury that they must be clearly proven and shown to have been made with some degree of deliberation,[69] and an instruction that, if the jury believe any statements by the defendant have been proven by the state and not denied by him, they are to be taken as true, is erroneous, as in violation of the presumption of innocence and in derogation of the statute permitting the defendant to refrain from testifying without raising a presumption of guilt.[70] It is not necessary that a cautionary instruction with respect to admissions or confessions should be accompanied by an admonition that it is for the jury to say whether or not any admission or confession of guilt has been made.[71] An instruction that the jury should exercise a reasonable caution with respect to alleged admissions of the defendant, and take into consideration the fact that sometimes statements, or conversations are not correctly reported, or may be misapprehended, or that the circumstances and conditions surrounding a person at the time he makes a statement may be such as to weaken the effect that ought to be given to it, is sufficient concerning admissions, in absence of a request for fuller instructions.[72]

it is the highest order of testimony; there can be but few higher sources of evidence than a confession voluntarily and freely made"—is erroneous. Calvin v. State, 44 S. E. 848, 118 Ga. 73.

[65] Welsh v. State, 96 Ala. 92, 11 So. 450.

Instruction not in compliance with rule. An instruction that "when confessions are deliberately and precisely identified they are among the most satisfactory and effectual proofs of guilt," was erroneous. Shelton v. State, 42 So. 30, 144 Ala. 106.

[66] State v. Wortman, 98 P. 217, 78 Kan. 847.

[67] Ante, § 48.

[68] Thompson v. State, 73 Miss. 584, 19 So. 204; Harris v. State, 1 Tex. App. 74.

[69] Colbert v. State, 104 N. W. 61, 125 Wis. 423.

[70] State v. Hudspeth, 51 S. W. 483, 150 Mo. 12.

[71] Coney v. State, 90 Ga. 140, 15 S. E. 746.

[72] People v. Holden, 109 P. 495, 13 Cal. App. 354; People v. Jackzo, 172 N. W. 557, 206 Mich. 183.

Instructions objectionable within rule. A charge that the law is as much vindicated by the acquittal of an innocent person as by the conviction of a guilty one; that the jury must receive defendant's alleged confession with great caution; that

The circumstances of the case may be such as to authorize or require the court to distinguish between admissions and confessions,[73] the former relating to the acknowledgment of facts and the latter to the acknowledgment of guilt,[74] and an instruction is erroneous which characterizes mere inculpatory admissions as confessions,[75] but a statement freely and voluntarily made by the defendant, by which he acknowledges participation in the main facts essential to constitute the crime charged against him, may properly be referred to as a confession.[76]

§ 217. Instructions on issue of voluntary character of confessions

In the great majority of jurisdictions as shown in a preceding chapter,[77] it is proper for the court to instruct the jury to disregard a confession admitted in evidence, if they find that it was not voluntarily made, or was the result of intimidation, duress, or other improper inducement,[78] and the general rule is that the court should so instruct, either on its own motion[79] or on re-

all confessions were prima facie involuntary, and must be cautiously received and considered; and that the jury should consider with great care the testimony of a witness who is interested, or who may be swearing to shield himself from prosecution. Strickland v. State, 44 So. 90, 151 Ala. 31.

[73] Brown v. State, 32 Miss. 433; State v. Caseday, 115 P. 287, 58 Or. 429.

[74] State v. Heidenreich, 29 Or. 381, 45 P. 755.

[75] Fletcher v. State, 90 Ga. 468, 17 S. E. 100; Covington v. State, 79 Ga. 687, 7 S. E. 153; Ledbetter v. State, 61 Miss. 22; Hogan v. State, 46 Miss. 274; Hogsett v. State, 40 Miss. 522.

Matters amounting merely to admissions. On trial for larceny of cattle, where there was evidence that defendant had told to others the circumstances connected with his possession of the animals, and testified in his own behalf that he bought the property from one who represented that he was the owner thereof, and showed in detail the manner in which possession was obtained, an instruction assuming that such declarations and such testimony amounted to a confession was erroneous. State v. Heidenreich, 29 Or. 381, 45 P. 755. Where accused after his arrest was questioned in the presence of the sheriff and constable and others, and admitted his implication in an affray in which he shot and wounded complainant, but claimed that he acted only in self-defense and used his revolver as a club only, the discharge being accidental, and that after complainant had knocked him off a chair into a bedroom complainant's wife joined in the assault, it was error for the court to refer to such admissions as a "confession" of guilt. People v. Cismadija, 132 N. W. 489, 167 Mich. 210.

[76] Fouse v. State, 119 N. W. 478, 83 Neb. 258.

[77] Ante, § 101.

[78] Shaw v. United States (C. C. A. Ky.) 180 F. 348, 103 C. C. A. 494; Shufflin v. State, 184 S. W. 454, 122 Ark. 606; State v. Priest, 103 A. 359, 117 Me. 223; Anderson v. State, 220 S. W. 775, 87 Tex. Cr. R. 230.

[79] **Ark.** Williams v. State, 39 S. W. 709, 63 Ark. 527.

Mass. Commonwealth v. Hudson, 70 N. E. 436, 185 Mass. 402.

Mich. People v. Maxfield, 108 N.

quest,[80] where there is some evidence that a confession intro-

W. 1087, 146 Mich. 103; People v. Clarke, 105 Mich. 169, 62 N. W. 1117.

Mo. State v. Webb, 115 S. W. 998, 216 Mo. 378, 20 L. R. A. (N. S.) 1142, 129 Am. St. Rep. 518, 16 Ann. Cas. 518; State v. Brennan, 65 S. W. 325, 164 Mo. 487.

Neb. Heddendorf v. State, 124 N. W. 150, 85 Neb. 747.

Tex. Follis v. State, 101 S. W. 242, 51 Tex. Cr. R. 186; Johnson v. State, 88 S. W. 223, 48 Tex. Cr. R. 423.

Instructions sufficiently complying with rule. A charge, on a prosecution for robbery, in which a written confession of defendant was introduced in evidence, that a confession, when voluntarily made, is evidence against accused, because common experience proves that a man will not confess facts to his disadvantage unless they are true; that such confessions should be strengthened by facts corroborative of their truth; and that if the jury believed that defendant made such confession to the officers having him in custody, freely and voluntarily, they should consider it, but that if defendant did not have sufficient mind or memory to know what he was saying, whether it was the result of intoxication or weakness of mind, or both, or if the same was made by inducements holding out escape or an inducement amounting to a threat, fear or promise, and that from such inducements the confession was made, the jury should disregard it. State v. Stibbens, 87 S. W. 460 188 Mo. 387. An instruction that a confession must be freely made without being induced by fear of injury or hope of benefit, and must be scanned with great caution and must be corroborated. Davis v. State, 67 S. E. 839, 7 Ga. App. 680. Defendant has the full benefit of his claim that his confession was not voluntary, where the court instructs that the confession must be disregarded if it was obtained while he was in custody by threats or promises, or while he was intoxicated. State v. Brooks, 119 S. W. 353, 220 Mo. 74. Where, on a trial for homicide, the confession of accused was admitted in evidence, and the sheriff, to whom the confession was made, testified that he warned accused before he confessed, and accused stated that he did not hear the warning, an instruction that the evidence must show that the warning was given, and that, if the evidence failed to show that the warning was given and that accused heard it, the confession could not be considered, sufficiently charged under what circumstances the confession might be considered. Green v. State, 98 S. W. 1059, 49 Tex. Cr. R. 645. Where there was evidence that confessions of defendant to the officers were induced by threats or promises of assistance, an instruction that, unless the statements were made voluntarily, and not induced by threats or promises, the jury could not consider them in the case, was sufficient, under a statute requiring that the confessions be made freely and without compulsion in order to be admissible as evidence. Cross v. State (Tex. Cr. App.) 101 S. W. 213. An instruction that, in order to consider certain admissions of defendant which were in evidence, the jury must find, beyond a reasonable doubt, that the statement was purely voluntary, and "made freely, of the respondent's free will, without any hope of favor or fear of the consequences," and that the burden was on the people to show that the statements were voluntary, was as favorable to defendant as the law permits. People v. Swetland, 77 Mich. 53, 43 N. W. 779. In a prosecution for arson, in which a confession of defendant was admitted, failure to charge as to the specific facts set out in the defendant's statement as to the reason for the fear causing him to make the confession was not error, where the court instructed that the jury must not consider any confession, unless they were satisfied that it had been made freely and volun-

[80] Bates v. State, 84 So. 373, 78 Fla. 672; Griner v. State, 49 S. E. 700, 121 Ga. 614; Johnson v. State, 42 So. 606, 89 Miss. 773; State v. Thomas, 157 S. W. 330, 250 Mo. 189; State v. Moore, 61 S. W. 199, 160 Mo. 443.

duced in evidence was obtained by improper means, or the evidence is conflicting upon the question of its voluntary character. In some jurisdictions, however, it is held that, since the court determines the admissibility of confessions, it may properly decline to instruct that the jury may disregard confessions submitted to them, if they believe from all the evidence that they were not freely and voluntarily made.[81] Where it appears, after confessions have been submitted to the jury, that they were not voluntarily made, the court should withdraw such evidence from the jury and instruct them to wholly disregard it.[82]

Where the court has instructed generally as to reasonable doubt, it is not necessary to instruct that the jury must be satisfied beyond a reasonable doubt that the defendant made a confession in evidence voluntarily.[83] Where the trial judge attempts to define what a voluntary confession is, he should explain that a hope of benefit, as well as the fear of injury, will render a confession induced by it involuntary.[84]

It is proper to refuse instructions with respect to the voluntary

tarily, and that they were not concluded by the fact that evidence of confessions had been admitted, but that, if they found from the evidence that the confession had not been freely and voluntarily made, they should disregard it. Morgan v. State, 48 S. E. 238, 120 Ga. 499. Where it appeared that defendant, who bore an assumed name when arrested, confessed when the sheriff confronted him with his true name, and afterwards told the sheriff that he should plead guilty, and that the sheriff replied that in that case he would speak to the judge and get defendant off as easy as possible, it was held that a charge that confessions must be made voluntarily, and that if defendant made them under undue influence they could not be considered, was sufficiently favorable to defendant. People v. Warner, 104 Mich. 337, 62 N. W. 405. Where the state proved that accused had made a confession, an instruction, requiring the jury to find, before they could consider any statement made by accused as evidence against him, that he was warned, and that the statement made was voluntary, properly called the jury's attention to the confession, and left the consideration thereof with the jury as they should find the facts. Thomas v. State, 95 S. W. 1069, 49 Tex. Cr. R. 633.

Failure to include words "or other improper influences." That the court, in instructing the jury not to consider defendant's confession if they believed it was induced by duress, threats, or coercion, failed to add "or other improper influence," is not error, where the jury had previously been instructed not to consider the confession unless they believed that it was freely and voluntarily made. Anderson v. State (Tex. Cr. App.) 54 S. W. 581.

[81] Stone v. State, 105 Ala. 60, 17 So. 114; Holland v. State, 22 So. 298, 39 Fla. 178.

[82] Bonner v. State, 55 Ala. 242; Cain v. State, 18 Tex. 387.

Confession submitted without objection. Although a confession goes to the jury without objection, and no motion is made to rule it out, the counsel may still request the court, in writing, to charge that, unless voluntarily made, the confession cannot warrant a conviction. Earp v. State, 55 Ga. 136.

[83] Nix v. State, 97 Ga. 211, 22 S. E. 975.

[84] Parker v. State, 34 Ga. 262.

character of a confession by the defendant, where there is no evidence that it was involuntary.[85]

§ 218. Instructions on corroboration of confessions

The general rule is that, when an extrajudicial confession has been admitted in evidence and there is some doubt whether a crime has been committed, the jury should be told that a confession, uncorroborated by some other evidence tending to show the commission of a crime, will not warrant a conviction,[86] there being statutes in some jurisdictions prohibiting convictions on extrajudicial confessions alone;[87] but, where the corpus delicti is abundantly established by evidence independent of such a confession, it is not error for the court to refuse such a charge,[88] and it is not

[85] Wilganowski v. State, 180 S. W. 692, 78 Tex. Cr. R. 328; Ex parte Martinez, 145 S. W. 959, 66 Tex. Cr. R. 1; Pinckard v. State, 138 S. W. 601, 62 Tex. Cr. R. 602; Bailey v. State, 59 S. W. 900, 42 Tex. Cr. R. 289.

[86] People v. Frey, 131 P. 127, 165 Cal. 140; Lucas v. State, 36 S. E. 87, 110 Ga. 756; Clary v. Commonwealth, 173 S. W. 171, 163 Ky. 48; Collins v. Commonwealth (Ky.) 25 S. W. 743.

Instructions sufficient to satisfy rule. A charge that confessions of guilt should be received with great caution, that a confession alone, uncorroborated by other evidence, will not justify a conviction, and that confessions must be corroborated by some fact or circumstance shown in the case that tend to connect defendant with the offense charged. Walker v. State (Ga. App.) 105 S. E. 717. Where the judge instructs that a conviction cannot be had on a confession only, but that it must be corroborated, and that proof of the corpus delicti is a sufficient corroboration, the instruction is sufficient where it is added that if it is shown that the crime was committed the jury could consider the confession. Owen v. State, 46 S. E. 433, 119 Ga. 304. In a prosecution for arson, in which evidence of a confession of defendant had been admitted, a charge that if the evidence be clear and decisive, satisfying the minds of the jury beyond a reasonable doubt that the building was maliciously and willfully burned, and, if the jury believed that the defendant freely and voluntarily confessed that he did it, then such a confession, thus corroborated, might serve as sufficient corroboration to authorize the conviction, was not error. Morgan v. State, 48 S. E. 238, 120 Ga. 499. In the absence of requested special instructions on the law of corroborative proof, the instruction, "No person can be convicted upon his own confession unless it is corroborated by other evidence, and whether there is such evidence is for the jury," is sufficient. Attaway v. State, 35 Tex. Cr. R. 403, 34 S. W. 112.

[87] Davis v. State, 173 S. W. 829, 115 Ark. 566.

Evidence connecting defendant with offense entirely circumstantial aside from confession. Where the commonwealth showed beyond doubt that deceased came to his death from a blow on the head which fractured his skull, but the evidence to connect the prisoner with the offense was wholly circumstantial, aside from certain alleged extrajudicial confessions, and the theory of the defense was that deceased was struck by a passing railroad train, the court should have charged the language of the statute, that a confession of accused, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense has been committed. Higgins v. Commonwealth, 134 S. W. 1135, 142 Ky. 647.

[88] **Cal.** People v. Wagner, 155 P. 649, 29 Cal. App. 363.

Ky. Dunbar v. Commonwealth, 232

necessary to the application of this rule that the corroborative evidence should tend to connect the accused with the crime charged.[89] However, in an instruction that a conviction may be had upon a voluntary confession corroborated only by proof of the corpus delicti, the court should not use language from which the jury may infer that such a confession, thus corroborated, will require a conviction, but should leave them free to pass upon the question whether or not the corroborative evidence, together with that relating to the confession, is sufficient to satisfy them beyond a reasonable doubt of the guilt of the accused.[90] An instruction with respect to the corroboration of confessions is not objectionable because it does not state the degree of proof necessary to supplement them.[91]

§ 219. Silence under accusation

In some jurisdictions, where there is evidence tending to show that statements were made in the presence of the defendant, expressly or impliedly accusing him of the crime for which he is being prosecuted to which he made no reply, it is proper to instruct that, if defendant heard the statements, the jury may consider whether he was bound to answer, and how far any inference is to be drawn against him because of his silence.[92] In other juris-

S. W. 655; Lee v. Commonwealth, 159 S. W. 648, 155 Ky. 62; Green v. Commonwealth, 83 S. W. 638, 26 Ky. Law Rep. 1221; Gilbert v. Commonwealth, 111 Ky. 793, 64 S. W. 846, 23 Ky. Law Rep. 1094; Dugan v. Commonwealth, 43 S. W. 418, 102 Ky. 241, 19 Ky. Law Rep. 1273; Bush v. Commonwealth, 17 S. W. 330, 13 Ky. Law Rep. 425; Ruberts v. Commonwealth, 7 S. W. 401; Patterson v. Commonwealth, 86 Ky. 313, 5 S. W. 387; Id., 5 S. W. 765, 99 Ky. 610.

Mass. Commonwealth v. McCann, 97 Mass. 580; Commonwealth v. Tarr, 4 Allen, 315.

Tex. Gallegos v. State, 90 S. W. 492, 49 Tex. Cr. R. 115; Ellington v. State, 87 S. W. 153, 48 Tex. Cr. R. 160; Murphy v. State, 67 S. W. 108, 43 Tex. Cr. R. 515; Nelson v. State (Cr. App.) 65 S. W. 95; Bailey v. State, 59 S. W. 900, 42 Tex. Cr. R. 289; Tidwell v. State, 47 S. W. 466, 40 Tex. Cr. R. 38, rehearing denied 48 S. W. 184, 40 Tex. Cr. R. 38; Franks v. State (Cr. App.) 45 S. W. 1013.

See State v. Turner, 19 Iowa, 144.

Proof of corpus delicti beyond reasonable doubt not required. It is not error to refuse to instruct the jury that, before they can consider any alleged confessions of defendant, they must be satisfied beyond a reasonable doubt, from other evidence in the case, of the existence of the corpus delicti. The confessions of a defendant, when admitted, are to be weighed and considered by the jury with all the other evidence. Holland v. State, 22 So. 298, 39 Fla. 178.

[89] Sandefur v. Commonwealth, 137 S. W. 504, 143 Ky. 655; Frazier v. Commonwealth (Ky.) 124 S. W. 797; Chapman v. Commonwealth (Ky.) 112 S. W. 567, 33 Ky. Law Rep. 965; Patterson v. Commonwealth, 86 Ky. 313, 5 S. W. 387; Id., 5 S. W. 765, 99 Ky. 610.

[90] Wimberly v. State, 31 S. E. 162, 105 Ga. 188.

[91] State v. Caseday, 115 P. 287, 58 Or. 429.

[92] Commonwealth v. Brailey, 134 Mass. 527.

Charge that silence "tantamount" to an admission. Where,

dictions such an instruction is improper.[93] Where the state seeks to draw inferences against the defendant because of his silence, when accusing statements are made in his presence, the court may[94] and should instruct that, unless the jury believe that the defendant heard such statements, they must disregard them.[95]

§ 220. Admissions or confessions containing statements favorable to defendant

Where the state puts in evidence a confession of the defendant containing divergent statements, instructions should not be so framed as to permit the jury to infer that they are not to take into consideration the statements most favorable to the accused.[96] In some jurisdictions, where the state relies for conviction upon a confession of the defendant, which contains exculpatory statements which disprove the state's case, the court should charge that the state is bound by such statements unless they are shown by the evidence to be untrue;[97] the rule being otherwise where

at the trial of a criminal case, the judge instructed the jury that, if a statement was made in the hearing and presence of a person which affected his rights or was criminating to him and he remained silent, such silence was tantamount to an admission of the truth of the facts stated, provided the statement was heard and understood by him and he was not in custody or under restraint, but was at liberty to reply or explain, and provided the statement was of such a nature and made under such circumstances, and by such persons, as naturally to call for a reply, it was held that if, instead of saying that silence was "tantamount" to an admission, the judge had said that it was in the nature of an admission, the instructions would have been strictly accurate, but that the inaccuracy, if any, was eliminated by the jury being told that, if they found the facts as contended by the government, "they would give to the circumstance such weight and significance as they thought it entitled to." Commonwealth v. McCabe, 163 Mass. 98, 39 N. E. 777.

[93] Phelan v. State, 88 S. W. 1040, 114 Tenn. 483.

[94] State v. Guffey, 163 N. W. 679, 39 S. D. 84.

[95] Rhea v. State, 148 S. W. 578, 67 Tex. Cr. R. 197.

[96] State v. Lallyer, 4 Minn. 368 (Gil. 277).

[97] **Tex.** Mullins v. State (Cr. App.) 225 S. W. 164; Coleman v. State, 199 S. W. 473, 82 Tex. Cr. R. 332; McInish v. State, 198 S. W. 780, 82 Tex. Cr. R. 141; Cline v. State, 178 S. W. 520, 77 Tex. Cr. R. 281; Gibson v. State, 110 S. W. 41, 53 Tex. Cr. R. 349; Jones v. State, 29 Tex. App. 20, 13 S. W. 990, 25 Am. St. Rep. 715.

Instruction rendered unnecessary by other instructions. Where the state introduced a confession or admission of defendant, containing his statement that deceased had his gun up and cocked, it was not necessary to charge that the state was bound by the statement, unless shown to be false; it being necessary, under the charge as to self-defense, to find deceased did not so have his gun, before there could be a conviction. Davis v. State, 163 S. W. 442, 73 Tex. Cr. R. 49.

Rule where confession contains no exculpatory statements. Where a written confession, which was introduced in evidence, contained no exculpatory statements, it was not necessary to charge the jury that the confession must be taken as a whole and that the state must disprove the exculpatory matters. Anderson v. State, 159 S. W. 847, 71 Tex. Cr. R. 27.

the state does not rely solely upon such confession,[98] or where there are facts other than the confession tending strongly to connect the defendant with the crime of which he is accusd,[99] or where the state does not rely upon the confession as an entirety and the exculpatory statements are proven by the defendant.[1] In another jurisdiction, where the state relies mainly for conviction upon a verbal confession of the defendant containing statements favorable to him, the court should instruct on request that the confession must be taken together, and if the part favorable to the defendant is not disproved, and is not improbable when considered with the other evidence, then that part is entitled to as much consideration as parts of the confession unfavorable to him.[2] In one jurisdiction, where the state puts in evidence confessions or admissions of the defendant containing statements favorable to him, it is proper for the court to instruct that any statements made by the defendant against himself the law presumes to be true, but that what he says in his own favor the jury may believe or not, according as they find the fact to be, after considering such statements in connection with all the other evidence.[3]

§ 221. Necessity or sufficiency of evidence as predicate for instructions

To justify or require an instruction on the subject of confessions, the effect to be given to them, or the necessity of their corroboration, there must be some evidence that the defendant has made a confession.[4] Proof of an inculpatory admission will not

[98] Cook v. State, 160 S. W. 465, 71 Tex. Cr. R. 532; McKinney v. State, 88 S. W. 1012, 48 Tex. Cr. R. 402.

Confession of principal as basis of instruction in prosecution of accomplice. In the prosecution of accused as an accomplice to a homicide, confession of the principal having been admitted solely to show that he killed deceased, such confession could not be made the basis of a charge that the state was bound by it in other matters, unless the falsity thereof was proven. Millner v. State, 162 S. W. 348, 72 Tex. Cr. R. 45.

[99] Gibson v. State, 110 S. W. 41, 53 Tex. Cr. R. 349.

[1] Belcher v. State, 161 S. W. 459, 71 Tex. Cr. R. 646.

[2] Burnett v. People, 68 N. E. 505, 204 Ill. 208, 66 L. R. A. 304, 98 Am. St. Rep. 206.

[3] **Mo.** State v. Chick, 221 S. W. 10, 282 Mo. 51; State v. Wansong, 195 S. W. 999, 271 Mo. 50; State v. Davis, 126 S. W. 470, 226 Mo. 493; State v. Wilson, 122 S. W. 671, 223 Mo. 173; State v. Merkel, 87 S. W. 1186, 189 Mo. 315; State v. Darragh, 54 S. W. 226, 152 Mo. 522; State v. McKenzie, 45 S. W. 1117, 144 Mo. 40; State v. Young, 119 Mo. 495, 24 S. W. 1038; State v. Richardson, 117 Mo. 586, 23 S. W. 769; State v. Brown, 104 Mo. 365, 16 S. W. 406; State v. Brooks, 99 Mo. 137, 12 S. W. 633.

[4] **Ala.** McCormick v. State, 37 So. 377, 141 Ala. 75; Burns v. State, 49 Ala. 370.

Ga. Chislon v. State, 91 S. E. 893, 19 Ga. App. 607; Thomas v. State, 84 S. E. 587, 143 Ga. 268; Cox v. State, 79 S. E. 909, 13 Ga. App. 687; Owens v. State, 48 S. E. 21, 120 Ga. 296;

authorize or require such an instruction,[5] and the nearer an admission approaches the completeness of a full confession of guilt without attaining thereto the more likely is any reference in the instructions to the subject of confessions to confuse the jury and

Knight v. State, 39 S. E. 928, 114 Ga. 48, 88 Am. St. Rep. 17; Jones v. State, 65 Ga. 147.

Ky. Spicer v. Commonwealth, 51 S. W. 802, 21 Ky. Law Rep. 528; Cargill v. Commonwealth, 93 Ky. 578, 20 S. W. 782.

Neb. Marion v. State, 16 Neb. 349, 20 N. W. 289.

Tex. Johnson v. State, 124 S. W. 664, 57 Tex. Cr. R. 603; Trevenio v. State, 87 S. W. 1162, 48 Tex. Cr. R. 207; Fox v. State (Cr. App.) 87 S. W. 157.

Instruction that confessions and admissions of accused should be received with great caution. Where a defendant charged with seduction before an examining magistrate pleaded guilty to the charge, and acknowledged his guilt to the father of the prosecutrix and another, all of which confessions were voluntarily made, without qualification, but, on testifying as a witness in his own behalf, stated that he only meant that he was guilty of the act of intercourse, and not of the seduction, an instruction that the confessions and admissions of accused should be received with great caution, and, if the jury believed from the evidence that accused meant that he was guilty of the intercourse merely, then such admissions could only be considered as corroborating evidence of the intercourse alone, and not to corroborate the alleged seduction, was properly refused, where the court charged that admissions and confessions of accused were admitted with caution, and that it was the province of the jury to consider all the circumstances under which the admissions were made, and determine their exact nature, import, and meaning. Flick v. Commonwealth, 34 S. E. 39, 97 Va. 766.

Instruction that a free and voluntary confession is the highest order of evidence. Where, on a prosecution for assault with intent to commit rape, there was evidence that defendant had offered one witness a bribe to testify that he had overheard a conversation between defendant and prosecutrix nearly contemporaneous with the alleged assault; another, that he had told defendant he heard defendant "had a little fight with the girl," and defendant answered, "Yes; she kicked and fought like a wild cat,"—and that defendant had offered a third witness money to testify that he had had sexual intercourse with prosecutrix, and had told a fourth that he intended to swear that he had intercourse with prosecutrix twice on the occasion of the alleged assault, it was held that an instruction that a free and voluntary confession of guilt is the highest order of evidence had no foundation in this testimony. Johnson v. People, 64 N. E. 286, 197 Ill. 48.

Evidence sufficient to authorize charge. Evidence that a person under arrest expressed a desire out of court to plead guilty, in order to begin to serve his sentence. Abrams v. State, 48 S. E. 965, 121 Ga. 170. Where there was testimony that defendants, accused of obstructing a railroad track, had admitted they saw the cross-tie on the track, shortly before it was struck by the train, and that one of them, when asked why he did not remove it, said, "It was near train time, and didn't have time," a charge as to the law relating to confessions and admissions, unattended by any intimation of the judge that defendants had made any confession or admission of guilt, was not error. State v. Taylor, 32 S. E. 149, 54 S. C. 174.

[5] **Ga.** Phillips v. State (App.) 107 S. E. 343; Easterling v. State, 100 S. E. 727, 24 Ga. App. 424; Reed v. State, 83 S. E. 674, 15 Ga. App. 435; Porter v. State, 74 S. E. 1099, 11 Ga.

be of harm to the defendant.[6] So, in order to entitle a defendant to an instruction that a confession cannot be considered, if it was not voluntary and was obtained through coercion or persuasion, there must be evidence on which to base such instruction.[7]

D. Acts and Declarations of Co-conspirators

§ 222. Propriety and sufficiency of instructions

In a criminal case the court is not authorized to charge on the acts and declarations of co-conspirators in the absence of the de-

App. 246; Bridges v. State, 70 S. E. 968, 9 Ga. App. 235; Hutchinson v. State, 63 S. E. 597, 5 Ga. App. 598; Riley v. State, 57 S. E. 1031, 1 Ga. App. 651; Davis v. State, 39 S. E. 906, 114 Ga. 104; Suddeth v. State, 37 S. E. 747, 112 Ga. 407; Lee v. State, 29 S. E. 264, 102 Ga. 221.

Ky. Bates v. Commonwealth, 174 S. W. 765, 164 Ky. 1; Black v. Commonwealth, 156 S. W. 1043, 154 Ky. 144; Tipton v. Commonwealth, 78 S. W. 174, 25 Ky. Law Rep. 1547.

Matters not authorizing a charge on the subject of confessions. On a trial for larceny of a jug of whisky, evidence that a witness saw accused soon after he was arrested, and that he told him he had not ordered any whisky, and that no one had promised to send him any, and stated a negro told him there was a jug of whisky for him at the express office, and he went and called for it, and got it. Cleveland v. State, 39 S. E. 941, 114 Ga. 110. In a prosecution for larceny, evidence of a statement by accused that he got a part of the stolen property from another man, and could account for his possession. State v. Smith, 106 N. W. 187, 129 Iowa, 709, 42 L. R. A. (N. S.) 539, 6 Ann. Cas. 1023.

Matters amounting merely to an inculpatory statement. Where, on a prosecution for murder, there was evidence that defendant, when informed that he would be arrested for the crime, stated that if deceased had treated his informant as he had treated defendant, informant would have wanted to kill him, it was prejudicial error to instruct that confessions are satisfactory and effectual proofs of guilt, as the evidence did not show a confession, but merely an inculpatory statement. Shelton v. State, 42 So. 30, 144 Ala. 106.

[6] Ransom v. State, 59 S. E. 101, 2 Ga. App. 826.

[7] Irby v. State, 95 Ga. 467, 20 S. E. 218; People v. Rogers, 85 N. E. 135, 192 N. Y. 331, 15 Ann. Cas. 177; Herndon v. State, 99 S. W. 558, 50 Tex. Cr. R. 552.

Evidence insufficient to justify submission of issue. The fact that an officer, who was present at the time and place (fixed by another officer in his testimony) that defendant made a confession, after being warned, did not hear the warning or confession, does not justify a submission to the jury of an issue as to whether the confession was made freely and voluntarily. Sullivan v. State, 51 S. W. 375, 40 Tex. Cr. R. 633.

Evidence sufficient to require charge. Where defendant testified in his own behalf that a warning was not given and hope of reward offered when his written confession was made, he was entitled to a charge that the confession could not be considered if any inducement was held out or hope of reward offered. Knight v. State, 116 S. W. 56, 55 Tex. Cr. R. 243. An assurance by the arresting officer to a girl 14 years old, that she shall not be hurt, holds out to her a hope of benefit to induce her confession, and is sufficient evidence on which to predicate a charge that confessions must be voluntary, and made without hope of benefit or fear of injury, in order to ground a conviction for crime thereon. Earp v. State, 55 Ga. 136.

fendant, unless there is evidence of a conspiracy,[8] and where it is alleged that a crime for which one is being prosecuted was committed as the result of a conspiracy between the defendant and third persons, the court should not only impress upon the jury that, before they can consider evidence of the statements and acts of such third persons in the absence of the defendant, they must find the existence of such conspiracy,[9] but that they must believe beyond a reasonable doubt that such conspiracy existed,[10] and

[8] Delaney v. State, 90 S. W. 642, 48 Tex. Cr. R. 594.

[9] **Ky.** Stacey v. Commonwealth, 225 S. W. 37, 189 Ky. 402.

Mo. State v. Kennedy, 177 Mo. 98, 75 S. W. 979.

Or. State v. Moore, 48 P. 468, 32 Or. 65.

Tex. Wilson v. State, 155 S. W. 242, 70 Tex. Cr. R. 3; Nelson v. State, 87 S. W. 143, 48 Tex. Cr. R. 274; Chapman v. State, 76 S. W. 477, 45 Tex. Cr. R. 479; Segrest v. State (Cr. App.) 57 S. W. 845; Casner v. State, 57 S. W. 821, 42 Tex. Cr. R. 118.

Instructions held proper within rule. An instruction that, where two or more persons are associated together for purpose of doing an unlawful act, the act or declaration of one while engaged in or pursuant to the common object or design is the act or declaration of all, for which all are liable, does not permit jury to use acts and declarations of one against all defendants regardless of proof of conspiracy or whether proof of conspiracy existed at the time of the act or declaration and does not permit proof of conspiracy as to all by evidence of acts and declarations of one. State v. Chong Ben, 173 P. 1173, 89 Or. 313, denying rehearing 173 P. 258, 89 Or. 313. In a prosecution for murder, where there is evidence of a conspiracy between defendant and others to commit the homicide, and of acts and declarations of an alleged coconspirator, instructions that, where a conspiracy is entered into between two or more, the acts and declarations of each in regard to the common purpose are the acts and declarations of all; and, when one enters into a conspiracy already formed, every act done by the others, before his entry or afterwards, in pursuance of the common design, is the act of the one so entering; and that if H. (a codefendant) and others formed a common purpose to kill deceased, and defendant entered into a conspiracy at any time before the killing, the acts and declarations of the co-conspirators made and done in pursuance of the common design after said agreement was made by H., and others, and before the killing, are admissible against defendant, but if defendant did not enter into such conspiracy the testimony should be disregarded in passing on his guilt—are not objectionable. Harris v. State, 31 Tex. Cr. R. 411, 20 S. W. 916. On a murder trial, where a conspiracy to kill deceased was sought to be shown, it was proper to charge that, if the jury believed that defendant had entered into a conspiracy to kill the deceased, they could consider as evidence against defendant any acts or declarations of his co-conspirators, or either of them, done or made to carry out their common purpose during the pendency of such conspiracy, but should disregard such acts and declarations if there was no conspiracy, or if they were not done or made during the pendency thereof to carry out the design. Luttrell v. State, 31 Tex. Cr. R. 493, 21 S. W. 248.

[10] **Ky.** Day v. Commonwealth, 191 S. W. 105, 173 Ky. 269; Hall v. Commonwealth, 93 S. W. 904, 29 Ky. Law Rep. 485.

Tex. Steele v. State, 223 S. W. 473, 87 Tex. Cr. R. 588; Wallace v. State, 81 S. W. 966, 46 Tex. Cr. R. 341; Chapman v. State, 76 S. W. 477, 45 Tex. Cr. R. 479; Graham v. State (Cr. App.) 61 S. W. 714.

that such acts or words of the alleged co-conspirators must have been done or uttered in furtherance of the object of the conspiracy.[11] The court should also further instruct that the acts and declarations of an alleged co-conspirator in the absence of the defendant are inadmissible to establish a conspiracy.[12] Where the admissibility of the declarations of a third person depends on whether they were spoken by a co-conspirator, and there is evidence that there was a conspiracy between the speaker and the defendant, the jury should be instructed to find whether there was a conspiracy, and to consider or disregard the declarations accordingly.[13]

§ 223. Declarations of alleged co-conspirator who has been acquitted

On the trial of one of two persons jointly indicted for a crime, it is proper to instruct that the declarations of the other before the crime are to be considered if the alleged conspiracy is proven, although the other has been acquitted.[14]

[11] State v. Moeller, 126 N. W. 568, 20 N. D. 114; Dobbs v. State, 100 S. W. 946, 51 Tex. Cr. R. 113.

[12] Holland v. State, 206 S. W. 88, 84 Tex. Cr. R. 144; Cooper v. State, 89 S. W. 816, 48 Tex. Cr. R. 608.

[13] State v. Kennedy, 75 S. W. 979, 177 Mo. 98; Parr v. State, 38 S. W. 180, 36 Tex. Cr. R. 493.

[14] Musser v. State, 61 N. E. 1, 157 Ind. 423.

CHAPTER XV

INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE

A. In Civil Cases

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231. General principles.
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A. In Civil Cases

§ 224. Right of party to instructions

In a civil action one relying upon circumstantial evidence is entitled to a charge that it may be considered by the jury,[1] and as to its force and effect,[2] and this may be so, although there is some direct evidence in the case,[3] and it may be necessary for the court to instruct that the jury may deduce certain facts from the facts and circumstances proved;[4] but if, in a case where there is both circumstantial and direct evidence, the case of the party requesting such an instruction rests upon the direct evidence rather than upon the circumstantial, the court may properly refuse such request.[5]

In an action to recover for death by wrongful act, in which the evidence is purely circumstantial, and in which the jury can de-

[1] State v. Hammond's Ex'rs, 6 Gill & J. (Md.) 157; Rounds v. Coleman (Tex. Civ. App.) 214 S. W. 496; Jones v. Hess (Tex. Civ. App.) 48 S. W. 46.

[2] Culbertson v. Hill, 87 Mo. 553; United States Exp. Co. v. Jenkins, 64 Wis. 542, 25 N. W. 549.

[3] Rice v. Detroit Fire & Marine Ins. Co. of Detroit, Mich. (Mo. App.) 176 S. W. 1113.

[4] Brown v. Rice's Adm'r, 76 Va. 629.

[5] Roberts v. Port Blakely Mill Co., 70 P. 111, 30 Wash. 25.

duce therefrom, with equal reason, the conclusions contended for by either party, the defendant is entitled to an instruction that, unless the jury find that the circumstances relied upon by the plaintiff as sustaining his theory are wholly inconsistent with any other reasonable hypothesis as to the manner of the death of the plaintiff's decedent, he has not met the burden of proof.[6]

As a general rule in the absence of a request so to do, the court need not instruct on the effect of circumstantial evidence in a civil case.[7]

§ 225. Propriety and sufficiency

An instruction on circumstantial evidence, to the effect that such evidence is to be regarded only when it is strong and satisfactory, is erroneous,[8] as is, of course, a charge which precludes the consideration of circumstantial evidence.[9] With proper qualifications the court may instruct that circumstantial evidence is as competent and as satisfactory as direct,[10] and a charge that circumstantial evidence, when strong and convincing, is often the most satisfactory from which to draw conclusions as to the existence or nonexistence of a disputed fact, is not open to the objection that it places a higher value on presumptions or inferences than on positive or direct testimony.[11] The sufficiency of a charge as to circumstantial evidence cannot be questioned, in the absence of a request for a more specific instruction.[12]

B. Criminal Cases

1. *Duty and Right of Court to Instruct on Circumstantial Evidence*

Instructions criticized as invading province of jury, see ante, § 53.

§ 226. General rule

Instructions, in a criminal prosecution, as to the weight to be attached to circumstantial evidence, are not required, where all the evidence for the state is positive, or all the facts bearing upon the commission of the alleged offense are testified to by eyewitnesses;[13] but where the state relies, for the conviction of the de-

[6] Wells v. Chamberlain, 168 N. W. 238, 185 Iowa, 264.

[7] Cowart v. Strickland, 100 S. E. 447, 149 Ga. 397, 7 A. L. R. 1110.

[8] McKay v. Seattle Electric Co., 136 P. 134, 76 Wash. 257.

[9] Rea v. Missouri, 17 Wall. 532, 21 L. Ed. 707; Glass v. Cook, 30 Ga. 133.

[10] Van Norman v. Modern Brotherhood of America, 121 N. W. 1080, 143 Iowa, 536.

[11] Wheelan v. Chicago, M. & St. P. Ry. Co., 85 Iowa, 167, 52 N. W. 119.

[12] Barnett v. Farmers' Mut. Fire Ins. Co., 73 N. W. 372, 115 Mich. 247.

[13] Ala. Miller v. State, 74 So. 840, 16 Ala. App. 3; Cowart v. State, 65

fendant, entirely upon circumstantial evidence,[14] or where the evidence is such that a conviction may be had upon circumstantial

So. 666, 11 Ala. App. 102; Bailey v. State, 53 So. 296, 390, 168 Ala. 4; Welch v. State, 27 So. 307, 124 Ala. 41.

Ill. People v. Zurek, 115 N. E. 644, 277 Ill. 621.

Tex. Gowans v. State, 145 S. W. 614, 64 Tex. Cr. R. 401; Jones v. State (Cr. App.) 77 S. W. 802; Campbell v. State (Cr. App.) 38 S. W. 171.

W. Va. State v. Cook, 72 S. E. 1025, 69 W. Va. 717.

[14] **Ala.** Mitchell v. State, 30 So. 348, 129 Ala. 23; Wilson v. State, 29 So. 569, 128 Ala. 17; Gilmore v. State, 13 So. 536, 99 Ala. 154.

Ga. Kincaid v. State, 79 S. E. 770, 13 Ga. App. 683; Allen v. State, 79 S. E. 769, 13 Ga. App. 657; Hays v. State, 74 S. E. 314, 10 Ga. App. 823; Middleton v. State, 66 S. E. 22, 7 Ga. App. 1; Lewis v. State, 64 S. E. 701, 6 Ga. App. 205; Hart v. State, 23 S. E. 831, 97 Ga. 365.

Ill. People v. Ambach, 93 N. E. 310, 247 Ill. 451.

Iowa. State v. Blydenburg, 112 N. W. 634, 135 Iowa, 264, 14 Ann. Cas. 443.

Kan. State v. Miller, 133 P. 878, 90 Kan. 230, Ann. Cas. 1915B, 818.

Mich. Gablick v. People, 40 Mich. 292.

Mo. State v. Fitzgerald, 201 S. W. 86; State v. Smith, 190 S. W. 288; State v. Wooley, 115 S. W. 417, 215 Mo. 620.

N. M. State v. McKnight, 153 P. 76, 21 N. M. 14; Territory v. Lermo, 46 P. 16, 8 N. M. 566.

Ohio. Carter v. State, 4 Ohio App. 193.

Okl. Pierson v. State, 164 P. 1005, 13 Okl. Cr. 382; Kirk v. State, 11 Okl. Cr. 206, 145 P. 307; Price v. State, 9 Okl. Cr. 359, 131 P. 1102; Baldwin v. State, 11 Okl. Cr. 228, 144 P. 634.

Tex. Moore v. State, 214 S. W. 347, 85 Tex. Cr. R. 573; Anderson v. State, 213 S. W. 639, 85 Tex. Cr. R. 411; Bell v. State, 206 S. W. 516, 84 Tex. Cr. R. 197; Love v. State, 199 S. W. 623, 82 Tex. Cr. R. 411; Renfro v. State, 198 S. W. 957, 82 Tex. Cr. R. 197; Henderson v. State (Cr. App.) 197 S. W. 869; Coulter v. State, 162 S. W. 885, 72 Tex. Cr. R. 602; Broadnax v. State, 150 S. W. 1168, 68 Tex. Cr. R. 177; Veasly v. State (Cr. App.) 85 S. W. 274; Stewart v. State (Cr. App.) 77 S. W. 791; Trejo v. State, 74 S. W. 546, 45 Tex. Cr. R. 127; Childers v. State, 37 Tex. Cr. R. 392, 35 S. W. 654; Polanka v. State, 33 Tex. Cr. R. 634, 28 S. W. 541; Martin v. State, 32 Tex. Cr. R. 441, 24 S. W. 512; Scott v. State (Cr. App.) 23 S. W. 685; Montgomery v. State (Cr. App.) 20 S. W. 926; Navarrow v. State (App.) 17 S. W. 545; Bennett v. State (App.) 15 S. W. 405; Daniels v. State (App.) 14 S. W. 395; Deaton v. State (App.) 13 S. W. 1009; Scott v. State (App.) 12 S. W. 504; Crowley v. State, 26 Tex. App. 578, 10 S. W. 217; Willard v. State, 26 Tex. App. 126, 9 S. W. 358; Crowell v. State, 24 Tex. App. 404, 6 S. W. 318; Jones v. State, 23 Tex. App. 501, 5 S. W. 138; Ramirez v. State, 20 Tex. App. 133; Riley v. Same, 20 Tex. App. 100; Counts v. State, 19 Tex. App. 430; Wright v. State, 18 Tex. App. 358; Allen v. State, 16 Tex. App. 237; Bryant v. State, Id., 144; Faulkner v. State, 15 Tex. App. 115; Cook v. State, 14 Tex. App. 96; Lee v. State, Id., 266; Thomas v. State, 13 Tex. App. 493; Ray v. State, 13 Tex. App. 51; Smith v. State, 7 Tex. App. 382.

Utah. State v. Romeo, 128 P. 530, 42 Utah, 46.

W. Va. State v. Lewis, 72 S. E. 475, 69 W. Va. 472, Ann. Cas. 1913A, 1203.

Illustrations of cases of circumstantial evidence requiring the court to instruct thereon. Where, in a prosecution for burglary, the stolen property was found in the house of one M., who testified that he obtained it from defendant, and defendant testified that he did not enter the house burglarized and had no connection with the theft whatsoever, but that at night M. awakened him and paid him for carrying the

alone,[15] the court must always, upon request, instruct upon the

property from the street where it then was to M.'s store, defendant was entitled to a charge on the law of circumstantial evidence. Gonzales v. State (Tex. Cr. App.) 105 S. W. 196. Where, in a prosecution for forgery in raising the amount of a check, the prosecuting witness testifies that the check called for $8.25 when he signed and delivered it, and that when it came back to his hands, after having been cashed, it called for $18.25, defendant is entitled to an instruction on circumstantial evidence, his connection with the alteration of the instrument being merely circumstantial. Dysart v. State, 79 S. W. 534, 46 Tex. Cr. R. 52. Where the only evidence of defendant's forgery was that he presented a forged order for money, which he said was given him by the person by whom it purported to be signed, the act of forgery was only established inferentially, and a failure to charge on the law of circumstantial evidence was reversible error. Hanks v. State (Tex. Cr. App.) 56 S. W. 922. Where, on a trial for murder of an illegitimate child, the mother of the child testified that defendant was its father; that, when the child was born, witness and defendant were alone in the house; that defendant took the child, which had cried, into another room, and witness heard him pouring water; that he came back and said the child was out there in the water; that he made a fire, and went out and soon returned with the child and placed it on the fire where it burned a long while; and that the child made no noise after being taken from the room, and witness did not state whether the child was alive when placed on the fire, it was held that, whether death resulted from drowning or burning, the case was one of circumstantial evidence, and a refusal to instruct as to such evidence was error. Puryear v. State, 28 Tex. App. 73, 11 S. W. 929. Where the indictment charged, first, the killing by shooting, and, second, by striking with an iron, and an eyewitness testified that before the shot was fired defendant struck deceased with the iron, but it appeared that death resulted from the shot alone, and witnesses heard a shot about 20 minutes after deceased was struck with the iron, but deceased's body was found nearly a mile from the witnesses, and there were others who heard a shot at about the same time in the vicinity of the place where the body was found, and deceased had but one bullet wound, it was held that it was reversible error not to instruct as to circumstantial evidence as to defendant shooting deceased. Leftwich v. State, 84 Tex. Cr. R. 489, 31 S. W. 385. In prosecution for murder, where there was no evidence that defendant actually took part in the homicide, and where the evidence, if any, that he aided or abetted the person committing homicide was wholly circumstantial, the law of circumstantial evidence should be submitted. Pizana v. State, 193 S. W. 671, 81 Tex. Cr. R. 81. Where there had been no difficulty between defendant and deceased, and defendant in a general fight struck deceased, but it was not shown who the others in the fight were or what kind of an instrument made the wound, a failure to charge on circumstantial evidence was error. Huddleston v. State, 156 S. W. 1168, 70 Tex. Cr. R. 260. Where there was no positive testimony of a sale in violation of the prohibition law, and there was positive testimony of a gift and the state sought to overcome it by circumstantial evidence, the court must, on request, charge on circumstantial evidence. Ely v. State, 158 S. W. 806, 71 Tex. Cr. R. 211. In prosecution for cattle theft, where only defendant's connection with cattle after they were taken was proved by direct evidence, and his possession was explained, court should have charged on circumstantial evidence. Rollins v. State, 203 S. W. 355, 83 Tex. Cr. R. 345. Where there is no confession by defendant, nor positive proof of the gist of theft (that is, the

[15] State v. Truskett, 118 P. 1047, 85 Kan. 804.

nature of such evidence and its probative force and effect. Thus where, in a prosecution for larceny, the state relies for conviction upon evidence of the possession by the defendant of the stolen property, a charge upon circumstantial evidence is required.[16] So

fraudulent taking), the case rests on circumstantial evidence, and a charge thereon is necessary. Pace v. State, 53 S. W. 689, 41 Tex. Cr. R. 203, reversing judgment 51 S. W. 953, 41 Tex. Cr. R. 203, on rehearing. On a prosecution for the theft of hogs, defendant's presence, about half a mile distant from the scene of the theft, with others who stole them, and his flight with them when discovered in possession of the hogs, are not such positive evidence of a taking by defendant as will justify the court in omitting to instruct the jury as to the law of circumstantial evidence. Montgomery v. State (Tex. Cr. App.) 20 S. W. 926. Though, on a trial for the theft of a cow, there are strong circumstances to show that the stolen animal was the one which witness saw defendant drive into his field within a week before the stolen cow was missed and its beef and hide found at defendant's house, yet, as the witness did not see and indentify the hide as of the cow he had seen defendant drive into his field, a failure to instruct on the law of circumstantial evidence is error. Smith v. State (Tex. App.) 12 S. W. 869. Where there is no positive proof that accused was nearer than 30 miles to the place from where a horse was stolen, a charge on circumstantial evidence should have been given. Green v. State (Tex. Cr. App.) 34 S. W. 283. Where defendant was hired to deliver 28 head of cattle, which he had never seen, to a person in another county, defendant and a negro who assisted him having trouble in getting the cattle across a certain creek, and some getting scattered in the timber, and the negro testified that some loose cattle ran through the highway at a place near where the stolen cow was kept, and the owner of the house where defendant stopped for dinner testified that defendant only had 27 head of cattle, but he delivered 28 head, including the stolen cow, and defendant claimed that he did not know he had the stolen cow until after the cattle were delivered, it was held that it was error to fail to submit the issue of circumstantial evidence in a prosecution for theft. York v. State, 61 S. W. 128, 42 Tex. Cr. R. 528. Where, on a trial for the larceny of money, the evidence showed that the prosecutor had the money in a drawer in an office, which was locked, that accused asked for the key to the office to procure clothing therein, that prosecutor gave him a bunch of keys containing the key to the office and to the drawer, that accused left on the next train after going into the office, that prosecutor on going into the office missed the money, a ragged $5 bill, that he wired the conductor of the train on which the accused was riding, and that the conductor secured a ragged $5 bill from accused, identified by prosecutor, a charge on circumstantial evidence was warranted. Suggs v. State, 143 S. W. 186, 65 Tex. Cr. R. 67. In a prosecution for theft of a hog, testimony that a witness, hearing shots, walked half a mile, and came in sight of accused hanging a hog in a tree, that he had a gun, and that the hog was shot, requires a charge on circumstantial evidence. Guerrero v. State, 80 S. W. 1001, 46 Tex. Cr. R. 445. A statement by defendant that he had branded the horse which he was charged to have stolen did not make the case one of direct evidence, since the statement did not show that the branding and the taking were contemporaneous, but was only a fact from which the unlawful taking might be inferred; hence it was error to refuse to instruct on circumstantial evidence. Gentry v. State, 56 S. W. 68, 41 Tex. Cr. R. 497.

[16] Miller v. State, 225 S. W. 382; Miller v. State (Cr. App.) 225 S. W. 879, 12 A. L. R. 597; Coleman v. State, 199 S. W. 473, 82 Tex. Cr. R. 332; Pierson v. State, 180 S. W. 1060,

such rule applies in a prosecution for forgery, or for passing a forged instrument, where the evidence of the state is circumstantial.[17] As a general rule the court need not instruct as to any particular circumstance,[18] but the case may be such as to make it error to refuse to charge that a particular circumstance constitutes no evidence against the defendant.[19] An omission to charge on circumstantial evidence is not cured by the ordinary instruction on reasonable doubt.[20]

§ 227. Rule where evidence is not entirely circumstantial

The general rule is that where, in addition to circumstantial evidence, there is direct and positive evidence of the guilt of the defendant,[21] or respecting the corpus delicti,[22] the omission of the

78 Tex. Cr. R. 275; Burdett v. State, 101 S. W. 988, 51 Tex. Cr. R. 345; Armstead v. State, 87 S. W. 824, 48 Tex. Cr. R. 304; Cortez v. State (Cr. App.) 74 S. W. 907; Davis v. State, 74 S. W. 544, 45 Tex. Cr. R. 182; Wallace v. State (Cr. App.) 66 S. W. 1102; Hodge v. State, 53 S. W. 862, 41 Tex. Cr. R. 229; Poston v. State (Cr. App.) 35 S. W. 656; Alderman v. State (Cr. App.) 23 S. W. 685; Hyden v. State, 31 Tex. Cr. R. 401, 20 S. W. 764; Taylor v. State, 27 Tex. App. 463, 11 S. W. 462; Guajardo v. State, 24 Tex. App. 603, 7 S. W. 331; Fuller v. State, 24 Tex. App. 596, 7 S. W. 330; Sullivan v. State, 18 Tex. App. 623.

[17] Carrell v. State, 184 S. W. 190, 79 Tex. Cr. R. 231; Lasister v. State, 94 S. W. 233, 49 Tex. Cr. R. 532; Nichols v. State, 44 S. W. 1091, 39 Tex. Cr. R. 80.

[18] Smotherman v. State, 83 S. W. 838, 47 Tex. Cr. R. 309.

[19] State v. Austin, 40 S. E. 4, 129 N. C. 534.

[20] Struckman v. State, 7 Tex. App. 581; Wallace v. State, Id. 570; Hunt v. State, Id. 212.

[21] **U. S.** Blanton v. United States, (C. C. A. Mo.) 213 F. 320, 130 C. C. A. 22, Ann. Cas. 1914D, 1238.

Ala. McCoy v. State, 54 So. 428, 170 Ala. 10; Cowan v. State, 34 So. 193, 136 Ala. 101; Hall v. State, 30 So. 422, 130 Ala. 45.

Ark. Jordan v. State, 217 S. W. 788, 141 Ark. 504; Griffin v. State, 216 S. W. 34, 141 Ark. 43; Bartlett v. State, 216 S. W. 33, 140 Ark. 553; Brown v. State, 203 S. W. 1031, 134 Ark. 597; McCain v. State, 201 S. W. 840, 132 Ark. 497; Vaughan v. State, 57 Ark. 1, 20 S. W. 588; Cohen v. State, 32 Ark. 226.

Cal. People v. Lapara, 183 P. 545, 181 Cal. 66; People v. Gorman, 161 P. 757, 31 Cal. App. 762; People v. Raber, 143 P. 317, 168 Cal. 316; People v. Holden, 109 P. 495, 13 Cal. App. 354.

Fla. Thomas v. State, 68 So. 944, 69 Fla. 692; Minor v. State, 46 So. 297, 55 Fla. 77.

Ga. Walker v. State, 101 S. E. 776, 24 Ga. App. 656; Ingram v. State, 100 S. E. 773, 24 Ga. App. 332; Scarboro v. State, 99 S. E. 637, 24 Ga. App. 27; Jones v. State, 94 S. E. 248, 147 Ga. 356; Lockett v. State, 92 S. E. 948, 20 Ga. App. 180; Vincent v. State, 91 S. E. 690, 146 Ga. 619; Ponder v. State, 90 S. E. 365, 18 Ga. App. 703; Hollingsworth v. State, 88 S. E. 213, 17 Ga. App. 725; Jackson v. State, 86 S. E. 459, 17 Ga. App. 269; Cooner v. State, 85 S. E. 688, 16 Ga. App. 539; Butler v. State, 85 S. E. 340, 143 Ga. 484; Brannon v.

[22] State v. Holbrook, 188 P. 947, 98 Or. 43.

In a prosecution for homicide, an instruction on circumstantial evidence is not necessary, where the only resort to such evidence is for the purpose of showing the manner in which the homicide took place. State v. Baird (Mo.) 231 S. W. 625.

court to charge the law applicable to cases of circumstantial evidence only will not constitute error. Thus, where the only issue

State, 80 S. E. 7, 140 Ga. 787; Banks v. State, 78 S. E. 1014, 13 Ga. App. 182; Brooks v. State, 78 S. E. 143, 12 Ga. App. 693; Harper v. State, 77 S. E. 915, 12 Ga. App. 651; Hegwood v. State, 75 S. E. 138, 138 Ga. 274; Tolliver v. State, 74 S. E. 1000, 138 Ga. 138; Wilson v. State, 72 S. E. 605, 10 Ga. App. 67; Benton v. State, 71 S. E. 498, 9 Ga. App. 422; Benton v. State, 71 S. E. 8, 9 Ga. App. 291; Bailey v. State, 68 S. E. 457, 8 Ga. App. 32; Holt v. State, 66 S. E. 279, 7 Ga. App. 77; Day v. State, 66 S. E. 250, 133 Ga. 434; Middleton v. State, 66 S. E. 22, 7 Ga. App. 1; Cliett v. State, 63 S. E. 626, 132 Ga. 36; Bivins v. State, 63 S. E. 523, 5 Ga. App. 434; Nobles v. State, 56 S. E. 125, 127 Ga. 212; Rosenthal v. State, 55 S. E. 497, 126 Ga. 558; Perdue v. State, 54 S. E. 820, 126 Ga. 112; Moore v. State, 25 S. E. 362, 97 Ga. 759.

Ill. People v. Dougherty, 107 N. E. 695, 266 Ill. 420.

Iowa. State v. Mitchell, 116 N. W. 808, 139 Iowa, 455.

Kan. State v. Kennedy, 184 P. 734, 105 Kan. 347; State v. Link, 125 P. 70, 87 Kan. 738.

Ky. Smith v. Commonwealth, 131 S. W. 499, 140 Ky. 599.

La. State v. Gordon, 39 So. 625, 115 La. 571.

Miss. Purvis v. State, 14 So. 268, 71 Miss. 706.

Mo. State v. Jackson, 186 S. W. 990; State v. Steinkraus, 148 S. W. 877, 244 Mo. 152; State v. Davis, 140 S. W. 902, 237 Mo. 237; State v. McCord, 140 S. W. 885, 237 Mo. 242; State v. Hubbard, 122 S. W. 694, 223 Mo. 80; State v. Nerzinger, 119 S. W. 379, 220 Mo. 36; State v. Salmon, 115 S. W. 1106, 216 Mo. 466; State v. Wooley, 115 S. W. 417, 215 Mo. 620; State v. Bobbitt, 114 S. W. 511, 215 Mo. 10; State v. Crone, 108 S. W. 555, 209 Mo. 316.

N. M. State v. McKnight, 153 P. 76, 21 N. M. 14.

N. C. State v. Neville, 72 S. E. 798, 157 N. C. 591.

N. D. State v. Foster, 105 N. W. 938, 14 N. D. 561.

Okl. Hendrix v. United States, 101 P. 125, 2 Okl. Cr. 240.

S. D. State v. Cline, 132 N. W. 160, 27 S. D. 573.

Tex. Wilson v. State, 204 S. W. 321, 83 Tex. Cr. 593; Soders v. State, 195 S. W. 1146, 81 Tex. Cr. R. 506; Marion v. State, 190 S. W. 499, 80 Tex. Cr. R. 478; Wilson v. State, 182 S. W. 891, 79 Tex. Cr. R. 7; Davis v. State, 180 S. W. 1085, 78 Tex. Cr. R. 352; Egbert v. State, 176 S. W. 560, 76 Tex. Cr. R. 663; Scott v. State, 175 S. W. 1054, 76 Tex. Cr. R. 410; Terrell v. State, 174 S. W. 1088, 76 Tex. Cr. R. 428; Vandeveer v. State, 173 S. W. 1197, 76 Tex. Cr. R. 308; Guerrero v. State, 171 S. W. 731, 75 Tex. Cr. R. 558; Cook v. State, 171 S. W. 227, 75 Tex. Cr. R. 350; Herrera v. State, 170 S. W. 719, 75 Tex. Cr. R. 120; Womack v. State, 170 S. W. 139, 74 Tex. Cr. R. 640; Thompson v. State, 167 S. W. 345, 74 Tex. Cr. R. 145; Forward v. State, 166 S. W. 725, 73 Tex. Cr. R. 561; Hendricks v. State, 160 S. W. 1190, 72 Tex. Cr. R. 75; Barrow v. State, 160 S. W. 458, 71 Tex. Cr. R. 549; Law v. State, 160 S. W. 98, 71 Tex. Cr. R. 179; Ballard v. State, 160 S. W. 92, 71 Tex. Cr. R. 168; Haynes v. State, 159 S. W. 1059, 71 Tex. Cr. R. 31; Anderson v. State, 159 S. W. 847, 71 Tex. Cr. R. 27; Nobles v. State, 158 S. W. 1133, 71 Tex. Cr. R. 121; Ely v. State, 158 S. W. 806, 71 Tex. Cr. R. 211; Pullen v. State, 156 S. W. 935, 70 Tex. Cr. R. 156; Perry v. State, 155 S. W. 263, 69 Tex. Cr. R. 644; Laird v. State, 155 S. W. 260, 69 Tex. Cr. R. 553; Meadows v. State (Cr. App.) 154 S. W. 546; Ferrell v. State, 152 S. W. 901, 68 Tex. Cr. R. 487; Whorton v. State, 151 S. W. 300, 68 Tex. Cr. R. 187; Clary v. State, 150 S. W. 919, 68 Tex. Cr. R. 290; Sylvas v. State, 150 S. W. 906, 68 Tex. Cr. R. 117; Willcox v. State, 150 S. W. 898, 68 Tex. Cr. R. 138; Wesley v. State, 150 S. W. 197, 67 Tex. Cr. R. 507; Moray v. State, 145 S. W.

in a prosecution for larceny is whether the stolen property be-

927, 65 Tex. Cr. R. 504; Robinson v. State, 145 S. W. 345, 66 Tex. Cr. R. 138; Mitchell v. State, 144 S. W. 1006, 65 Tex. Cr. R. 545; Foote v. State, 144 S. W. 275, 65 Tex. Cr. R. 368, Ann. Cas. 1916A, 1184; Williams v. State, 143 S. W. 634, 65 Tex. Cr. R. 82; Wright v. State, 141 S. W. 228, 63 Tex. Cr. R. 364; Ellington v. State, 140 S. W. 1102, 63 Tex. Cr. R. 420; Brogdon v. State, 140 S. W. 352, 63 Tex. Cr. R. 475; Taylor v. State, 138 S. W. 615, 62 Tex. Cr. R. 611; Bass v. State, 127 S. W. 1020, 59 Tex. Cr. R. 186; Cabrera v. State, 118 S. W. 1054, 56 Tex. Cr. R. 141; Potts v. State, 118 S. W. 535, 56 Tex. Cr. R. 39; Knuckles v. State, 114 S. W. 825, 55 Tex. Cr. R. 6; Tinsley v. State, 106 S. W. 347, 52 Tex. Cr. R. 91; McCue v. State (Cr. App.) 103 S. W. 883; Richardson v. State, 103 S. W. 852; Smith v. State, 102 S. W. 406, 51 Tex. Cr. R. 427; Glascow v. State, 100 S. W. 933, 50 Tex. Cr. R. 635; Herndon v. State, 99 S. W. 558, 50 Tex. Cr. R. 552; Mahoney v. State (Cr. App.) 98 S. W. 854; Yancy v. Same, 87 S. W. 693, 48 Tex. Cr. R. 166; Aladin v. State, 86 S. W. 327, 48 Tex. Cr. R. 1, 122 Am. St. Rep. 730; Usher v. State, 81 S. W. 712, 47 Tex. Cr. R. 98; Cruse v. State (Cr. App.) 77 S. W. 818; Leftwich v. State (Cr. App.) 55 S. W. 571; Nite v. State, 54 S. W. 763, 41 Tex. Cr. R. 340; Wolf v. State (Cr. App.) 53 S. W. 108; Glover v. State, 46 S. W. 824; Williams v. State (Cr. App.) 45 S. W. 494; Taylor v. State (Cr. App.) 42 S. W. 285; Colter v. State, 39 S. W. 576, 37 Tex. Cr. R. 284; Upchurch v. State (Cr. App.) 39 S. W. 371; Rogers v. State, 38 S. W. 184, 36 Tex. Cr. R. 563; Granado v. State, 37 Tex. Cr. R. 426, 35 S. W. 1069; Adams v. State, 34 Tex. Cr. R. 470, 31 S. W. 372; Hayes v. State, 30 Tex. App. 404, 17 S. W. 940.

W. Va. State v. Wilson, 83 S. E. 44, 74 W. Va. 772.

Wis. Anderson v. State, 114 N. W. 112, 133 Wis. 601.

Illustrations of cases of direct evidence making it unnecessary to charge on circumstantial evidence. In a prosecution for burglary, a showing that defendant was seen to enter the house, was found in the room alleged to have been burglarized, the door of which was previously closed, and that she was seen running out of the room, made a case of direct evidence, and it was not necessary to charge on circumstantial evidence. Smith v. State (Tex. Cr. App.) 90 S. W. 638. Where defendant obtained money by representing directly to a bank that he had a deposit in another bank, drawing his check for the amount against such deposit, this representation being shown to be false by the testimony of the latter bank's clerk, and defendant testified that he believed at the time that he had the amount claimed on deposit, it was held that a special charge on circumstantial evidence was unnecessary. Brown v. State (Tex. Cr. App.) 43 S. W. 986. Where, in a prosecution for fraudulently converting a horse belonging to another, there was direct evidence that defendant hired the horse from the owner, and that defendant afterwards sold the horse, the mere fact that the owner sent the horse to defendant by a servant, and could not positively testify that the servant delivered the horse to defendant, did not require a charge on circumstantial evidence. Lewallen v. State, 87 S. W. 1159, 48 Tex. Cr. R. 283. The fact that witnesses who testified to seeing the petitioning defendant raise his arm and shoot were so far from the scene of the shooting that they could hear none of the conversation between the parties does not make their testimony circumstantial, so as to entitle that defendant to an instruction as to conviction on purely circumstantial evidence. State v. Holbrook, 193 P. 434, 98 Or. 43. Where a defendant, arrested for the homicide of a child, states that the mother killed the child, that he saw the killing, after which the mother told him to bury the child, that he buried it, and the mother gave him money with which to leave the country, and the mother testifies that he

longs to the prosecuting witness, who testifies that it belongs to

took the child out alive, and afterwards returned, stating that he had buried it under a certain tree, and subsequently the body was found under said tree, it is not error to refuse instructions on circumstantial evidence. Red v. State (Tex. Cr. App.) 53 S. W. 618. Where defendant was accused of being an accomplice to a homicide, and the alleged principal testified that defendant advised him to kill deceased, and gave him a gun for that purpose, there was sufficient direct evidence, so that the case was not wholly based on circumstantial evidence, and the refusal to charge the law applicable to circumstantial evidence was not error. Thomas v. State, 62 S. W. 919, 43 Tex. Cr. R. 20, 96 Am. St. Rep. 834. Where a witness testifies that he saw defendant, who was one of an armed mob, shoot deceased, and saw deceased falling, there is no call for a charge on circumstantial evidence, though others of the party also shot deceased, and he was found a little distance from where he fell. Augustine v. State, 52 S. W. 77, 41 Tex. Cr. R. 59, 96 Am. St. Rep. 765. A charge, in a prosecution for murder, that, when the prosecution relies on circumstantial evidence alone, proof, by a preponderance of evidence, of a single fact inconsistent with defendant's guilt, calls for his acquittal, is properly refused where there is positive testimony that defendant committed the killing, and no fact inconsistent with his guilt is shown. Rains v. State, 88 Ala. 91, 7 So. 315. Instructions defining the law of circumstantial evidence need not be given in a homicide case, where any circumstances in evidence were as to defendant's relations with another man than deceased, her husband, and were introduced only to show motive. Lawson v. State, 84 N. E. 974, 171 Ind. 431. Where evidence of the killing is given by an accomplice, who was present at the time, the fact that it was dark, and that he was some distance from the parties when it occurred, does not require a charge on circumstantial evidence. Kidwell v. State, 35 Tex. Cr. R. 264, 33 S. W. 342. Where, in a prosecution for grand larceny, charged to have been committed by defendant stealing certain money from the prosecutor's person, the only circumstantial evidence introduced was corroborative of the direct testimony of the prosecuting witness, it was not error for the court to refuse requested instructions which assumed that the case was one of circumstantial evidence. People v. Lonnen, 73 P. 586, 139 Cal. 634. Where two witnesses testified to seeing accused in the act of removing a ring from the cravat of a sleeping person, though they could not see the ring on account of accused's hand being in the way, but had seen it on the cravat and noticed afterwards that it was gone, it cannot be said that the prosecution relied entirely or mainly on circumstantial evidence; and instructions based on such an assumption were properly refused. People v. Burns, 53 P. 1096, 121 Cal. 529. Where defendant was indicted for sending a threatening letter, and the postmaster testified he saw defendant place the letter in the mail box, and that he immediately afterwards found the letter in the mail box, which was previously empty, the evidence as to defendant's mailing the letter was direct, so that a failure to charge the law of circumstantial evidence was not error. Dunn v. State, 63 S. W. 571, 43 Tex. Cr. R. 25. Where one on trial for stealing hogs testified that he got possession of them with the consent of prosecutor, of whom he purchased them, and the defense of purchase was sufficiently submitted, he was not entitled to a charge on circumstantial evidence. Reed v. State, (Tex. Cr. App.) 46 S. W. 931.

Implied admission. Where a burglary is proved and defendant is shown to have been in recent possession of goods stolen from the house at the time of the alleged burglary, and there is evidence of an implied admission by accused of his guilt, and the jury are instructed as to the weight to be given to his explanation of recent possession of the stolen goods

him,[23] or where the accused in a prosecution for larceny relies on a claim of ownership,[24] or where in a prosecution for burglary the evidence as to defendant's entry of the house in question is positive,[25] or where the only issue is as to the sanity of the defendant, and the evidence in regard thereto is open, direct, and oral,[26] or where, in a prosecution for adultery, the paramour of the defendant testifies positively against him,[27] a charge on circumstantial evidence is not required. So, where the state relies on direct evidence of the offense charged, and circumstantial evidence is introduced only for the purposes of corroboration, it is not error to refuse to instruct as to what would be necessary to warrant a conviction on circumstantial evidence.[28] So instructions on circumstantial evidence are not required, where the defendant is positively identified as the guilty party by a witness, or by statements made as a part of the res gestæ or as dying declarations;[29] nor are they required in a prosecution for rape, where the prosecutrix testifies fully to the whole transaction and all the attending circumstances,[30] and want of exact certainty in the identification by a witness of the defendant as the one committing the crime charged does not call for such instructions.[31]

The mere fact that the intent with which an alleged criminal act was done is a matter of circumstantial evidence does not require a charge on such evidence,[32] as where, in a prosecution for

and as to reasonable doubt, a new trial will not be granted for failure to charge as to what weight the law attaches to evidence of a purely circumstantial nature. McElroy v. State, 53 S. E. 759, 125 Ga. 37.

Matters not constituting direct evidence within rule. In a prosecution for assault with intent to murder, a statement by the person assaulted that, after the gun was fired and he had been shot, he turned, looked, and recognized defendant's face by the flash of the gun, was insufficient to take the case out of the rule of circumstantial evidence, and hence defendant was entitled to an instruction thereon. Henry v. State, 221 S. W. 1083, 87 Tex. Cr. R. 392.

[23] Gann v. State (Tex. Cr. App.) 59 S. W. 896.

[24] Smith v. State, 136 S. W. 481, 62 Tex. Cr. R. 124.

[25] Camarillo v. State (Tex. Cr. App.) 68 S. W. 795.

[26] State v. Soper, 49 S. W. 1007, 148 Mo. 217.

[27] Moore v. State, 125 S. W. 34, 58 Tex. Cr. R. 183.

[28] State v. Shives, 165 P. 272, 100 Kan. 588; State v. Gereke, 86 P. 160, 74 Kan. 196, judgment reversed on rehearing Same v. Gerike, 87 P. 759, 74 Kan. 196; State v. Calder, 59 P. 903, 23 Mont. 504.

[29] Thompson v. State, 187 S. W. 204, 79 Tex. Cr. R. 478; Gradington v. State, 155 S. W. 210, 69 Tex. Cr. R. 595; Jenkins v. State, 93 S. W. 726, 49 Tex. Cr. R. 457, 122 Am. St. Rep. 812; Hernandez v. State, 81 S. W. 1210, 47 Tex. Cr. R. 20.

[30] Moore v. State, 96 S. W. 327, 49 Tex. Cr. R. 449; Ricks v. State, 87 S. W. 345, 48 Tex. Cr. R. 229.

[31] Monk v. State, 44 S. W. 1101.

[32] **S. D.** State v. Harbour, 129 N. W. 565, 27 S. D. 42.

Tex. Egbert v. State, 176 S. W. 560, 76 Tex. Cr. R. 663; Williams v. State, 124 S. W. 954, 58 Tex. Cr. R. 82; Alexander v. State, 49 S. W. 229, 50 S. W. 716, 40 Tex. Cr. R. 395;

larceny, the taking is proven by direct evidence, and the intent with which such act was committed is sought to be established by circumstantial evidence.[33] The fact that the direct evidence in a case consists of the testimony of an accomplice does not take it out of the operation of the above rule, dispensing with the necessity of a charge on circumstantial evidence.[34]

In some jurisdictions an instruction on circumstantial evidence should never be given unless the evidence on behalf of the state is wholly circumstantial.[35] In other jurisdictions, however, an admixture of direct evidence will not make it improper for the court to charge, or justify its refusal to charge, on circumstantial evidence, if the evidence is largely of the latter character,[36] and in one jurisdiction the giving of a brief correct instruction on circumstantial evidence is proper, although the principal evidence for the state is that of an eyewitness.[37]

§ 228. Rule where a confession or admission of defendant is introduced in evidence against him

A confession or admission by the defendant of actual participation in the act charged against him as a criminal offense constitutes direct evidence of guilt.[38] In accordance with the rule stated above, therefore, where there is evidence of such a confession or admission, the court will not be required to charge on circumstantial evidence.[39] This rule applies where the testimony to the

Russell v. State, 44 S. W. 159, 38 Tex. Cr. R. 590.

Vt. State v. Lapoint, 88 A. 523, 87 Vt. 115, 47 L. R. A. (N. S.) 717, Ann. Cas. 1916C, 318.

[33] Burton v. State, 146 S. W. 186, 65 Tex. Cr. R. 578; Nixon v. State, (Tex. Cr. App.) 93 S. W. 555; Roberts v. State, 70 S. W. 423, 44 Tex. Cr. R. 267; Houston v. State, 47 S. W. 468.

[34] Tune v. State, 94 S. W. 231, 49 Tex. Cr. R. 445; Rios v. State, 48 S. W. 505; Id., 47 S. W. 987, 39 Tex. Cr. R. 675.

[35] **Mo.** State v. Willard, 192 S. W. 437; State v. Dipley, 147 S. W. 111, 242 Mo. 461; State v. Nerzinger, 119 S. W. 379, 220 Mo. 36; State v. Clow, 110 S. W. 632, 131 Mo. App. 548.

Okl. Star v. State, 131 P. 542, 9 Okl. Cr. 210; Foster v. State, 126 P. 835, 8 Okl. Cr. 139.

Or. State v. Holbrook, 188 P. 947, 98 Or. 43.

[36] Allen v. State, 80 S. E. 215, 14 Ga. App. 115; Rountree v. State (Tex. Cr. App.) 58 S. W. 106; Howard v. State, 8 Tex. App. 612.

[37] State v. Kampert, 165 N. W. 972, 139 Minn. 132.

[38] **Ga.** Perry v. State, 36 S. E. 781, 110 Ga. 234.

Kan. State v. Kornstett, 61 P. 805, 62 Kan. 221.

Mo. State v. Gartrell, 71 S. W. 1045, 171 Mo. 489.

Tex. Borrer v. State, 204 S. W. 1003, 83 Tex. Cr. R. 198; Sullenger v. State, 182 S. W. 1140, 79 Tex. Cr. R. 98; Paul v. State, 45 S. W. 725.

[39] **U. S.** (C. C. A. Ill.) Ossendorf v. United States, 272 F. 257.

Ala. Green v. State, 12 So. 416, 97 Ala. 59.

Ga. Horton v. State, 93 S. E. 1012, 21 Ga. App. 120; Smith v. State, 54 S. E. 127, 125 Ga. 296; Griner v. State, 49 S. E. 700, 121 Ga. 614.

Ill. Langdon v. People, 24 N. E. 874, 133 Ill. 382.

confession comes from an accomplice,[40] and although the corroboration of the accomplice giving such testimony be by circumstantial evidence.[41] So such rule applies, although the confession contains statements exculpating the defendant,[42] or although it is alleged to have been obtained by coercion,[43] and, in the absence of a request for such an instruction, the omission of the court to charge the law of circumstantial evidence, to be applied if the jury do not believe that an alleged confession was made, is not error.[44]

Mo. State v. Mills, 199 S. W. 131, 272 Mo. 526; State v. Robinson, 23 S. W. 1066, 117 Mo. 649.

N. C. State v. West, 68 S. E. 14, 152 N. C. 832.

Tex. Miller v. State (Cr. App.) 225 S. W. 262; Tillman v. State (Cr. App.) 225 S. W. 165; Johnson v. State, 197 S. W. 995, 82 Tex. Cr. R. 82; Villareal v. State, 189 S. W. 156, 80 Tex. Cr. R. 133; Strickland v. State, 161 S. W. 110, 71 Tex. Cr. R. 582; Hargrove v. State, 140 S. W. 234, 63 Tex. Cr. R. 143; High v. State, 112 S. W. 939, 54 Tex. Cr. R. 333; Burk v. State, 95 S. W. 1064, 50 Tex. Cr. R. 185; Keith v. State, 94 S. W. 1044, 50 Tex. Cr. R. 63; Whitehead v. State, 90 S. W. 876, 49 Tex. Cr. R. 123; Landreth v. State, 70 S. W. 758, 44 Tex. Cr. R. 239; Carmona v. State, 65 S. W. 928; Ricks v. State, 56 S. W. 928, 41 Tex. Cr. R. 676; Matthews v. State, 51 S. W. 915, 41 Tex. Cr. R. 98; Hedrick v. State, 51 S. W. 252, 40 Tex. Cr. R. 532; White v. State, 50 S. W. 705, 40 Tex. Cr. R. 366; Franks v. State (Cr. App.) 45 S. W. 1013; Doucette v. State (Cr. App.) 45 S. W. 800; Holmes v. State (Cr. App.) 42 S. W. 979; Albritton v. State (Cr. App.) 26 S. W. 398; White v. State, 32 Tex. Cr. R. 625, 25 S. W. 784; Wilson v. State (Cr. App.) 21 S. W. 361; Self v. State, 28 Tex. App. 398, 13 S. W. 602; Johnson v. State, 28 Tex. App. 17, 11 S. W. 667; Carr v. State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; Heard v. State, 24 Tex. App. 103, 5 S. W. 846.

Illustrations of cases in which instructions not required within rule. Where the state introduced confessions admitting the killing, and defendant, while testifying, admitted the killing, a charge on circumstantial evidence was not required, notwithstanding defendant denied making the confessions. Gantt v. State (Tex. Cr. App.) 105 S. W. 799. Where, in a prosecution for mule theft, defendant had confessed to obtaining possession of the mules by taking them from the pasture in which prosecutor was keeping them, and had also made conflicting statements as to how he obtained them, the court was not bound to give a charge on circumstantial evidence, though the state relied on the circumstance of possession subsequent to the alleged taking. Welch v. State, 95 S. W. 1035, 50 Tex. Cr. R. 28. Where the corpus delicti was clearly established, and defendant's confession, if believed, would require a conviction, and circumstances adduced were additional proofs of guilt, it was not error to exclude instructions on circumstantial evidence. Dennis v. State, 23 So. 1002, 118 Ala. 72. Where, on a prosecution for the forgery of a note, defendant admitted making the note, but claimed that he had authority to do so, the court was not required to give a charge on circumstantial evidence. Usher v. State, 81 S. W. 309, 47 Tex. Cr. R. 93.

[40] Wampler v. State, 28 Tex. App. 352, 13 S. W. 144.

[41] Tyler v. State, 180 S. W. 687, 78 Tex. Cr. R. 279.

[42] Barnes v. State, 111 S. W. 943, 53 Tex. Cr. R. 628.

[43] Jackson v. State (Tex. Cr. App.) 62 S. W. 914.

[44] Smith v. State, 54 S. E. 127, 125 Ga. 296.

Confessions, however, may be circumstantial as well as direct evidence. If the fact or facts confessed are only matters from which an inference of participation in the alleged crime arises, the confession is circumstantial evidence.[45] It follows that such a confession will not relieve the court from the obligation to charge the law of circumstantial evidence.[46] Thus, in a prosecution for burglary, a charge as to circumstantial evidence should be given when all the evidence in relation to the breaking and entering is circumstantial, although a plea of guilty by the defendant to a charge of theft of property stolen during the burglary is in evidence.[47]

§ 229. Harmless error in refusing instruction

Although the state relies entirely upon circumstantial evidence, if it is full and satisfactory, without serious conflict, and clearly shows the guilt of the accused, a failure to charge on circumstantial evidence will not require the granting of a new trial.[48]

§ 230. Necessity of request for instructions

As a general rule it will not be error to fail to give an instruction on circumstantial evidence, in the absence of a request therefor.[49] This is particularly true where the state does not rely entirely on circumstantial evidence.[50] Thus, where there is evidence

[45] Hart v. State, 82 S. E. 164, 14 Ga. App. 714.

[46] Winn v. State, 198 S. W. 965, 82 Tex. Cr. R. 316; Bloch v. State, 193 S. W. 303, 81 Tex. Cr. R. 1; Early v. State, 97 S. W. 82, 50 Tex. Cr. App. 344; Willard v. State, 26 Tex. App. 126, 9 S. W. 358.

[47] Beason v. State, 67 S. W. 96, 43 Tex. Cr. R. 442, 69 L. R. A. 193.

[48] Toler v. State, 33 S. E. 629, 107 Ga. 682; Richards v. State, 27 S. E. 726, 102 Ga. 569.

[49] **U. S.** (C. C. A. Minn.) Robinson v. United States, 172 F. 105, 96 C. C. A. 307; (C. C. A. Tex.) Hughes v. United States, 231 F. 50, 145 C. C. A. 238.

Cal. People v. Balkwell, 76 P. 1017, 143 Cal. 259; People v. Hiltel, 63 P. 919, 131 Cal. 577.

Colo. Reagan v. People, 112 P. 785, 49 Colo. 316.

Iowa. State v. Hart, 118 N. W. 784, 140 Iowa, 456; State v. Bartlett, 105 N. W. 59, 128 Iowa, 518.

Kan. State v. Ingram, 16 Kan. 14.

S. D. State v. Millard, 138 N. W. 366, 30 S. D. 169; State v. Colvin, 124 N. W. 749, 24 S. D. 567.

Tex. Bennett v. State (Cr. App.) 50 S. W. 945.

[50] **U. S.** (C. C. A. Tex.) Bloch v. U. S., 261 F. 321, certiorari denied 40 S. Ct. 481, 253 U. S. 484, 64 L. Ed. 1025.

Ga. Mitchell v. State (App.) 103 S. E. 180; Long v. State (App.) 102 S. E. 359; Huckeba v. State, 100 S. E. 757, 24 Ga. App. 333; Etter v. State, 100 S. E. 453, 24 Ga. App. 275; Golden v. State, 99 S. E. 470, 23 Ga. App. 788; Coppedge v. State, 96 S. E. 1046, 22 Ga. App. 631; Garrett v. State, 95 S. E. 301, 21 Ga. App. 801; Chislon v. State, 91 S. E. 893, 19 Ga. App. 607; Bargeman v. State, 88 S. E. 591, 17 Ga. App. 807; Teal v. State, 87 S. E. 830, 17 Ga. App. 556; Wells v. State, 86 S. E. 650, 17 Ga. App. 301; Jackson v. State, 86 S. E. 459, 17 Ga. App. 269; Braxley v. State, 86 S. E. 425, 17 Ga. App. 196; Everett v. State, 83 S. E. 428, 15 Ga. App. 390; Clark v.

of a confession of the defendant,[51] or of incriminatory admissions by him,[52] or where the only circumstantial evidence relates to the intent of the defendant,[53] a request is necessary to put the court in error in failing to charge on circumstantial evidence.

However, in some jurisdictions, even where the evidence is in part direct, it is not considered good practice to fail to give an instruction on circumstantial evidence, though no request is made therefor, since the jury may not credit the direct evidence,[54] and where the evidence produced by the state is entirely circumstantial it is the duty of the court to instruct thereon, whether a request is made or not,[55] and although it is said in one jurisdiction that the performance of such duty is waived by the failure of the defendant to request an instruction,[56] in other jurisdictions it is reversible error for the court not to instruct of its own motion on circumstantial evidence, where the state relies exclusively on such evidence.[57]

2. *Sufficiency of Instructions and Propriety of Particular Instructions*

§ 231. General principles

It has been said that there is no prescribed formula for an instruction on the force and cogency of circumstantial evidence,[58]

State, 83 S. E. 223, 142 Ga. 601; Barron v. State, 77 S. E. 214, 12 Ga. App. 342; Smith v. State, 74 S. E. 711, 11 Ga. App. 89; Jordan v. State, 71 S. E. 875, 9 Ga. App. 578; Smith v. State, 54 S. E. 127, 125 Ga. 296.

Kan. State v. Davis, 188 P. 231, 106 Kan. 527; State v. Kennedy, 184 P. 734, 105 Kan. 347.

[51] Bloodworth v. State, 95 S. E. 532, 22 Ga. App. 132; Thomas v. State, 88 S. E. 917, 18 Ga. App. 101; Sutton v. State, 88 S. E. 122, 587, 17 Ga. App. 713; Weatherby v. State, 78 S. E. 1014, 13 Ga. App. 170.

[52] Wolfork v. State (Ga. App.) 103 S. E. 718.

[53] Reddick v. State, 74 S. E. 901, 11 Ga. App. 150; Love v. State, 72 S. E. 433, 9 Ga. App. 874.

[54] Middleton v. State, 66 S. E. 22, 7 Ga. App. 1.

[55] **Ga.** Amason v. State, 99 S. E. 631, 23 Ga. App. 784; Reynolds v. State, 98 S. E. 246, 23 Ga. App. 369; Leonard v. State, 86 S. E. 463, 17 Ga. App. 267; Allen v. State, 80 S. E. 215, 14 Ga. App. 115; Harden v. State, 78 S. E. 681, 13 Ga. App. 34; Young v. State, 76 S. E. 753, 12 Ga. App. 86; Bailey v. State, 74 S. E. 285, 10 Ga. App. 829; Tyus v. State, 72 S. E. 509, 10 Ga. App. 23; Twilley v. State, 71 S. E. 587, 9 Ga. App. 435.

Wyo. Gardner v. State, 196 P. 750.

[56] State v. Woods, 185 P. 21, 105 Kan. 554.

[57] **Ga.** Kelley v. State, 93 S. E. 497, 20 Ga. App. 821; Kinard v. State, 91 S. E. 941, 19 Ga. App. 624; Harris v. State, 90 S. E. 370, 18 Ga. App. 710; Gantz v. State, 88 S. E. 993, 18 Ga. App. 154; Coney v. State, 88 S. E. 918, 18 Ga. App. 112; Butler v. State, 88 S. E. 593, 17 Ga. App. 769; Andrews v. State, 88 S. E. 194, 145 Ga. 14; Martin v. State, 87 S. E. 715, 17 Ga. App. 516; Harvey v. State, 70 S. E. 141, 8 Ga. App. 660; Weaver v. State, 69 S. E. 488, 135 Ga. 317; White v. State, 60 S. E. 803, 4 Ga. App. 72.

Tenn. Webb v. State, 203 S. W. 955, 140 Tenn. 205.

[58] Davis v. State, 100 S. E. 50, 24 Ga. App. 35; Amason v. State, 99 S.

and in some jurisdictions a charge specifically upon circumstantial evidence may not be necessary, in view of other instructions given covering every material element in the case.[59] Thus an instruction presenting to the jury in concrete form all possible hypotheses that are favorable to the defendant, and telling them that if they believe any one of them he should be acquitted, is a sufficient charge on circumstantial evidence.[60]

An instruction on circumstantial evidence is not erroneous merely because it does not follow approved forms.[61] Unquestionably, however, it is the safer and better practice, where the trial court undertakes to declare the law on circumstantial evidence, to follow forms which have been frequently approved by the court of last resort.[62]

It is an unnecessary and dangerous thing for courts, in charging upon the law of circumstantial evidence, to give lengthy and prolix instructions attempting to explain the law applicable to this character of evidence.[63] A charge which follows the language of the statute will ordinarily be sufficient.[64] Where the court gives the usual stereotyped charge on circumstantial evidence, it is not essential for it to inform the jury that the state relies on such evidence;[65] but, where all the evidence is circumstantial, it is error to instruct in such a way as to convey the impression that there is direct evidence against the defendant.[66] Where the court correctly instructs the jury with respect to the force and effect of circumstantial evidence, it is clearly not required to en-

E. 631, 23 Ga. App. 784; Coffman v. State, 165 S. W. 939, 73 Tex. Cr. R. 295; Rye v. State, 8 Tex. App. 153.

[59] State v. Neville, 72 S. E. 798, 157 N. C. 591; Brown v. State, 126 P. 263, 7 Okl. Cr. 678; State v. Overson, 83 P. 557, 30 Utah, 22, 8 Ann. Cas. 794.

[60] Griffin v. State, 101 S. E. 767, 24 Ga. App. 656; Davis v. State, 100 S. E. 50, 24 Ga. App. 35; Reynolds v. State, 98 S. E. 246, 23 Ga. App. 369.

[61] Galloway v. State, 70 S. W. 211, 44 Tex. Cr. R. 230.

[62] State v. Salmon, 115 S. W. 1106, 216 Mo. 466; McIver v. State (Tex Cr. App.) 60 S. W. 50.

[63] Harris v. State, 137 P. 365, 10 Okl. Cr. 417.

[64] McDonald v. State, 94 S. E. 262, 21 Ga. App. 125.

[65] Flagg v. State, 153 S. W. 852, 69 Tex. Cr. R. 107; Henderson v. State, 96 S. W. 37, 50 Tex. Cr. R. 266; Pennington v. State (Tex. Cr. App.) 48 S. W. 507.

Compare Anderson v. State, 213 S. W. 639, 85 Tex. Cr. R. 411.

Rule where usual charge on circumstantial evidence refused. Where the evidence in a prosecution for violating the local option law was of a circumstantial nature, a charge by the court beginning that "the state relies to a certain extent upon circumstantial evidence" where the usual charge on this phase of the law was asked by defendant and refused, is an improper limitation, and does not explain how or how far the state relies on circumstantial evidence. Trinkle v. State, 105 S. W. 201, 52 Tex. Cr. R. 42.

[66] Martin v. State, 74 S. E. 306, 10 Ga. App. 798.

join caution upon the jury in the matter of applying such evidence.[67]

§ 232. Contrasting direct and circumstantial evidence

Subject to the rule against invading the province of the jury, which in some jurisdictions may render such an instruction erroneous,[68] it is proper, where the evidence is both direct and circumstantial, to define each class of evidence and explain the difference between them,[69] and the court may properly instruct, when accompanied by appropriate explanations, that there is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence,[70] that there is no practical

[67] People v. Shuler, 28 Cal. 490; Minniard v. Commonwealth, 164 S. W. 804, 158 Ky. 210; Brady v. Commonwealth, 11 Bush (Ky.) 282; State v. Le Blanc, 41 So. 105, 116 La. 822.

[68] Horton v. State (Tex. App.) 19 S. W. 899; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207.

Harmless error. The error, if any, in a charge that a conviction may be had on circumstantial as well as direct evidence, on the ground that it is on the weight of the evidence, does not require a reversal, where the charge is followed, and in direct connection therewith, by the statement that, to justify a conviction on circumstantial evidence, each fact necessary to establish guilt must be proved beyond a reasonable doubt, and that all the facts must be considered with each other and lead on the whole to a conclusion of guilt. Roberts v. State, 129 S. W. 611, 60 Tex. Cr. R. 20.

[69] Joiner v. State, 31 S. E. 556, 105 Ga. 646.

[70] People v. Urquidas, 96 Cal. 239, 31 P. 52; People v. Morrow, 60 Cal. 142.

Instructions held proper within rule. On prosecution for the larceny of a watch, on evidence that defendant was in a position to take the watch, and that no other person was in that position, the following charge is not erroneous: "Circumstantial evidence cannot very well lie. It is quite as safe for a jury to convict on circumstantial evidence, when a proper case is given, as it is on direct, positive proof. The direct, positive proof may be false; the circumstances cannot be false." People v. Davis, 64 Hun, 636, 19 N. Y. S. 781. On a trial for murder, an instruction that "strong circumstantial evidence is often the most satisfactory of any from which to draw the conclusion of guilt," followed with the explanation that witnesses who testify to a direct fact may be guilty of perjury, while "circumstances will not lie," is not objectionable, in telling the jury that circumstantial evidence is better than any other. State v. Moelchen, 53 Iowa, 310, 5 N. W. 186. Where the evidence was such as to require instructions on circumstantial evidence, it was not error for the court to state that great jurists have pronounced it "of a nature equally satisfactory with positive evidence, and less liable to proceed from perjury." State v. Ward, 61 Vt. 153, 17 A. 483.

Telling jury that as many wrongful verdicts have been based on direct evidence as on circumstantial evidence. It is not error for the court to instruct the jury that certain cases read to them by defendant's counsel, in which innocent persons had been convicted on circumstantial evidence, "are extreme cases, and probably very seldom occur," and that, "if much search be made, it might be found that a greater number of cases could be cited wherein improper convictions have been had from direct, positive evidence, through inattention or perjury of witnesses." State v. McKiernan, 17 Nev. 224, 30 P. 831. Where on a trial for murder, in which the evidence was all circumstantial, the jury were instructed that

difference between circumstantial and direct evidence,[71] that no greater degree of mental conviction is required to find a verdict on circumstantial evidence than in the case of direct evidence,[72] and that, if circumstantial evidence is of such a character as to exclude every reasonable hypothesis other than that of the defendant's guilt, it is entitled to the same weight as direct evidence.[73] It is accordingly proper to charge that the guilt of an

defendant could not be convicted if there was any reasonable doubt of his guilt; that circumstantial evidence must be absolutely inconsistent with his innocence; that they were to determine the weight and character of the evidence, and must not suppose that the court had any opinion on the subject; that the responsibility for the verdict was theirs, and that they were not to be governed by anything said by the court except as to the rules of law applicable to the case, it was held that it was not error for the court to say, in giving the case to the jury, that circumstantial evidence was just as good as any other if it satisfied the jury beyond a reasonable doubt of the guilt of accused; that just as many cases of wrongful verdicts, and, according to the books, more, resulted from direct than from circumstantial evidence; and that in his practice of 40 years in the criminal courts he found that most of those cases of circumstantial evidence are found in romances and dramas, in which the writer weaves a set of circumstances around the hero, having an explanation in mind, and, either just before he is condemned, or just after, the explanation arrives, and the hero goes off the stage in a blaze of glory—since the charge was full, fair, clear, and correctly stated the law. People v. Neufeld, 58 N. E. 786, 165 N. Y. 43.

[71] State v. Rome, 64 Conn. 329, 30 A. 57; Territory v. Egan, 3 Dak. 119, 13 N. W. 568.

Necessary qualification. A charge that "the law makes no distinction between circumstantial and positive evidence," without any qualifying instruction as to the care to be used in considering circumstantial evidence, is erroneous because misleading. Burt v. State, 72 Miss. 408, 16 So. 342, 48 Am. St. Rep. 563.

[72] Cargile v. State, 70 S. E. 873, 136 Ga. 55.

[73] Reynolds v. State, 46 N. E. 31, 147 Ind. 3; Longley v. Commonwealth, 87 S. E. 339, 99 Va. 807.

Instruction to give same weight to circumstantial evidence as to direct. An instruction defining both direct and circumstantial evidence, and stating that the circumstantial evidence which had been received was competent, and that "if it is of such a character as to exclude every reasonable supposition, other than that of defendant's guilt, then and in that event it should be given the same weight as direct evidence," was not an unconditional direction to the jury to give the same weight to circumstantial evidence as to direct evidence. Davis v. State, 70 N. W. 984, 51 Neb. 301.

Illustrations of proper instructions as to relative value of circumstantial and direct evidence. An instruction that "where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses would have been," is correct. People v. Daniels, 34 P. 233, 4 Cal. Unrep. 248, following Same v. Cronin, 34 Cal. 191. In a criminal case, an instruction: "Evidence is of two kinds, direct and circumstantial. 'Direct evidence' is where a witness testifies of his own personal knowledge of the main fact, or facts, to be proven. 'Circumstantial evidence' is proof of certain facts and circumstances in a certain case, from which the jury may infer other and connected facts, which usually and reasonably follow according to the common

accused may be established by circumstantial evidence alone,[74] and the accused is not entitled to a charge which takes as a standard for weighing the effect of circumstantial evidence the testimony of credible eyewitnesses,[75] nor to a charge that a conviction should not be had on circumstantial evidence when direct evidence is obtainable.[76]

An instruction that, in order to warrant a verdict of guilty on circumstantial evidence alone, it must be such as to produce "nearly" the same degree of certainty as direct evidence has been held not improper in some jurisdictions,[77] or at least not reversible error,[78] but in other jurisdictions it is considered erroneous.[79]

§ 233. Degree of certainty required

An instruction on circumstantial evidence should define it and state the rule governing its effect,[80] and should include a statement that, in order to warrant a conviction of the defendant, the jury must be satisfied of his guilt beyond a reasonable doubt to

experience of mankind. Crime may be proven by circumstantial evidence, as well as by direct testimony of eyewitnesses, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendants, and inconsistent with any reasonable theory of their innocence"—sufficiently charged on circumstantial evidence. State v. Hillman, 127 S. W. 102, 142 Mo. App. 510. An instruction that circumstantial evidence should be regarded in all cases, and was many times quite as conclusive as direct evidence, and when it was strong and satisfactory the jury should give it fair weight, and, if it convinces the guarded judgment, the jury should base a conviction thereon, but that the jury should make its reasonable inferences from circumstances proved, and, if they had a reasonable doubt as to defendant's guilt, should acquit, was not prejudicially misleading. State v. Sloan, 89 P. 829, 35 Mont. 367. On a trial for homicide, an instruction as to the relative value of circumstantial and positive evidence, stating that it depends on facts and circumstances in one instance and on the reliability of the witness in the other, was not erroneous, as leading the jury to conclude that in considering circumstantial evidence the reliability of the witness who testifies to the facts and circumstances from which the fact in issue is to be inferred is not to be considered of so much importance as when he gives direct and positive evidence of the fact in issue. State v. Tedder, 65 S. E. 449, 88 S. C. 437.

[74] Beeler v. People, 146 P. 762, 58 Colo. 451; Williams v. State, 75 So. 785, 73 Fla. 1198; People v. Cotton, 95 N. E. 283, 250 Ill. 338; People v. Darr; 179 Ill. App. 130, judgment affirmed 104 N. E. 389, 262 Ill. 202; Epps v. State, 1 N. E. 491, 102 Ind. 539.

[75] State v. Carson, 115 N. C. 743, 20 S. E. 384; State v. Allen, 103 N. C. 433, 9 S. E. 626; Rea v. State, 8 Lea (Tenn.) 356.

[76] Webb v. State, 65 So. 845, 11 Ala. App. 123.

[77] People v. Cronin, 34 Cal. 191.

[78] People v. Eckman, 72 Cal. 582, 14 P. 359.

[79] State v. Dotson, 67 P. 938, 26 Mont. 305.

[80] State v. Brady (Iowa) 91 N. W. 801.

the exclusion of every other reasonable hypothesis.[81] Such an instruction should not permit the jury to act upon probabilities.[82]

The essential elements of such an instruction are comprised in a charge to the effect that, to justify a conviction on circumstantial evidence, each fact necessary to the conclusion of guilt must be proven by competent evidence beyond a reasonable doubt, that all the facts so necessary must be consistent with each other and with the main fact, that the circumstances taken together must be of a conclusive nature, producing a reasonable and moral certainty that the accused and no other person committed the offense charged, that no other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, and that the facts must be absolutely incompatible with his innocence, and incapable of any other explanation on any other reasonable hypothesis than that of guilt.[83] The omission from the above charge on circumstantial evidence of the phrase "and no other

[81] **Ga.** Hill v. State, 66 S. E. 802, 7 Ga. App. 336; Holt v. State, 62 S. E. 992, 5 Ga. App. 184; Lett v. State, 59 S. E. 85, 2 Ga. App. 829; Glaze v. State, 58 S. E. 1126, 2 Ga. App. 704; Baker v. State, 58 S. E. 1114, 2 Ga. App. 662; Harwell v. State, 58 S. E. 1111, 2 Ga. App. 613.

Mont. State v. Allen, 87 P. 177, 34 Mont. 403.

Okl. Matthews v. State, 130 P. 125, 8 Okl. Cr. 676.

Tex. Reynolds v. State, 217 S. W. 151, 86 Tex. Cr. R. 453.

[82] People v. O'Brien, 62 P. 297, 130 Cal. 1; People v. Dilwood, 94 Cal. 89, 29 P. 420.

[83] **Kan.** State v. Ward, 192 P. 836, 107 Kan. 498.

Tex. McGee v. State, 155 S. W. 246, 69 Tex. Cr. R. 580; Reeseman v. State, 128 S. W. 1126, 59 Tex. Cr. R. 430; Porch v. State, 99 S. W. 102, 50 Tex. Cr. R. 335; Crow v. State, 39 S. W. 574, 37 Tex. Cr. R. 295; Bookser v. State, 26 Tex. App. 593, 10 S. W. 219.

Wis. Colbert v. State, 104 N. W. 61, 125 Wis. 423.

Circumstances to be consistent with each other. In a prosecution for murder, based wholly on circumstantial evidence, it is error to refuse a charge that guilt must be proved by facts and circumstances, all of which are consistent with each other and with the guilt of the accused, and absolutely inconsistent with any reasonable theory of innocence. State v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

Other illustrations of sufficient instructions. Where the prosecution relies for conviction on evidence partly direct and partly circumstantial, an instruction on circumstantial evidence which defines its nature and points out the degree of certainty required as compared with direct evidence, and charges that it is legal and competent, and justifies conviction if incompatible with innocence and incapable of explanation on any other hypothesis than that of guilt, is sufficient. Stockbridge v. Territory, 79 P. 753, 15 Okl. 167. A charge on circumstantial evidence is sufficient where, besides giving a general definition of such evidence, the jury are told that, if they entertain a reasonable doubt as to any fact or element necessary to constitute the offense, they must acquit; and that, to authorize conviction on such evidence, each circumstance should not be only consistent with guilt, but inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt of guilt. State v. Asbell, 46 P. 770, 57 Kan. 398. On a prosecution for adultery, the jury are sufficiently warned

person" will not render it erroneous,[84] nor will the omission of the clause, requiring that facts relied on to justify a conviction on circumstantial evidence must be consistent with each other, be cause for reversal, in the absence of a request to so instruct.[85]

Since it is not necessary, in order to convict, that the guilt of the accused should be established beyond all possible doubt,[86] the words "absolutely incompatible" used in the above instruction are the subject of criticism in some jurisdictions, and when contained in a requested instruction will be ground for refusing it.[87]

against being misled by a train of circumstantial evidence when the court charges that the circumstances offered by the state must be such as necessarily lead the mind of a reasonable, just, and prudent man to the conclusion of guilt, and that they must exclude all reasonable doubt, and he further narrates the facts relied on by the state, which facts, if true, could leave no reasonable doubt of guilt, and then leaves to the jury the question of fact. State v. Hart, 94 Iowa, 749, 64 N. W. 278.

[84] Bosley v. State, 153 S. W. 878, 69 Tex. Cr. R. 100; Moseley v. State, 127 S. W. 178, 59 Tex. Cr. R. 90; Ramirez v. State, 66 S. W. 1101, 43 Tex. Cr. R. 455; Bennett v. State, 48 S. W. 61, 39 Tex. Cr. R. 639.

Instructions not improper within rule. An instruction on circumstantial evidence was not erroneous because it did not tell the jury that, in order to convict, they must find that defendant "alone" committed the crime. Bell v. State (Tex. Cr. App.) 71 S. W. 24. Where, in a prosecution for burglary, the court charged that the circumstances, taken together, must be of a conclusive nature, leading to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that accused, or accused acting with some other person, committed the offense charged, the fact that the charge on circumstantial evidence did not require the jury to find that the accused, and no other person, committed the crime, was immaterial, it being proven that accused and his codefendant were acting together as principals in the commission of the offense. Boersh v. State (Tex. Cr. App.) 62 S. W. 1060.

[85] State v. Wolfley, 93 P. 337, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412, denying rehearing 89 P. 1046, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412.

[86] Lawson v. State, 76 So. 411, 16 Ala. App. 174; People v. Riley, 3 N. Y. Cr. R. 374.

Absolute certainty not required. On a trial for murder, an instruction that absolute certainty is never required in the trial of criminal cases, and though in the application of circumstantial evidence the utmost caution should be used, yet it may rise so high in the scale of belief as to generate full conviction, and produce "the highest degree of moral certainty," and when, after due caution, this result is reached, the jury are authorized to act on it and, if satisfied "to the exclusion of every reasonable doubt" of defendant's guilt, they might so find, is not open to objection. Gibson v. State, 23 So. 582, 76 Miss. 136.

[87] State v. Rover, 13 Nev. 17; Horn v. State, 73 P. 705, 12 Wyo. 80.

Illustrations of instructions held to require greater degree of certainty than the law demands. A charge that, "to justify the inference of legal guilt from circumstantial evidence, the existence of inculpatory facts must be established absolutely and to a demonstration incompatible with the innocence of the accused." People v. Bellamy, 109 Cal. 610, 42 P. 236. An instruction that "the hypothesis contended for must be established to an absolute moral certainty, to the entire exclusion of any other hypothesis being true, or the jury must find the defendant not guilty." State v. Glass, 5 Or. 73. An instruction that, to obtain a conviction on circumstantial evidence alone, the people must show facts and circum-

It is proper to refuse a charge that each and every circumstance must be consistent with the other and with the whole chain of circumstances, and each and all must point to defendant exclusively as the guilty agent, since the circumstances may point to two persons as the guilty parties, defendant being one, or one or more circumstances may have no reference whatever to the defendant or the crime charged, in which case the jury will be justified in not considering it.[88]

§ 234. Requirement that circumstances be consistent with hypothesis of guilt and inconsistent with that of innocence

Where the evidence is circumstantial, it is proper to instruct that to warrant a conviction of the defendant the evidence must not only be consistent with the hypothesis of his guilt, but inconsistent with every other rational hypothesis,[89] and the general rule is that such an instruction should be given on request.[90] Instruc-

stances absolutely inconsistent, on any reasonable hypothesis, with the innocence of the accused, and incapable of explanation on any other theory than that of his guilt. Carlton v. People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346. An instruction, in a prosecution for murder, that, to convict for a criminal offense on circumstantial evidence, the state must show such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis with defendant's innocence, and incompatible of explanation except by defendant's guilt. State v. Caseday, 115 P. 287, 58 Or. 429. An instruction that, "in cases of alleged murder proved alone by circumstances, if those circumstances are not conclusive as to the guilt of the defendant, there ought to be a motive, and that a strong one, proved, which might have impelled the defendant to commit the act, and, if such proof is not made, the jury ought to acquit the defendant," is properly refused, since the jury might understand that, if the evidence did not show the defendant's guilt with absolute certainty, they must acquit him in absence of proof of a motive. Sumner v. State, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561.

An instruction that the evidence must point unerringly to the guilt of defendant and must be irreconcilable with innocence is properly refused as requiring absolute certainty. Gardner v. State (Wyo.) 196 P. 750.

[88] Timmerman v. Territory, 3 Wash. T. 445, 17 P. 624.

[89] **Ala.** Riley v. State, 88 Ala. 188, 7 So. 104; Id., 88 Ala. 193, 7 So. 149.

Cal. People v. Muhly, 114 P. 1017, 15 Cal. App. 416.

Ga. Callaway v. State (Sup.) 106 S. E. 577.

Tex. Gaines v. State (Cr. App.) 77 S. W. 10.

Wis. Spick v. State, 121 N. W. 664, 140 Wis. 104.

[90] **U. S.** (C. C. A. Va.) Garst v. United States, 180 F. 339, 103 C. C. A. 469.

Ala. Bowen v. State, 37 So. 233, 140 Ala. 65; Brown v. State, 108 Ala. 18, 18 So. 811.

Ga. Bush v. State, 97 S. E. 554, 23 Ga. App. 126; Harris v. State, 90 S. E. 370, 18 Ga. App. 710; Leonard v. State, 86 S. E. 463, 17 Ga. App. 267; Harvey v. State, 70 S. E. 141, 8 Ga. App. 660.

Ind. Robinson v. State, 124 N. E. 489, 188 Ind. 467; Wantland v. State, 145 Ind. 38, 43 N. E. 931.

Iowa. State v. Brazzell, 150 N. W. 683, 168 Iowa, 480.

Kan. State v. Andrews, 61 P. 808, 62 Kan. 207; Horne v. State, 1 Kan. 42, 81 Am. Dec. 499.

Miss. Simmons v. State, 64 So. 721, 106 Miss. 732, suggestion of error overruled 65 So. 511, 107 Miss.

tions should not be so framed as to make it possible for the jury to infer that they are only authorized to acquit in the event that the

463; Smith v. State, 57 So. 913, 101 Miss. 283, reversing judgment on suggestion of error 57 So. 368; Irving v. State, 56 So. 377. 100 Miss. 208; Pope v. State, 56 Miss. 790.

Mo. State v. David, 33 S. W. 28, 131 Mo. 380; State v. Woolard, 111 Mo. 248, 20 S. W. 27; State v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; State v. Sasseen, 75 Mo. App. 197.

S. C. State v. Hudson, 44 S. E. 968, 66 S. C. 394, 97 Am. St. Rep. 768.

Tenn. Turner v. State, 4 Lea, 206; Lawless v. State, 4 Lea, 173.

Tex. Smith v. State, 35 Tex. Cr. R. 618, 33 S. W. 339, 34 S. W. 960; Harris v. State, 34 Tex. Cr. R. 494, 31 S. W. 388; Jones v. State, 34 Tex. Cr. R. 490, 30 S. W. 1059, 31 S. W. 664; Smith v. State, 8 Tex. App. 141; Walker v. State, 6 Tex. App. 576; Black v. State, 1 Tex. App. 368.

Instructions held insufficient within rule. Where the only proof of guilt is circumstantial, it is error to submit the case with no further instruction as to the quantum of evidence necessary than that "the proof of guilt must be inconsistent with any other rational supposition." State v. Brady, 97 N. W. 62, 121 Iowa, 561, 12 L. R. A. (N. S.) 199. An instruction that circumstantial evidence has been received in every age of the common law, and when it arises so high in the scale of belief as to generate in the minds of the jury full conviction of defendant's guilt beyond a reasonable doubt, then they are authorized to convict. Permenter v. State, 54 So. 949, 99 Miss. 453, Ann. Cas. 1913E, 426. An instruction that, "before you can convict on circumstantial evidence, it must be of such character and weight as to exclude all reasonable hypothesis of defendant's innocence," is too meager, and fails to state the rule in such a way as to make it a safe guide for the jury. State v. Taylor, 111 Mo. 538, 20 S. W. 239.

Instructions held improperly refused. Where the evidence was circumstantial, an instruction that, to convict, the circumstances should be of a conclusive nature, producing a reasonable and moral certainty that the accused, and no one else, committed the offense charged; and that, to warrant a conviction upon circumstantial evidence alone, such circumstances must be shown as are consistent with the guilt of the party charged, and cannot, upon any reasonable theory, be true, and the party charged be innocent; and, if all the facts relied on to secure a conviction can be reasonably accounted for consistently with the innocence of the defendant, then the jury should acquit—was improperly refused where other instructions given did not define the nature of the circumstances relied on to show guilt with as much particularity. Marzen v. People, 50 N. E. 249, 173 Ill. 43.

Instructions held sufficient within rule. A charge on circumstantial evidence, in a prosecution for perjury, that "the facts and circumstances proved, if any, should not only be consistent with the falsity of said alleged false statement, but inconsistent with any other reasonable hypothesis or conclusion than that of its falsity," states the legal requisites of such evidence the same as though it required the evidence to exclude "every reasonable hypothesis consistent with the innocence of defendant." McCoy v. State (Tex. Cr. App.) 73 S. W. 1057. A charge that, to warrant conviction on circumstantial evidence the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of accused's guilt, and that in weighing such testimony it must be consistent with accused's guilt, must exclude every other reasonable hypothesis save that of his guilt and, if it is consistent with accused's guilt, a conviction cannot be had if there be any other reasonable hypothesis upon which the testimony can be reconciled and explained, was not erroneous as

proved essential facts and circumstances are equally as consistent

failing to charge the hypothesis of innocence, and to charge that if the proved facts were consistent with innocence accused would be entitled to an acquittal. Cargile v. State, 70 S. E. 873, 136 Ga. 55. Where the hypothesis arising from circumstantial evidence consistent with innocence was fully and fairly stated, and the jury instructed that if satisfied that the hypothesis was true, or if they had a reasonable doubt as to its truth, defendant should be acquitted, there was a substantial compliance with rule relating to instruction or circumstantial evidence. Mangum v. State, 63 S. E. 543, 5 Ga. App. 445. An instruction that it is a rule of evidence that, to warrant a conviction on circumstantial evidence, the facts must not only be consistent with guilt, but exclude every other reasonable hypothesis, is not erroneous because the court did not also charge that, if there was any other inference of innocence, the jury should acquit. Toomer v. State, 60 S. E. 198, 130 Ga. 63. An instruction that, if the jury believe that the evidence is consistent with the guilt of defendant and inconsistent with his innocence, and establishes his guilt to the exclusion of every other reasonable hypothesis, he should be found guilty. Elliot v. State, 74 S. E. 691, 138 Ga. 23. A charge that to warrant conviction on circumstantial evidence the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis, and that each separate fact or link from which deduction of guilt is drawn must be clearly proved, and that the jury should then determine whether remaining circumstances clearly proved are consistent with guilt and inconsistent with any other reasonable hypothesis than that of guilt, and that all facts and circumstances necessary to show commission of crime and to connect defendant therewith must be proved. Gravett v. State, 102 S. E. 426, 150 Ga. 74. An instruction that, in order to warrant a conviction on circumstantial evidence. each fact necessary for the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt and that all the facts necessary to the conclusion of guilt must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and "no other person committed the offense charged," was not erroneous for failure to directly charge that the testimony must exclude every reasonable hypothesis consistent with defendant's innocence. Henderson v. State, 96 S. W. 37, 50 Tex. Cr. R. 266. An instruction that in order to convict on circumstantial evidence the circumstances should all concur to show that defendant committed the crime, and be inconsistent with any other rational conclusion, necessarily includes the thought that the circumstances to warrant his conviction must be inconsistent with commission of the crime by another. State v. Whitbeck, 123 N. W. 982, 145 Iowa, 29. An instruction that it was not safe to convict on circumstantial evidence if the jury could draw from the circumstances any other conclusion than the guilt of the accused, was not erroneous on the ground that the court should have charged that the jury must acquit in such event. State v. Langford, 55 S. E. 120, 74 S. C. 460. It is not error to charge that circumstantial evidence is legal, and that the jury may convict on such evidence alone, but that to do so the circumstances must not only be consistent with defendant's guilt, but inconsistent with every other reasonable hypothesis, and then to modify this statement by the further statement that this rule applies only when the conviction depends entirely on circumstantial evidence, so that, if there is any direct evidence, the rule does not apply. State v. Allen, 56 So. 655, 129 La. 733, Ann. Cas. 1913B, 454. An instruction that circumstantial evidence, if it convinces the mind of the

with the innocence as with the guilt of the defendant.[91] This rule applies, although there is direct as well as circumstantial evidence in the case, since, where the court undertakes to charge on circumstantial evidence, it must do so fully and correctly.[92] It has been held error to refuse to charge that if the facts, no matter how strongly they may seem to show the guilt of the defendant, can be reconciled with the theory that another may have committed the crime alleged, he should be acquitted.[93] An instruction sufficiently complies with the above rule which tells the jury that, before they can convict on circumstantial evidence alone, the facts and circumstances must all form a complete chain and all point to guilt and be irreconcilable with any reasonable theory of innocence.[94] So a charge is sufficient which states that circumstantial

guilt of defendant beyond a reasonable doubt, is just as satisfactory evidence as any other evidence, and that, when one seeks to convict on circumstantial evidence, the jury must be satisfied of defendant's guilt beyond a reasonable doubt, and the circumstances must point to his guilt to the exclusion of any other reasonable hypothesis, is not error. State v. Jackson, 46 S. E. 538, 68 S. C. 53. Where, on a trial for murder, the court charged that, to warrant a conviction on circumstantial evidence, the facts proved must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis, and that if the theory of guilt and the theory of innocence were both consistent with the facts proven, the benefit of the doubt should be given to the defendant, and he should be acquitted, it was held that the charge was not erroneous as stating that accused was entitled to the benefit of the doubt only in case the theory of guilt and that of innocence were equally consistent with the facts proven, nor as stating that, to warrant an acquittal, the evidence must be consistent with innocence, while the burden was on the state to establish guilt to the exclusion of every other reasonable hypothesis. McNaughton v. State, 71 S. E. 1038, 136 Ga. 600, writ of error dismissed 32 S. Ct. 532, 223 U. S. 744, 56 L. Ed. 639.

Use of word "conclusion," instead of "hypothesis." Where a judge charged a jury that the guilt of the accused must be proved beyond all reasonable doubt, to the exclusion of every other conclusion, it was held that there was no error in using the word "conclusion" for "hypothesis"; that there was no legal difference between the two words. State v. Willingham, 33 La. Ann. 537.

"Reasonable supposition." A charge in reference to circumstantial evidence "that the testimony must not only be consistent with the guilt of the person charged, but inconsistent with any other reasonable supposition," though a slight departure from the words generally used, is not error of law. State v. Davenport, 38 S. C. 348, 17 S. E. 37.

[91] Garst v. United States (U. S. C. C. A. Va.) 180 F. 339, 103 C. C. A. 469.

[92] State v. Gray, 147 S. W. 510, 163 Mo. App. 696.

[93] Gilmore v. State, 99 Ala. 154, 13 So. 536.

Contra, see People v. Foley, 64 Mich. 148, 31 N. W. 94.

[94] **Mo.** State v. Maggard, 157 S. W. 354, 250 Mo. 335; State v. Kebler, 128 S. W. 721, 228 Mo. 367; State v. Sharpless, 111 S. W. 69, 212 Mo. 176.

Okl. Star v. State, 131 P. 542, 9 Okl. Cr. 210.

Tenn. Lancaster v. State, 91 Tenn. 267, 18 S. W. 777.

Tex. Hampton v. State, 1 Tex. App. 652.

"Ought" to be inconsistent with any rational theory of innocence.

evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty it is sufficient to warrant a conviction.[95] Under the above rule it is proper to refuse an instruction which requires that the jury be convinced, in order to bring in a verdict of guilty, that there is no other possible hypothesis except that of the guilt of the defendant,[96] since the hypothesis other than that of guilt, which the evidence must exclude to warrant a conviction, must be a reasonable one.[97]

Under the rule that, where an instruction is correct as given, although not as explicit as desired, error cannot be predicated thereon, in absence of a request for further instructions, the rule is, in some jurisdictions, that where the court has charged that the burden is on the state to prove to the satisfaction of the jury beyond a reasonable doubt every material allegation of the indictment, it need not instruct, of its own motion, that the jury cannot convict unless the circumstances exclude every reasonable hypothesis of innocence,[98] and in some jurisdictions it need not in such a case, so instruct, even on request.[99]

§ 235. Proof of each circumstance or each essential fact

Where the evidence is purely circumstantial, the rule in most jurisdictions is that the court in a criminal case should instruct that every material and necessary fact upon which a conviction depends must be proven by competent evidence beyond a reasonable doubt, and that, if any of the facts or circumstances established be absolutely inconsistent with the hypothesis of guilt, that

An instruction that, when a criminal charge is to be proved on circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion, is not erroneous in failing to make that condition mandatory; the word "ought" meaning to be bound in duty or by moral obligation, to be necessary or becoming, and to be synonymous with "should." State v. Blaine, 124 P. 516, 45 Mont. 482.

[95] Cunningham v. State, 77 N. W. 60, 56 Neb. 691.

[96] **Ala.** Strickland v. State, 44 So. 90, 151 Ala. 31; Garrett v. State, 97 Ala. 18, 14 So. 327; Culver v. State, 99 Ala. 193, 13 So. 527; Blackburn v. State, 86 Ala. 595, 6 So. 96; Mose v. State, 36 Ala. 211.

Cal. People v. Strong, 30 Cal. 151.

Mo. State v. Schoenwald, 31 Mo. 147.

[97] **Ala.** Baldwin v. State, 111 Ala. 11, 20 So. 528; Horn v. State, 102 Ala. 144, 15 So. 278; Little v. State, 89 Ala. 99, 8 So. 82.

Ark. Griffin v. State, 216 S. W. 34, 141 Ark. 43; Bost v. State, 215 S. W. 615, 140 Ark. 254.

Miss. Kendrick v. State, 55 Miss. 436.

[98] State v. House, 78 N. W. 859, 108 Iowa, 68; Tatum v. State, 85 N. W. 40, 61 Neb. 229.

[99] Jones v. State, 61 Ark. 88, 32 S. W. 81.

hypothesis cannot be true,[1] the omission to so charge not being supplied by the ordinary instruction on the doctrine of reasonable doubt,[2] and an instruction which authorizes a conviction, although a fact essential to guilt is not proven beyond a reasonable doubt, is erroneous.[3]

[1] **U. S.** (C. C. La.) United States v. Wright, 16 F. 112.

Ala. Jones v. State, 107 Ala. 93, 18 So. 237.

Iowa. State v. Harmann, 112 N. W. 632, 135 Iowa, 167.

Ky. Holloway v. Commonwealth, 11 Bush, 344.

Mich. People v. McArron, 79 N. W. 944, 121 Mich. 1; People v. Stewart, 42 N. W. 662, 75 Mich. 21; People v. Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

Wis. Kollock v. State, 88 Wis. 663, 60 N. W. 817.

Instructions held insufficient within rule. Where, on a prosecution for murder the evidence is circumstantial, the refusal of an instruction to the effect that if any one fact necessary to a conclusion of guilt is wholly inconsistent with the hypothesis of guilt, it breaks the chain of circumstantial evidence upon which the inference of guilt depends, and that, however plausible or apparently conclusive all other circumstances may be, the charge must fail, is not excused by the giving of instructions declaring that, to justify a conviction upon circumstantial evidence, the circumstances "must all be in harmony with the guilt of the accused"; that in such a case the jury must "be satisfied that all the circumstances proved are consistent with the defendant having committed the act," and "must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that defendant is the guilty person." Dunn v. State, 78 N. E. 198, 166 Ind. 694.

Instructions held sufficient within rule. Refusal of charge that, when circumstantial evidence is relied on, "every link in the chain of evidence must be proved beyond a reasonable doubt," was not ground for reversing a conviction, where the court charged that the state relied "upon both direct and circumstantial evidence, and, before the state can rely upon circumstantial evidence, it is necessary for the state to establish every circumstantial fact upon which it relies beyond a reasonable doubt." State v. Fleming, 41 S. E. 549, 130 N. C. 688.

Effect of other instructions. It was unnecessary to give a requested instruction that each fact in the chain must be established beyond reasonable doubt, where the court had already charged that the jury should acquit, if there was doubt as to one of the facts essential to establish guilt, and that to convict circumstantial evidence must be inconsistent with any other rational conclusion except guilt. People v. Hamilton (Cal. App.) 192 P. 467.

State not required to establish each necessary fact beyond all doubt. On a prosecution for murder, where the evidence relied on by the state was circumstantial, it was proper to refuse to instruct that each link in the chain of circumstances should be established to the "entire satisfaction" of the jury. State v. Blydenburgh (Iowa) 104 N. W. 1015.

[2] People v. Eckert, 19 Cal. 603; Hunt v. State, 7 Tex. App. 212; Wallace v. State, 7 Tex. App. 570; Struckman v. State, 7 Tex. App. 581; Myers v. State, 7 Tex. App. 640.

[3] **Ark.** Gill v. State, 59 Ark. 422, 27 S. W. 598.

Colo. Graves v. People, 18 Colo. 170, 32 P. 63; Clare v. People, 9 Colo. 122, 10 P. 799.

Iowa. State v. Cohen, 78 N. W. 857, 108 Iowa, 208, 75 Am. St. Rep. 213.

Kan. State v. Furney, 21 P. 213, 41 Kan. 115, 13 Am. St. Rep. 262.

Mont. State v. Gleim, 17 Mont. 17, 41 P. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655.

An instruction, however, should not authorize the jury to consider each essential fact separately in determining whether it has been proven beyond a reasonable doubt,[4] and in some jurisdictions there are decisions to the effect that the defendant in a criminal case is only entitled to an instruction as to the effect of a reasonable doubt after a consideration of all the evidence in the case.[5] In Illinois it is proper to charge that, in order to convict, the jury need not be satisfied beyond a reasonable doubt of the existence of each link in the chain of circumstances relied on by the state, but it is sufficient if, taking the evidence altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty;[6] this

N. D. State v. Johnson, 103 N. W. 565, 14 N. D. 288; State v. Young, 82 N. W. 420, 9 N. D. 165.

Ohio. Adams v. State, 31 Ohio St. 462.

Okl. Dossett v. United States, 3 Okl. 591, 41 P. 608.

Wash. Leonard v. Territory, 7 P. 872, 2 Wash. T. 381.

Instructions not improper within rule. In a prosecution for homicide, an instruction that it was immaterial that the evidence against defendant was circumstantial, or made up of facts and circumstances surrounding the death and defendant's relation to deceased, provided only that the jury believed such facts and circumstances to be proved by the evidence beyond all reasonable doubt, and to be inconsistent with any other hypothesis than the guilt of defendant, was not erroneous for failure to require every "essential" fact to be proved beyond a reasonable doubt. State v. Lucas, 97 N. W. 1003, 122 Iowa, 141. Where the court charged the jury that "circumstantial evidence is the proof of certain facts and circumstances in a given case from which the jury may infer other connected facts, which usually and reasonably follow, according to the common experience of mankind. * * * If, therefore, you believe from the evidence that such facts and circumstances have been proven as to satisfy you, beyond a reasonable doubt, that the defendant * * * did willfully * * * kill M., you are warranted in finding him guilty," it was held that the charge was not subject to the objection that it does not require the circumstances from which the jury may infer other connected facts to be established beyond a reasonable doubt. State v. Avery, 113 Mo. 475, 21 S. W. 193.

Rule where evidence not entirely circumstantial. Where, in a prosecution for homicide, the evidence was not entirely circumstantial, but the fact of death, together with defendant's immediate relations with deceased and the circumstances surrounding decedent's death were proven by positive testimony, an instruction on circumstantial evidence that it was not necessary that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied on to establish defendant's guilt, but that it was sufficient if, taking the evidence all together, the jury was satisfied beyond all reasonable doubt that defendant was guilty, was not prejudicial, as misleading in the use of the word "link" in the chain of circumstances, etc. State v. Lucas, 97 N. W. 1003, 122 Iowa, 141.

[4] State v. Cohen, 78 N. W. 857, 108 Iowa, 208, 75 Am. St. Rep. 213.

[5] Carr v. State, 99 S. W. 831, 81 Ark. 589; Wise v. State, 2 Kan. 419, 85 Am. Dec. 595; State v. Wells, 111 Mo. 533, 20 S. W. 232; State v. Christian, 66 Mo. 138; State v. Schoenwald, 31 Mo. 147.

[6] Gott v. People, 58 N. E. 293, 187 Ill. 249; Keating v. People, 160 Ill. 480, 43 N. E. 724; Siebert v. People, 143 Ill. 571, 32 N. E. 431; Davis v. People, 114 Ill. 86, 29 N. E. 192;

not being considered as likely to mislead the jury into the belief that every material fact necessary to constitute the crime charged is not required to be proven beyond a reasonable doubt.[7] In Texas the decisions are not harmonious, it being held in some of the cases that as a general rule the ordinary charge upon the effect of a reasonable doubt upon the whole case will be sufficient;[8] but in a number of cases in this jurisdiction it has been held that a charge is not open to objection which is to the effect that in order to warrant a conviction on circumstantial evidence each fact necessary to establish the guilt of the accused must be proven by competent evidence beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with the guilt of the defendant, but inconsistent with any other reasonable hypothesis than that of his guilt, and should produce in the minds of the jury a reasonable certainty that the accused committed the offense charged.[9]

As to mere matters of subsidiary evidence, adduced to establish the facts essential to a conviction of one accused of crime, the doctrine of reasonable doubt has no application,[10] and it is proper

Weaver v. People, 24 N. E. 571, 132 Ill. 536.

[7] Weaver v. People, 132 Ill. 536, 24 N. E. 571. See People v. Grove, 120 N. E. 277, 284 Ill. 429.

[8] Carson v. State, 34 Tex. Cr. R. 342, 30 S. W. 799; Gallaher v. State, 28 Tex. App. 247, 12 S. W. 1087; Thurmond v. State, 27 Tex. App. 347, 11 S. W. 451.

[9] Baldez v. State, 37 Tex. Cr. R. 413, 35 S. W. 664; Chitister v. State, 33 Tex. Cr. R. 635, 28 S. W. 683; Crow v. State, 33 Tex. Cr. R. 264, 26 S. W. 209; Brookin v. State, 26 Tex. App. 121, 9 S. W. 735; Johnson v. State, 18 Tex. App. 385.

[10] **Ill.** Jamison v. People, 145 Ill. 357, 34 N. E. 486.

Ind. State v. Fisk, 83 N. E. 995, 170 Ind. 166; Wade v. State, 71 Ind. 535.

Iowa. State v. Cohen, 78 N. W. 857, 108 Iowa, 208, 75 Am. St. Rep. 213.

Kan. State v. Phillips, 186 P. 743, 106 Kan. 192.

N. Y. People v. Kerr (O. & T.) 6 N. Y. S. 674.

N. C. State v. Crane, 110 N. C. 530, 15 S. E. 231; State v. Frank, 50 N. C. 384.

See Hinshaw v. State, 47 N. E. 157, 147 Ind. 334.

Instructions held not misleading under rule. A charge in a prosecution, wherein the state relied on circumstantial evidence, that all the links in the chain of evidence must be shown beyond a reasonable doubt, but that every particular fact making up a link in the chain of evidence must be shown, so as to satisfy the jury from the whole evidence as to the truth of several links in the chain of evidence, was proper. State v. Pack, 186 P. 742, 106 Kan. 188. Where, in a prosecution for murder, the court charged, with reference to circumstantial evidence, that it was not necessary that each and every circumstance should be proved beyond a reasonable doubt, but that some facts might be proved with more and some with less assurance of certainty, it was held that the instruction should not be construed to mean that every circumstance constituting a link in the chain of circumstances necessary to establish the fact of killing by the defendant need not be proved beyond a reasonable doubt, but that every incidental circumstance, such as those bearing upon the probabilities that

to refuse instructions having a tendency to lead the jury to think that each and every subsidiary fact must be proved beyond a reasonable doubt.[11] For this reason instructions which make use of the metaphor of the chain and its links to illustrate the nature of circumstantial evidence, and tell the jury that each link must be shown beyond a reasonable doubt, are objectionable, as the word "link" may be construed by the jury as referring, not only to an essential fact, but to any circumstance brought forward to establish an essential fact.[12] It is better in any case to avoid the use of such rhetorical phrases. If any such allusion is to be made, a more accurate description would be to liken circumstantial evidence to the strands of a rope.[13] In some jurisdictions, where the only circumstantial evidence in the case is corroborative, it is not error to charge that it is not necessary that every fact and circumstance and every link in the chain must be proven beyond a reasonable doubt, but that all the evidence in the case, when considered as a whole, must satisfy the jury beyond a reasonable doubt that the defendant is guilty.[14]

the main circumstances were true, need not be so proved, and was not therefore misleading. People v. Wolter, 97 N. E. 30, 203 N. Y. 484.

[11] Davidson v. State, 135 Ind. 254, 34 N. E. 972; Smith v. State, 85 N. W. 49, 61 Neb. 296.

[12] **Ala.** Spraggins v. State, 35 So. 1000, 139 Ala. 93; Harvey v. State, 27 So. 763, 125 Ala. 47; Grant v. State, 97 Ala. 35, 11 So. 915; Wharton v. State, 73 Ala. 366; Tompkins v. State, 32 Ala. 569.

Ill. People v. See, 101 N. E. 257, 258 Ill. 152.

Ind. Dunn v. State, 78 N. E. 198, 166 Ind. 694.

Neb. Marion v. State, 16 Neb. 349, 20 N. W. 289.

N. C. State v. Trull, 85 S. E. 133, 169 N. C. 363.

Okl. Harris v. State, 137 P. 365, 10 Okl. Cr. 417, judgment affirmed on rehearing 139 P. 846, 10 Okl. Cr. 417.

See Pope v. State, 53 So. 292, 168 Ala. 33; Wolf v. People, 102 P. 20, 45 Colo. 532.

[13] Rayburn v. State, 63 S. W. 356, 69 Ark. 177.

[14] People v. Rich, 94 N. W. 375, 133 Mich. 14.

CHAPTER XVI

INSTRUCTIONS ON CHARACTER OF DEFENDANT IN CRIMINAL PROSECUTION

A. Good Character

§ 236. Presumption of good character.
237. Necessity and propriety of instructions on effect of evidence of good character.
238. Sufficiency of instructions as to effect of good character.
239. Confining consideration of good character to doubtful cases.
240. Effect of good character as in itself generating a reasonable doubt.
241. Effect of good character where evidence entirely circumstantial.
242. Worthlessness of good character where guilt clearly established from all the evidence.

B. Bad Character

243. Effect of bad character.
244. Instructions on inability of state to show bad character.

A. Good Character

Instructions criticized as invading province of jury, see ante, § 54.

§ 236. Presumption of good character

In the federal courts there is authority to the effect that, in the absence of any evidence of the character of the defendant in a criminal case, a presumption that he is of good character exists and that the court should so instruct on request.[1] The later decisions of these courts, however, deny the right of the defendant to such an instruction,[2] and the general rule in the state courts is that, where the defendant does not put his character in issue or fails to introduce any evidence concerning it, he is not entitled to an instruction that his character is presumed to be good,[3] and where the

[1] Mullen v. United States (C. C. A. Ky.) 106 F. 892, 46 C. C. A. 22.

[2] Greer v. United States (C. C. A. Okl.) 240 F. 320, 153 C. C. A. 246; United States v. Smith (D. C. Pa.) 217 F. 839.

See Chambliss v. United States (C. C. A. Okl.) 218 F. 154, 132 C. C. A. 112; Fields v. United States, 27 App. D. C. 433, certiorari denied and writ of error dismissed 27 S. Ct. 543, 205 U. S. 292, 51 L. Ed. 807.

[3] **Ala.** Dryman v. State, 102 Ala. 130, 15 So. 433.

Cal. People v. Hopper (App.) 183 P. 836; People v. Fleshman, 148 P. 805, 26 Cal. App. 788; People v. Cruse, 141 P. 936, 24 Cal. App. 497; People v. Conte, 122 P. 450, 17 Cal. App. 771, rehearing denied in Supreme Court 122 P. 457, 17 Cal. App. 771.

Fla. McDuffee v. State, 46 So. 721, 55 Fla. 125.

Ga. Mixon v. State, 51 S. E. 580, 123 Ga. 581, 107 Am. St. Rep. 149.

Idaho. State v. Gruber, 115 P. 1, 19 Idaho, 692.

Ind. Knight v. State, 70 Ind. 375.

Kan. State v. Gaunt, 157 P. 447, 98 Kan. 186.

only issue is whether the defendant was insane at the time of the alleged crime it is proper to refuse such an instruction.[4] It follows that an accused is not entitled to an instruction that the presumption of good character can be treated as a basis of inference for adding weight to the presumption of innocence or its logical resultant—a reasonable doubt.[5]

§ 237. Necessity and propriety of instructions on effect of evidence of good character

Except in jurisdictions where such an instruction is held to invade the province of the jury,[6] the general rule is that, where there is evidence of the good character of the defendant in a criminal prosecution, he is entitled, on request, to have the jury instructed to consider it, and as to the proper function and possible effect of such evidence,[7] and in some jurisdictions mandatory statutes require such an instruction in such a case.[8] The fact that the

Ky. Howard v. Commonwealth, 70 S. W. 1055, 114 Ky. 372, 24 Ky. Law Rep. 1225.

Mich. People v. Kemmis, 116 N. W. 554, 153 Mich. 117.

N. Y. People v. Lingley, 101 N. E. 170, 207 N. Y. 396, 46 L. R. A. (N. S.) 342, Ann Cas. 1913D, 403, reargument denied 102 N. E. 1109, 208 N. Y. 597; People v. Brasch, 85 N. E. 809, 193 N. Y. 46; People v. Pekarz, 78 N. E. 294, 185 N. Y. 470; People v. Langley, 100 N. Y. S. 123, 114 App. Div. 427.

N. C. State v. Knotts, 83 S. E. 972, 168 N. C. 173.

Va. Robinson v. Commonwealth, 87 S. E. 553, 118 Va. 785.

Compare People v. Woods, 172 N. W. 384, 206 Mich. 11.

[4] People v. Griffith, 80 P. 68, 146 Cal. 339.

[5] Durham v. State, 163 S. W. 447, 128 Tenn. 636, 51 L. R. A. (N. S.) 180.

Rule that presumption of good character contained in presumption of innocence. Where the character of defendant, in a criminal case, has not been attacked, no special instructions as to presumption of good character can be demanded beyond the general instruction of the presumption of innocence in the absence of evidence of guilt. People v. Johnson, 61 Cal. 142. In homicide, a charge that defendant is presumed to be a man of good character, and that such presumption, coming in aid of the general presumption of innocence, is not to be left unconsidered by the jury, but is a fact in the case tending to establish defendant's innocence, was properly refused. People v. Lee, 81 P. 969, 1 Cal. App. 169.

[6] Pharr v. State, 9 Tex. App. 129; Heard v. State, 9 Tex. App. 1.

[7] **Ala.** Ducett v. State, 65 So. 351, 186 Ala. 34.

Mich. People v. McKeighan, 171 N. W. 500, 205 Mich. 367.

Neb. McDougal v. State, 181 N. W. 519.

N. Y. People v. Brasch, 85 N. E. 809, 193 N. Y. 46.

Ohio. Burns v. State, 79 N. E. 929, 75 Ohio St. 407.

Okl. Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617, rehearing denied 101 P. 111, 1 Okl. Cr. 617.

In Arkansas it is not prejudicial error to refuse to expressly tell the jury that they may consider evidence of good character with all the other evidence in arriving at a verdict. Price v. State, 170 S. W. 235, 114 Ark. 398.

[8] State v. Anslinger, 71 S. W. 1041, 171 Mo. 600.

Requirement of instructions "whenever necessary." In Missouri, under a statute requiring the trial court to instruct on good char-

witnesses of the defendant as to his good character are contradicted does not deprive him of the right to such an instruction,[9] and evidence in the case of the good conduct of the accused, although not offered to prove good character, is sufficient to sustain an instruction thereon.[10] There must be some evidence, however, of the good character of the defendant to make it error for the court to refuse an instruction thereon.[11] Evidence of character to warrant or demand such an instruction should bear on the trait of character involved in the charge against the defendant,[12] and evidence of the moral character of the defendant furnishes no basis for an instruction as to his character for peace and quietude.[13] It is held that it is not reversible error to give an instruction on the character of the defendant, although no evidence is offered to support or impeach it.[14]

Where the facts are such that evidence of good character could be of no benefit to the defendant, it will not be error to refuse an instruction on the effect thereof,[15] and a statute requiring an instruction as to the good character of the defendant, where there is evidence in support of it, does not apply where his reputation is only put in issue as affecting his credibility as a witness.[16] In the absence of a request to charge on the subject, it will usually not be reversible error to fail specifically to instruct as to the effect and weight of proof of good character.[17]

acter "whenever necessary," it is held that the defendant is entitled to such an instruction, not only when he himself has offered evidence of his good character, but in any case where his character is put in issue and there is sufficient evidence to warrant a finding by the jury that his character is good. State v. Baird (Mo.) 231 S. W. 625.

[9] People v. Duzan, 112 N. E. 315, 272 Ill. 478.

[10] State v. Turner, 152 S. W. 313, 246 Mo. 598, Ann. Cas. 1914B, 451.

[11] **Ga.** Amerson v. State, 88 S. E. 998, 18 Ga. App. 176.

Ill. Williams v. People, 46 N. E. 749, 166 Ill. 132.

Miss. Lewis v. State, 47 So. 467, 93 Miss. 697.

Mo. State v. Byrd, 213 S. W. 35, 278 Mo. 426; State v. Vinton, 119 S. W. 370, 220 Mo. 90; State v. Gartrell, 71 S. W. 1045, 171 Mo. 489.

Mont. State v. Penna, 90 P. 787, 35 Mont. 535.

N. Y. People v. Wright, 117 N. Y. S. 441, 133 App. Div. 133.

[12] State v. Anslinger, 71 S. W. 1041, 171 Mo. 600; Flick v. Commonwealth, 34 S. E. 39, 97 Va. 766.

[13] State v. Priest, 114 S. W. 949, 215 Mo. 1.

[14] Hays v. Territory (Okl. Sup.) 52 P. 950, reversed 54 P. 300, 7 Okl. 15.

[15] Holmes v. State, 119 P. 430, 6 Okl. Cr. 541.

[16] State v. Kimmell, 137 S. W. 329, 156 Mo. App. 461.

[17] **Ga.** Scarboro v. State, 99 S. E. 637, 24 Ga. App. 27; Mills v. State, 86 S. E. 280, 17 Ga. App. 116; Scott v. State, 73 S. E. 575, 137 Ga. 337; Ellison v. State, 73 S. E. 255, 137 Ga. 193; Hagood v. State, 62 S. E. 641, 5 Ga. App. 80.

Iowa. State v. Poder, 132 N. W. 962, judgment reversed on rehearing State v. Podor, 135 N. W. 421, 154 Iowa, 686; State v. Brandenberger, 130 N. W. 1065, 151 Iowa, 197.

Mich. People v. Luce, 178 N. W. 54, 210 Mich. 621.

§ 238. Sufficiency of instructions as to effect of good character

A defendant is entitled to have evidence of his good character considered the same as any other established fact bearing upon the question of his guilt,[18] and to have such evidence submitted to the jury without any disparagement by the court,[19] and instructions calculated to diminish the force of the evidence of good character, or to withdraw it altogether from the consideration of the jury, are erroneous,[20] and it is error to instruct that such evidence

Mo. State v. Kimmell, 137 S. W. 329, 156 Mo. App. 461; State v. Fisher, 62 S. W. 690, 162 Mo. 169.

Utah. State v. MacMillan, 145 P. 833, 46 Utah, 19.

[18] State v. McNally, 87 Mo. 644; State v. Van Kuran, 69 P. 60, 25 Utah, 8.

Consideration on question of alibi. In a criminal trial, the defense being an alibi, where there is positive evidence pro and con as to whether defendant was present when the crime was committed, and there is evidence of defendant's good character, it is error to charge that the jury, in determining whether defendant was present, may exclude the evidence as to his character. People v. Laird, 102 Mich. 135, 60 N. W. 457.

Use of word "must." Where the court charged the jury to consider all the evidence, and particularly that offered to show previous good character, it was not necessary to further specifically say to the jury that they "must" consider the evidence of good character. State v. Ames, 96 N. W. 330, 90 Minn. 183.

[19] People v. Woods, 172 N. W. 384, 206 Mich. 11; Latimer v. State, 76 N. W. 207, 55 Neb. 609, 70 Am. St. Rep. 403; People v. Dom Pedro (Sup.) 43 N. Y. S. 44, 19 Misc. Rep. 300.

Instructions improper within rule. An instruction that the respondent had the right to put his good reputation before the jury for their consideration, "as a kind of makeweight in his favor, if there's a pinch in the case." State v. Daley, 53 Vt. 442, 38 Am. Rep. 694.

Instructions not erroneous as minimizing the effect of good character. A charge that evidence of good character or reputation for peace and quiet was admitted to induce the jury to believe that he was not likely to commit the crime charged, that in a case depending entirely on circumstantial evidence, where in addition the testimony is conflicting, evidence of good character, though it does not constitute a defense, is entitled to all consideration the jury think proper to give it, but it is of no significance in the face of satisfactory evidence of guilt, and that, if the jury believe beyond a reasonable doubt that accused committed the offense, they should convict though they believe his prior character and reputation were inconsistent therewith, but, if they can reconcile the evidence on any reasonable hypothesis consistent with defendant's innocence, the jury should acquit. Hedger v. State, 128 N. W. 80, 144 Wis. 279. A charge as follows: "Of course, all persons have at some time been persons of good character, and many defendants in courts of justice, up to the time of the commission of the offense of which they are convicted, had a good character, and you will take this into consideration when you come to determine upon the weight and applicability of the testimony as to the good character of the defendant." Commonwealth v. Griffin, 42 Pa. Super. Ct. 597.

[20] Johnson v. State, 58 S. E. 684, 2 Ga. App. 405; People v. Hancock, 7 Utah, 170, 25 P. 1093.

Instructions held not objectionable under rule. A charge on the subject of character, that it was contended that evidence had been introduced showing defendant to be of good character, that evidence of good character might be taken into consideration not only in passing on de-

should be accorded very little weight, where the evidence against the defendant is strong,[21] or where the question is one of great and atrocious criminality.[22]

Where, although evidence of good character is practically all a defendant has to rely upon in answer to a charge of crime, the court instructs only in the most general terms on the subject of character, and there is reason to think that, because of the fact that such evidence was not presented to the jury at the proper time and in the proper connection, the jury may not have given the evidence tending to show the good character of the accused the full weight and consideration it was entitled to receive, a conviction based upon weak and unsatisfactory evidence will be reversed, although, in a strict and legal sense, no error was committed.[23]

The general rule is that it is not sufficient to instruct that the good character of the defendant is a circumstance for the consideration of the jury, since this is only equivalent to the admission of the testimony as to character.[24] In some jurisdictions, however,

fendant's guilt, but also as to whether such character might of itself generate a doubt of defendant's guilt. Jordan v. State, 60 S. E. 1063, 130 Ga. 406. Where defendant testified in his own behalf, and evidence of his character and the character of other witnesses was received on both sides, a general instruction that such testimony should be considered on the question of the credibility of witnesses was not erroneous as limiting the effect of the evidence of defendant's character to his credibility, and excluding it on the issue of his guilt. State v. Olds, 76 N. W. 644, 106 Iowa, 110.

[21] Johnson v. State, 34 Neb. 257, 51 N. W. 835; Long v. State, 23 Neb. 33, 36 N. W. 310.

[22] Cancemi v. People, 16 N. Y. 501.

[23] Seymour v. State, 30 S. E. 263, 102 Ga. 803.

[24] People v. Bell, 49 Cal. 485.

Illustrations of proper or sufficient instructions. An instruction that the jury could consider evidence as to good character of the accused, and if it be such as to create a doubt in the minds of the jury, and lead them to believe in view of the improbability that a person of such character would not be guilty of the offense, that the testimony of the state is false or such as to create a reasonable doubt of guilt, the jury should acquit was proper. Howell v. State, 52 S. E. 649, 124 Ga. 698. In a prosecution for peculation, an instruction that evidence of defendant's good character is pertinent on the question of his guilt, and should be duly weighed, that it might be assumed that a person possessed of good character would not commit the offense imputed to defendant, that good character is not a controlling item of evidence, but is to be considered with all the proof, and should have greater weight when the evidence against defendant is circumstantial than when it is direct and positive, and that it is for the jury to determine how much reliance should be placed on the same, in the face of all the evidence, is proper. People v. Lyon, 1 N. Y. Cr. R. 400. It is proper to charge the jury that they can consider the character of defendant as bearing on his guilt or innocence, and whether a person with a good character would be less liable to be guilty of crime than a person of bad habits and character. People v. Harrison, 93 Mich. 594, 53 N. W. 725. An instruction, on a trial for murder, that "the defendant has introduced evidence tending to show his good

it is held that if the jury are told that they may consider evidence of the good character of the defendant, and give it such weight as they see proper under all the evidence in the case, in connection with the law of reasonable doubt, there is a sufficient instruction on such issue.[25]

§ 239. Confining consideration of good character to doubtful cases

Evidence of the good character of the defendant is to be considered without reference to the apparently conclusive or inconclusive quality of the other evidence,[26] and the defendant is entitled to an instruction so declaring.[27] Instructions which are not in harmony with this rule, or which are calculated to lead the jury to think that such evidence is only of value in a doubtful case, or when the other evidence raises a doubt as to the guilt of the defendant, are erroneous.[28]

character as a man of peace and quiet, and for honesty and integrity," and that, "if * * * the good character of the defendant for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain any reasonable doubt of the defendant's guilt, then it is your duty to acquit him"—contains all that defendant is entitled to have on the point. People v. Bowman, 81 Cal. 566, 22 P. 917. There is a substantially correct statement of the law where the court charges that evidence that defendant was of good general reputation for peace and good order is positive evidence, which may work a doubt for his acquittal, but is not to weigh against positive facts which should convince the jury he did the deed he was charged with; and that, where the circumstances are such as to leave no room for doubt, this evidence would not work an acquittal, but is to be considered the same as any other evidence; and this being followed by defendant's point that "evidence of good character is not a mere makeweight, thrown in to assist in the production of a result that would happen at all events, but is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal," as to which the court states that it has so indicated in what had been said before, and that the proposition is affirmed. Commonwealth v. Harmon, 49 A. 217, 199 Pa. 521, 85 Am. St. Rep. 799.

[25] Linn v. United States (C. C. A. N. Y.) 251 F. 476, 163 C. C. A. 470; Pickrell v. State, 111 P. 656, 4 Okl. Cr. 14; Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617, rehearing denied 101 P. 111, 1 Okl. Cr. 617; Commonwealth v. Corsino, 104 A. 739, 261 Pa. 593.

See State v. Long, 108 A. 36, 7 Boyce (Del.) 397.

[26] State v. Birkby, 97 N. W. 980, 122 Iowa, 102.

[27] People v. Billick, 183 N. Y. S. 685, 193 App. Div. 914.

[28] **U. S.** (Sup.) Edgington v. United States, 17 S. Ct. 72, 164 U. S. 361, 41 L. Ed. 467; (C. C. A. Ark.) Rowe v. United States, 97 F. 779, 38 C. C. A. 496; (C. C. A. N. Y.) Oppenheim v. United States, 241 F. 625, 154 C. C. A. 383, reversing judgment United States v. Oppenheim (D. C.) 228 F. 220.

Cal. People v. Ashe, 44 Cal. 288.

D. C. United States v. Gunnell, 5 Mackey, 196.

In determining the question of the guilt of the defendant, the jury are to consider the evidence as a whole, and are not to weigh

Ind. Kistler v. State, 54 Ind. 400.
Kan. State v. Jewell, 127 P. 608, 88 Kan. 130.
Mass. Commonwealth v. Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485.
Mich. People v. Van Dam, 107 Mich. 425, 65 N. W. 277.
Minn. State v. Sauer, 38 Minn. 438, 38 N. W. 355.
Miss. Powers v. State, 21 So. 657, 74 Miss. 777; Coleman v. State, 59 Miss. 484.
N. Y. People v. Weiss, 114 N. Y. S. 236, 129 App. Div. 671; People v. Pollock, 51 Hun, 613, 4 N. Y. S. 297; People v. Clements, 5 N. Y. Cr. R. 282; People v. De Graff, 6 N. Y. St. Rep. 412.
N. C. State v. Henry, 50 N. C. 65.
Ohio. Stewart v. State, 22 Ohio St. 477.
Pa. Commonwealth v. Tenbroeck, 108 A. 635, 265 Pa. 251; Commonwealth v. Ronello, 96 A. 826, 251 Pa. 329; Commonwealth v. House, 72 A. 804, 223 Pa. 487; Commonwealth v. Sayars, 21 Pa. Super. Ct. 75.
S. C. State v. Barth, 25 S. C. 175, 60 Am. Rep. 496.

Instructions improper within rule. A charge as follows: "That [evidence of good character] is a legitimate subject for you to take into consideration, but it goes only to this extent: If an act which the law makes an offense has been actually committed, if you are satisfied beyond a reasonable doubt that the prohibited act was committed, it makes no difference what the character of the man is. It is not the subject of your investigation; but if the evidence should leave your minds in such a state that you cannot say that you are satisfied beyond a reasonable doubt, and if you find that the defendant has borne hitherto an unblemished character, such a character as makes the act inconsistent with his history and standing, that circumstance should turn the scale in his favor. At such a time the influence of a good character ought to weigh very strongly in behalf of a person accused." State v. Holmes, 65 Minn. 230, 68 N. W. 11. An instruction, on trial for murder, that "where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the matter." People v. Hancock, 7 Utah, 170, 25 P. 1093. Where several witnesses testified to previous good character of accused, and they were not contradicted, an instruction that the jury were limited in the consideration of previous good character to cases where the questions of fact were closely balanced, and that good character should not create a reasonable doubt as to guilt unless otherwise the evidence was nearly balanced, and in refusing to charge that, in the exercise of sound judgment, the jury might give accused the benefit of the presumption of innocence arising from good character, no matter how conclusive the other testimony appeared to be, was reversible error. People v. Conrow, 93 N. E. 943, 200 N. Y. 356. On the trial of a criminal indictment, where the defense is an alibi, and evidence of good reputation has been submitted, it is reversible error for the court to charge as follows: "A man may have a good reputation and yet commit a crime. Evidence of good reputation would not amount to much, if you were satisfied, beyond a reasonable doubt from the evidence, apart from that, that this is the man who committed the assault. Evidence of good reputation may have very great weight with you, if evidence of the facts are not as clear as you might like to have them." Commonwealth v. Mandela, 48 Pa. Super. Ct. 56.

Instructions not objectionable within rule. An instruction that the law permits evidence of good character to be submitted to the jury for their consideration in every case of homicide, no matter what may be the other testimony in the cause, and that, when a doubt arises as to the guilt of the accused, such evidence is conclusive in his favor. Kilpatrick v. Commonwealth, 3 Phila. (Pa.) 237. A charge: "Defendant has a right to

each fact, separate and detached from every other fact, and an instruction from which the jury may infer that the other evidence in the case is first to be examined without the aid of the evidence of the defendant's good character, and if such examination satisfies them of the guilt of the defendant they are to go no further, is erroneous.[29] Accordingly it is error to charge that, if the jury find, independent of the evidence of the good character of the defendant, that there is a reasonable doubt of his guilt, they must acquit,[30] and it is proper to instruct that such evidence, if believed, may be sufficient under some circumstances to raise a doubt of the guilt of the defendant, even as against positive evidence thereof.[31]

§ 240. Effect of good character as in itself generating a reasonable doubt

A defendant in a criminal case is entitled to a charge that evidence of his good character may be sufficient to create a reasonable doubt of his guilt.[32] Merely to tell the jury that they should consider the evidence of good character in connection with all the other evidence in the case is not sufficient.[33] The proper instruction in such case in some jurisdictions is that the evidence of good character must be considered in connection with all the other evidence, and if the evidence, when viewed as a whole, raises a rea-

show his previous good character as a circumstance tending to show the improbability of his guilt. If, however, you believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your mind that defendant, previous to the commission of the alleged crime, had sustained a good reputation as a peaceable and law-abiding citizen." State v. Porter, 49 P. 964, 32 Or. 135.

[29] People v. Wileman, 44 Hun (N. Y.) 187.

[30] Holland v. State, 131 Ind. 568, 31 N. E. 359; Remsen v. People, 43 N. Y. 6; Commonwealth v. Cleary, 135 Pa. 64, 19 A. 1017, 26 Wkly. Notes Cas. 137, 8 L. R. A. 301.

[31] People v. McArron, 79 N. W. 944, 121 Mich. 1; People v. Hughson, 47 N. E. 1092, 154 N. Y. 153.

Instruction to the contrary erroneous. An instruction that evidence of good character should not prevail against facts strongly proven is erroneous, especially where the evidence as to defendant's guilt is not conclusive. State v. Lindley, 51 Iowa, 343, 1 N. W. 484, 33 Am. Rep. 139.

[32] Fields v. State, 47 Ala. 603. 11 Am. Rep. 771; People v. Doggett, 62 Cal. 27.

Instructions sufficient within rule. An instruction that good character was a substantive fact to be considered with other facts, and that, even if the other facts might not leave a reasonable doubt, still, if the good character that might be established had the effect to raise such doubt, it would be the duty of the jury to acquit. Phillips v. State (Ga. App.) 105 S. E. 823.

"Any doubt." It was proper to refuse to charge that, if defendant has proved a good character, the jury will give him the benefit of "any doubt" it may create, since defendant is entitled only to any "reasonable" doubt which it may create. McSwean v. State, 21 So. 211, 113 Ala. 661.

[33] State v. Brown, 115 P. 994, 39 Utah, 140, Ann. Cas. 1913E, 1.

sonable doubt of the guilt of the defendant, he should be acquitted,[34] although without such evidence of good character the jury would be convinced of the guilt of the defendant beyond a reasonable doubt,[35] and such an instruction should not be refused.[36] In jurisdictions where this rule prevails, an instruction is not in proper form which fails to tell the jury that evidence of good character, in order to raise a reasonable doubt, must be considered in connection with all the other evidence.[37]

As a corollary, therefore, of the above rule, the defendant has no right in such jurisdictions to have the jury instructed, in effect, that evidence of good character may be, in itself, dissociated from the rest of the evidence, sufficient to raise a reasonable doubt.[38]

[34] McCall v. State, 46 So. 321, 55 Fla. 108; Olds v. State, 33 So. 296, 44 Fla. 452.

[35] Taylor v. State, 42 So. 996, 149 Ala. 32; Bryant v. State, 23 So. 40, 116 Ala. 445; State v. Randall (N. J.) 113 A. 231; State v. Harris (Utah) 199 P. 145.

Instructions held objectionable as too restricted. An instruction that the jury should consider evidence of good character with all the other evidence in the case, and if it raised a reasonable doubt as to accused's guilt, defendant was entitled to the benefit of it, and should be acquitted, but that his good character should be considered in connection with all the other evidence in the case. People v. Parker, 131 N. W. 1120, 166 Mich. 587.

[36] Watts v. State, 59 So. 270, 177 Ala. 24.

[37] Miller v. State, 107 Ala. 40, 19 So. 37.

[38] **Ala.** Pinson v. State, 78 So. 876, 201 Ala. 522; Henderson v. State, 72 So. 590, 15 Ala. App. 1; Watson v. State, 72 So. 569, 15 Ala. App. 39; Allen v. State, 62 So. 971, 8 Ala. App. 228; Davis v. State, 44 So. 561, 152 Ala. 25; Bell v. State, 37 So. 281, 140 Ala. 57; Crawford v. State, 21 So. 214, 112 Ala. 1; Grant v. State, 97 Ala. 35, 11 So. 915.

Fla. Olds v. State, 33 So. 296, 44 Fla. 452.

Ga. Hill v. State, 89 S. E. 351, 18 Ga. App. 259, conforming to answer to certified questions. Deal v. Same. 88 S. E. 573, 145 Ga. 33; Maddox v. State, 71 S. E. 498, 9 Ga. App. 448; Brazil v. State, 43 S. E. 460, 117 Ga. 32.

Ill. Spalding v. People, 49 N. E. 993, 172 Ill. 40.

Miss. Hammond v. State, 21 So. 149, 74 Miss. 214.

Va. Briggs v. Commonwealth, 82 Va. 554.

Wash. State v. Cushing, 50 P. 512, 17 Wash. 544.

Wis. Niezorawski v. State, 111 N. W. 250, 131 Wis. 166.

Instructions held properly refused within rule. A charge, in a prosecution for assault with intent to murder, that, if the defendant had established a good reputation as being a peaceable and quiet citizen, it was the duty of the jury to consider the same, and give him the benefit of any reasonable doubt which might be created by such proof, and that every man on trial for crime is permitted to introduce evidence of his general good character, and this evidence may alone be sufficient to generate a reasonable doubt of his guilt, and that the jury ought to consider such evidence in arriving at their verdict. Bohlman v. State, 33 So. 44, 135 Ala. 45. An instruction in a prosecution for homicide that, if the prisoner had proved a good character as a man of peace, the law says that such good character may be sufficient to create and generate a reasonable doubt of his guilt, though no such doubt would have existed but for such good character. Jarvis v. State, 34 So. 1025, 138 Ala. 17. Charges that good character of accused, taken together with other evidence in the case, is sufficient

In Georgia a late case has held [39] that the jury should be told that good character may be sufficient alone and of itself to raise a reasonable doubt of the guilt of the defendant, so as to authorize his acquittal, and that it is error to instruct that evidence touching the good character of the accused can warrant an acquittal only in connection with the other evidence; but still later cases have restored the former rule.[40]

In New York, however, the defendant is entitled without qualification to an instruction that the jury may, in the exercise of a sound discretion, give him the benefit of a previous good character, no matter how conclusively the other evidence may appear to establish his guilt.[41] A similar doctrine has been enunciated in other jurisdictions.[42] In one jurisdiction it has been said that a mere charge to consider the good character of the defendant in connection with all the other evidence, and if, on a consideration of all of it, including good character, the jury have a reasonable

to generate a reasonable doubt, and that proof of good character may generate a reasonable doubt of accused's guilt. Phillips v. State, 49 So. 794, 161 Ala. 60. A charge that proof of good character "alone," when taken in connection with other evidence, may be sufficient ground on which to base a reasonable doubt of defendant's guilt and justify his discharge. Caldwell v. State, 49 So. 679, 160 Ala. 96. An instruction that evidence of good character of accused may alone create a reasonable doubt as to his guilt, and if the evidence is conflicting may be looked to, and accused may be acquitted on the strength thereof when taken in conjunction with all the other evidence. Robinson v. State, 58 So. 121, 4 Ala. App. 1. A charge that, if the jury find defendant is a man of good character, they may consider that character in connection with the other evidence in determining his guilt, and it may generate a reasonable doubt of his guilt, is erroneous; "it" referring to the good character alone. Scott v. State, 32 So. 623, 133 Ala. 112.

[39] Taylor v. State, 79 S. E. 924, 13 Ga. App. 715.

[40] Groce v. State, 97 S. E. 525, 148 Ga. 520; Hill v. State, 89 S. E. 351, 18 Ga. App. 259.

[41] People v. Bonier, 179 N. Y. 315, 72 N. E. 226, 103 Am. St. Rep. 880; People v. Elliott, 57 N. E. 103, 163 N. Y. 11, reversing judgment 60 N. Y. S. 1145, 43 App. Div. 621; People v. Billick, 183 N. Y. S. 685, 193 App. Div. 914; People v. Koppman, 143 N. Y. S. 919, 158 App. Div. 660; People v. Buccufurri, 143 N. Y. S. 62, 158 App. Div. 186.

An instruction that evidence of good character is sufficient to raise a question of reasonable doubt is not, however, properly framed under this rule, since it is not predicated on the belief of the jury in such evidence. People v. Trimarchi, 131 N. E. 910, 231 N. Y. 263.

[42] Snitkin v. U. S. (C. C. A. Ind.) 265 F. 489.

In Pennsylvania, instructions which would have a tendency to lead the jury to disregard evidence of good character altogether, if, from all the other evidence they reach the conclusion that the defendant is guilty, are erroneous. Commonwealth v. House, 72 A. 804, 223 Pa. 487; Commonwealth v. Cate, 69 A. 322, 220 Pa. 138. Although, in the absence of a request so to charge, it will not necessarily be error for the court to fail to instruct that evidence of good character, in itself, by the creation of a reasonable doubt, may work the acquittal of the defendant. Commonwealth v. Beingo, 66 A. 153, 217 Pa. 60.

doubt of his guilt, to acquit him, is not charging the rules applicable to evidence of good character.[43]

§ 241. Effect of good character where evidence entirely circumstantial

It is proper to refuse an instruction, in a case in which the evidence adduced against the defendant is purely circumstantial, that evidence of good character is of itself sufficient to create a reasonable doubt, since such an instruction is equivalent to charging that no person of good character can be convicted of crime by circumstantial evidence, however strong it may be.[44]

§ 242. Worthlessness of good character where guilt clearly established from all the evidence

It is proper to refuse an instruction which authorizes an acquittal because of the previous good reputation of the defendant, although the jury believe him to be guilty,[45] and in most jurisdictions after the court has correctly instructed the jury in accordance with the rules above set forth it is proper to instruct that evidence of good character cannot avail the defendant or justify his acquittal if the jury are satisfied from all the evidence beyond a reasonable doubt of his guilt.[46] Such an instruction does not pre-

[43] State v. Brown, 115 P. 994, 39 Utah, 140, Ann. Cas. 1913E, 1.

This statement, however, does not seem to have been concurred in by the majority of the court, who, after reviewing the New York decisions, prescribe a form of instruction to the effect that the jury should consider all of the evidence in the case, including the evidence of good character and if, upon a consideration of all the evidence, they entertain a reasonable doubt, or if the evidence of good character alone, when considered in connection with the other evidence as aforesaid, produces or creates a reasonable doubt of the guilt of the accused, the defendant is entitled to the benefit of such doubt and should be acquitted. State v. Brown (Utah) 115 P. 994.

[44] Browne v. United States (C. C. A. N. Y.) 145 F. 1, 76 C. C. A. 31, affirming judgments United States v. Rosenthal (C. C. N. Y.) 126 F. 766; United States v. Cohn (C. C. N. Y.) 128 F. 615.

[45] State v. Stentz, 74 P. 588, 33 Wash. 444.

[46] **Ala.** Armor v. State, 63 Ala. 173.

Cal. People v. Mitchell, 62 P. 187, 129 Cal. 584.

Ga. Thomas v. State (App.) 103 S. E. 859; Taylor v. State, 88 S. E. 696, 17 Ga. App. 787; McCullough v. State, 76 S. E. 393, 11 Ga. App. 612; Nelms v. State, 51 S. E. 588, 123 Ga. 575.

Ill. People v. Anderson, 87 N. E. 917, 239 Ill. 168.

Ind. Rollins v. State, 62 Ind. 46.

Kan. State v. Douglass (Sup.) 24 Pac. 1118.

La. State v. Simon, 59 So. 975, 131 La. 520; State v. Spooner, 41 La. Ann. 780, 6 So. 879; State v. Riculfi, 35 La. Ann. 770.

Mich. People v. Mead, 50 Mich. 228, 15 N. W. 95.

Mo. State v. Wertz, 90 S. W. 838, 191 Mo. 569; State v. Darragh, 54 S. W. 226, 152 Mo. 522; State v. Bryant, 134 Mo. 246, 35 S. W. 597.

Mont. State v. Jones, 80 P. 1095, 32 Mont. 442.

N. Y. People v. Dippold, 51 N. Y. S. 859, 30 App. Div. 62.

clude the consideration of such evidence upon the issue of the

Ohio. Watha v. State, 34 Ohio Cir. Ct. R. 60.

Wash. State v. Stentz, 74 P. 588, 33 Wash. 444.

Instructions held proper within rule. A charge that proof of good character was not admitted for the purpose of shielding the defendant from the consequences of his conduct, but simply as a circumstance to be considered by the jury with the other evidence, and if, from all the evidence, they believed him to be guilty beyond a reasonable doubt, they should say so by their verdict, as firmly against a man of good character as of bad. "Good character does not shield a man from the consequences of a criminal act, proved to the satisfaction of a jury beyond a reasonable doubt, though it may raise a reasonable doubt of the act having been done with a criminal intent." Hussey v. State, 87 Ala. 121, 6 South. 420. A charge that, "when the guilt of the accused is made to appear by proof to the satisfaction of the jury beyond a reasonable doubt, the jury are authorized to convict, regardless of the good character of the accused"; the court having also charged in the same connection that "the jury has the right to consider the good character of the accused," not merely where his guilt is doubtful, under the other testimony in the case, but where such testimony of good character may of itself generate such doubts. Thornton v. State, 33 S. E. 673, 107 Ga. 683. An instruction in a homicide case that "previous good character and reputation is not a defense against any criminal charge, but evidence on the subject is admitted for the purpose of strengthening the presumption of innocence; * * * that, if the evidence on the whole case convinces you beyond a reasonable doubt that the defendant is guilty, you must return a verdict of guilty, without reference to his previous good character and reputation." State v. McGrath, 57 P. 321, 35 Or. 109. A charge, in a prosecution for perjury, that, if the defendant's reputation in the community in which he lived for truth and veracity was good, the jury might consider that fact in determining his guilt, but, if on a consideration of all the evidence the jury believed beyond a reasonable doubt that he was guilty, his previous good reputation would neither justify nor excuse the offense, the court refusing to charge that the defendant has a right to have testimony showing his previous good character considered in determining whether reasonable doubt exists as to his guilt, and, if from all the other evidence in the case the jury would be satisfied of the guilt of defendant, they must still determine whether the previous good character when weighed with all the other facts and circumstances raises a reasonable doubt, and, if such reasonable doubt remains in the minds of the jurors they must acquit. Coleman v. State, 118 P. 594, 6 Okl. Cr. 252. A charge that the previous good character of defendant, if proved to the reasonable satisfaction of the jury, ought to be considered in passing on the guilt of defendant, but that, if all the evidence in the case, including that which had been given touching the previous good character of the defendant, showed him to be guilty of the charge, then his previous good character could not justify, excuse, palliate, or mitigate the offense. State v. Maupin, 93 S. W. 379, 196 Mo. 164. An instruction that evidence of defendant's good reputation for honesty and integrity should be considered with all the other evidence in the case, but that if, from all the evidence, the jury was satisfied of his guilt beyond a reasonable doubt, it was immaterial what his reputation had previously been as to honesty and integrity. State v. Dunn, 102 N. W. 935, 125 Wis. 181. Where the jury has been instructed to consider the evidence of defendant's good character in determining his guilt or innocence, a further charge that, if the jury believe from the evidence beyond a reasonable doubt that defendant killed deceased as charged, then his good character alone and of itself cannot justify, excuse, palliate, or mitigate the offense, is not erroneous, as excluding defendant's good character

guilt or innocence of the defendant,[47] and instructions affirming the opposite rule, that in such case evidence of good character can generate a reasonable doubt, are of course erroneous, as they are self-contradictory.[48] In one jurisdiction, however, it is held to be reversible error to charge that, where the jury are satisfied under all the evidence of the guilt of the defendant beyond a reasonable doubt, evidence of his previous good character cannot raise such a doubt; the view being taken that such an instruction may lead the jury to disregard such evidence, if from all the other evidence they conclude he is guilty.[49]

B. Bad Character

§ 243. Effect of bad character

To justify the admission against the accused of evidence of bad character, it is necessary that he shall have already clearly and expressly put his character in issue, and if the accused introduces no evidence of good character it is error to charge that character is always in issue in a trial for a criminal offense.[50] On the other hand, if no issue is made as to the past life or reputation of the defendant, he is not entitled to an instruction that, if the jury find that he has been leading a wild or vicious life, such fact should not

from the consideration of the jury. State v. Kilgore, 70 Mo. 546. An instruction, "if the crime charged in the indictment has been conclusively proven to the satisfaction of the jury beyond a reasonable doubt, that in that case any good character of the defense does not avail him," does not withdraw from the jury evidence as to defendant's good character, where the court had previously charged that, in case of reasonable doubt as to defendant's guilt, which must be determined on all the evidence, defendant was entitled to an acquittal, and that evidence as to the good character of defendant should be considered in determining the question of reasonable doubt. People v. Sweeney, 59 Hun, 619, 13 N. Y. S. 25. In a prosecution for murder, a charge that the good character of one on trial for crime, if satisfactorily proved, may of itself, in a case where guilt is not plainly established, be sufficient to generate a reasonable doubt, but where the guilt is made to appear to the satisfaction of the jury beyond a reasonable doubt, they are authorized to convict, regardless of the good moral character of accused, is not erroneous, as too narrowly restricting the use of evidence in relation to good character. Henderson v. State, 48 S. E. 167, 120 Ga. 504.

[47] State v. Alderman, 78 A. 331, 83 Conn. 597; Dorsey v. State, 100 N. E. 369, 179 Ind. 531; Eacock v. State, 82 N. E. 1039, 169 Ind. 488; People v. Gilbert, 92 N. E. 85, 199 N. Y. 10, 20 Ann. Cas. 769; State v. Meyers, 117 P. 818, 59 Or. 537.

[48] Paul v. State, 100 Ala. 136, 14 So. 634.

[49] Commonwealth v. Ronello, 96 A. 826, 251 Pa. 329; Commonwealth v. House, 72 A. 804, 223 Pa. 487, reversing judgment 36 Pa. Super. Ct. 363; Commonwealth v. Cate, 69 A. 322, 220 Pa. 138, 123 Am. St. Rep. 683; Commonwealth v. Howe, 38 Pa. Super. Ct. 208.

[50] People v. Slauson, 83 N. Y. S. 107, 85 App. Div. 166.

be considered in determining his guilt,[51] and in the absence of any evidence of the bad character of the defendant a failure to charge that evidence of his bad character goes only to his credibility as a witness and is not evidence of his guilt is not error.[52] Where evidence of the character of a defendant in a criminal prosecution has been admitted to impeach him, it is proper to refuse to instruct that the jury are not to take into account his good or bad character.[53] It is not improper to charge, where the evidence justifies such an instruction, that persons of bad character are entitled to defend themselves on the same principles, and to have the same rules of law applied to them, as persons of good character.[54]

§ 244. Instructions on inability of state to show bad character

In some jurisdictions it is error to instruct in a criminal case, where the defendant has not put his reputation in issue by claiming to be of good character, that in view of such failure of the defendant to raise such issue the state is not authorized to introduce any evidence to impeach his character,[55] since such an instruction is susceptible of the inference that the people, had they been permitted, might have shown that the character of the defendant was bad.[56] In one jurisdiction, however, it is held not error to so charge, if it is not intimated that the jury should draw inferences prejudicial to the defendant on account of the omission of testimony to his good character.[57]

[51] People v. Waugh, 158 P. 336, 30 Cal. App. 402.

[52] State v. Furgerson, 63 S. W. 101, 162 Mo. 668.

[53] Jones v. State, 96 Ala. 102, 11 So. 399.

[54] Green v. State, 52 S. E. 431, 124 Ga. 343; People v. Davis, 64 Hun, 636, 19 N. Y. S. 781.

[55] Brown v. State, 32 Ohio Cir. Ct. R. 93.

[56] People v. Gleason, 55 P. 123, 122 Cal. 370.

[57] State v. Tozier, 49 Me. 404.

CHAPTER XVII

INSTRUCTIONS ON DEGREE OF PROOF.

A. Preponderance of Evidence.

§ 245. Necessity and propriety of instructions.
246. Sufficiency of instructions.
247. Instructions requiring too high a degree of proof.
248. Correctness of use of words "satisfy," "to the satisfaction," etc.
249. Instructions not objectionable as requiring too high a degree of proof.
250. Requirement that each of the jurors be reasonably satisfied.
251. "Clear" or "fair" preponderance.
252. Slight preponderance.
253. Evidence evenly balanced.
254. Instructions objectionable or criticized as requiring less than a preponderance of the evidence or as permitting jury to speculate upon probabilities.
255. Number of witnesses as element in determining preponderance of evidence.
256. Effect of error in defining preponderance of evidence.

B. Doctrine of Reasonable Doubt in Criminal Cases

1. *Necessity of Instructions Requiring Proof Beyond a Reasonable Doubt*

257. General rule.
258. Qualifications of rule.

2. *Sufficiency of Instructions on Necessity of Proof Beyond a Reasonable Doubt*

259. General principles.
260. Necessity of defining reasonable doubt.
261. Sufficiency of definitions of reasonable doubt.
262. Doubt arising out of the evidence or want of evidence.
263. Defining reasonable doubt as one for which reason can be given.
264. Actual, real, strong, substantial, or well-founded doubt.
265. Possibility of innocence of accused.
266. Opportunity of choice between two opposing theories.
267. Probability or supposition of innocence.
268. Probability of guilt.
269. Doubt which would influence, or cause one to hesitate, in his private affairs.
270. Moral or mathematical certainty.
271. Abiding conviction to a moral certainty.
272. Conscientious belief.
273. Effect of doubt upon any particular fact.
274. Necessity of convincing each juror beyond a reasonable doubt in order to convict or to prevent an acquittal.
275. Belief or doubt as men.
276. Doubt as to grade or degree of offense charged.
277. Giving benefit of doubt to state.
278. Repetition of instructions.

A. PREPONDERANCE OF EVIDENCE

Instructions criticized as invading province of jury, see ante, § 64.

§ 245. Necessity and propriety of instructions

The question as to the preponderance of the evidence arises, and only arises, when, the party on whom rests the burden of proof having produced sufficient evidence to support a conclusion in his favor, his adversary introduces opposing evidence. In view of such opposing evidence, the situation may then be such that the jury is in doubt, and not at all satisfied or convinced, in which case the decision must be based upon the preponderance rule. If in the opinion of the jury the evidence preponderates in favor of the one on whom the burden of proof does not lie, or is equally balanced, the decision must be in his favor, and if it preponderates ever so slightly in favor of the other party the latter is entitled to a verdict.[1] Accordingly, in civil cases, the general rule is that, on conflicting evidence, an instruction to find according to the preponderance of the evidence, or that the party on whom the burden of proof rests, whether it be the plaintiff or the defendant, must prove his case by a preponderance of the evidence, is proper,[2] and such an instruction should generally be given on request.[3]

An instruction which minimizes the importance of the rule re-

[1] Lawrence v. Goodwill (Cal. App.) 186 P. 781.

[2] **Ga.** Parker v. Georgia Pac. Ry. Co., 83 Ga. 539, 10 S. E. 233.

Ill. Young v. Copple, 52 Ill. App. 547.

Ind. De Hart v. Johnson County Com'rs, 143 Ind. 363, 41 N. E. 825.

Iowa. Jamison v. Jamison, 84 N. W. 705, 113 Iowa, 720.

S. C. Fowler v. Harrison, 42 S. E. 159, 64 S. C. 311.

Tex. Birkman v. Fahrenthold, 114 S. W. 428, 52 Tex. Civ. App. 335.

In Alabama it has been held, in opposition to the rule of the text, that in the absence of any applicable legal presumption it is for the jury alone to determine upon the amount of evidence required to sustain the contentions of the party having the burden of proof, and that the court should not instruct that the jury are bound to find according to the preponderance of the evidence. Mays v. Williams, 27 Ala. 267. The more recent view prevailing in this jurisdiction, however, is that, while a charge that the evidence must preponderate in plaintiff's favor, to entitle him to recover, may be refused, it is not error to give it. Green v. Southern States Lumber Co., 50 So. 917, 163 Ala. 511.

[3] **Ill.** Illinois Cent. R. Co. v. Warriner, 82 N. E. 246, 229 Ill. 91, affirming judgment 132 Ill. App. 301; Kidd v. White, 138 Ill. App. 107; Illinois Cent. R. Co. v. Becker, 119 Ill. App. 221; Tedens v. Schumers, 112 Ill. 263.

Md. Ohlendorf v. Kanne, 66 Md. 495, 8 Atl. 351.

Or. Hagermann v. Chapman Timber Co., 133 P. 342, 65 Or. 588.

In Missouri it is not error to refuse to instruct that the party having the burden of proof must satisfy the jury "by a preponderance of evidence"; it being held that such an instruction is couched in technical terms. Anchor Milling Co. v. Walsh, 37 Mo. App. 567.

quiring a party to prove his case by a preponderance of the evidence should not be given.[4] On the other hand, an instruction is proper which in effect tells the jury that if they find that the plaintiff has proved his case, as stated in his declaration, by a preponderance of the evidence, he is entitled to recover.[5] Where defendant puts in no evidence, an instruction as to the preponderance of the evidence is improper, as the jury in such case consider the case on the evidence of plaintiff.[6]

On conflicting evidence, an instruction on the mode of determining the preponderance of the evidence should be given on request.[7] Ordinarily, in the absence of a request, it is not error to fail to charge on the general doctrine as to the preponderance of the evidence, or to fail to explain to the jury the meaning of the phrase "preponderance of the evidence."[8]

§ 246. Sufficiency of instructions

Where the court undertakes to charge on the preponderance of the evidence, the jury should be told that, unless the evidence preponderates in favor of the plaintiff, they should find for the defendant; an instruction to make up their verdict from a preponderance of the evidence not being sufficiently definite.[9] A

[4] Button v. Metcalf, 80 Wis. 193, 49 N. W. 809.

[5] City of Macon v. Smith, 82 S. E. 162, 14 Ga. App. 703; Ford v. Coal Belt Ry. Co., 143 Ill. App. 431; Springfield Consol. Ry. Co. v. Johnson, 120 Ill. App. 100.

[6] Cohen v. City of Chicago, 197 Ill. App. 377.

Where there is no conflict in the testimony, the failure of the court to instruct the jury that plaintiff must establish the necessary facts by a preponderance of testimony is not error. Schlengener v. Chicago, M. & St. P. Ry. Co., 61 Iowa, 235, 16 N. W. 103.

No evidence to rebut statutory presumption. Where plaintiff had shown an injury inflicted by defendant's railway train, thus making a prima facie case of negligence under the statute which defendant failed to explain, instruction that plaintiff must prove by preponderance of testimony that decedent was injured by defendant's negligence was erroneous. Hamel v. Southern Ry. Co. in Mississippi, 74 So. 276, 113 Miss. 344.

[7] Louisville & N. R. Co. v. Ward (C. C. A. Ill.) 61 F. 927, 10 C. C. A. 166.

[8] **Cal.** Hardy v. Schirmer, 124 P. 993, 163 Cal. 272.

Ga. Tallulah Falls Ry. Co. v. Taylor, 93 S. E. 533, 20 Ga. App. 786; Jamerson v. Thaxton, 66 S. E. 984, 7 Ga. App. 395; Georgia, F. & A. Ry. Co. v. Lasseter, 51 S. E. 15, 122 Ga. 679; Gunn v. Harris, 88 Ga. 439, 14 S. E. 593.

Mo. Zackwik v. Hanover Fire Ins. Co. (App.) 225 S. W. 135.

Wis. McHatton v. McDonnell's Estate, 165 N. W. 468, 166 Wis. 323.

[9] Southwestern Telegraph & Telephone Co. v. Newman (Tex. Civ. App.) 34 S. W. 661.

Illustrations of instructions held proper or sufficient. An instruction that the test of preponderance and weight of the testimony is where the jury believe truth to be after hearing all the evidence, was correct. Johnston v. Delano, 154 N. W. 1013, 175 Iowa, 498. An instruction, on the preponderance of evidence, that plaintiff was required to

charge with respect to the degree of proof essential to enable a party to recover is not necessarily erroneous, because it does not expressly require him to prove his case by a preponderance of the evidence;[10] but such an instruction may be properly refused.[11]

It is not error to accompany an instruction on the necessity of establishing a claim by a preponderance of the evidence by the statement that a conviction beyond a reasonable doubt is not re-

establish his case by a preponderance of the evidence, that if the evidence was evenly balanced, and the jury were in doubt as to its preponderance, or if it favored the defendant, their verdict should be for the defendant, sufficiently covered the subject. Handlan v. Miller, 122 S. W. 751, 143 Mo. App. 101. An instruction, defining "preponderance of the evidence" as not the greater number of witnesses, but that evidence which was more satisfying and convincing to the minds of the jury, without adding "in respect to its credibility," was not erroneous. Zackwik v. Hanover Fire Ins. Co. (Mo. App.) 225 S. W. 135. A charge that by "preponderance of evidence is meant that superior weight of evidence on the issues, which, while it may not convince the mind beyond a reasonable doubt, is yet sufficient to incline an impartial mind to one side of the issue rather than the other," is a substantial definition of "preponderance of evidence." Scott v. Brown, 56 S. E. 130, 127 Ga. 88. An instruction that the preponderance of evidence was not alone determined by the number of witnesses, that in determining the preponderance the jury should take into consideration the opportunity of the witnesses for seeing or knowing the things about which they testified, their conduct while testifying, their interest or lack thereof in the result, and the probability or improbability of the truth of their statements in view of all the other evidence, was sufficient upon that point. Hoskovec v. Omaha St. Ry. Co., 123 N. W. 305, 85 Neb. 295. An instruction that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, and that, in determining upon which side the preponderance of evidence is, the jury may consider the opportunities of the several witnesses as to the matters about which they testify, their conduct while testifying, their interest in the result, the probability of the truth of their several statements, and that from all such circumstances the jury may determine upon which side is the weight of the evidence, was not erroneous. Hersberger v. Pacific Lumber Co., 88 P. 587, 4 Cal. App. 460, rehearing denied, 88 P. 591, 4 Cal. App. 460.

[10] Hueni v. Freehill, 125 Ill. App. 345; Kerr v. Quincy, O. & K. C. R. Co., 87 S. W. 596, 113 Mo. App. 1.

Every instruction need not tell the jury that they must find the facts from a preponderance of the evidence. It is sufficient if from the entire charge it appears that the jury were clearly directed to predicate their findings of fact upon the evidence adduced. Chicago & E. I. R. Co. v. Pittman, 135 Ill. App. 481, judgment affirmed Pittman v. Chicago & E. I. R. Co., 83 N. E. 431, 231 Ill. 581.

Instruction setting out facts to be found from the evidence. Where an instruction directed that, if the jury found from the evidence the facts therein stated, they should find defendant guilty, and the facts stated were all the facts necessary to constitute a cause of action and require such verdict, the instruction was not objectionable for failure to require that the finding of the facts must be from a preponderance of the evidence. Illinois Cent. R. Co. v. Warriner, 82 N. E. 246, 229 Ill. 91, affirming judgment 132 Ill. App. 301.

[11] Richardson v. Dybedahl, 98 N. W. 164, 17 S. D. 629.

quired;[12] but the trial court, having laid down the proper rule as to the amount of evidence required to prove certain facts in issue, has discretion to refuse to make such additional statement.[13]

An instruction which enumerates various elements to be considered in determining the preponderance of the evidence, but which does not leave the jury free to consider all the facts and circumstances in evidence in deciding where such preponderance lies is erroneous, and is properly refused.[14] The court should not single out a part of the evidence, and require the jury to determine the weight of the evidence from such part,[15] and an instruction which prevents a party from relying on the proof of his adversary in making out a preponderance of the evidence is error.[16] The requirements of the rule as to the preponderance of the evidence should be limited to those issues essential to the maintenance of the action,[17] and should not be extended to material allegations of the complaint which are admitted.[18] An instruction that the plaintiff must make out his case, so far as he has the affirmative, by a preponderance of testimony, without telling the jury in what respect he has the affirmative, is improper,[19] as is an instruction that the defendant has the burden of proving a counterclaim by the preponderance of all the evidence in the cause, he being only required to prove it by a preponderance of the evidence relevant to that particular issue.[20]

§ 247. Instructions requiring too high a degree of proof

In civil actions the party upon whom the burden of proof rests is not required to prove his case or his defense by more than a preponderance of the evidence, and instructions which exact more,

[12] Kuenster v. Woodhouse, 77 N. W. 165, 101 Wis. 216.

[13] Wunderlich v. Palatine Ins. Co., 92 N. W. 264, 115 Wis. 509.

[14] Parker v. Chicago Rys. Co., 200 Ill. App. 9; Larsen v. Ward Corby Co., 198 Ill. App. 109; Smith v. James, 163 Ill. App. 501; Eddy v. Lowry (Tex. Civ. App.) 24 S. W. 1076.

[15] Brisch v. Chicago City Ry. Co., 176 Ill. App. 341.

[16] Philadelphia, B. & W. R. Co. v. Hand, 61 A. 285, 101 Md. 233.

[17] Nelson v. Chicago City Ry. Co., 163 Ill. App. 98; Freeman Wire & Iron Co. v. Collins, 53 Ill. App. 29; Collins v. Clark, 72 S. W. 97, 30 Tex. Civ. App. 341.

Proof of elements of damage. An instruction is too broad which is to the effect that "every item and element of damage claimed by the plaintiff must by shown by a preponderance of the evidence in the case." Richardson v. Chicago City Ry. Co., 170 Ill. App. 336.

An instruction to decide all the issues by a preponderance of the evidence is not, however, objectionable as indefinite and misleading, where the issues submitted embraced the material allegations of plaintiff's petition. Texas & P. Ry. Co. v. Whiteley, 96 S. W. 109, 43 Tex. Civ. App. 346.

[18] O'Donnell v. Chicago, R. I. & P. R. Co., 91 N. W. 566, 65 Neb. 612.

[19] Gilbert v. Bone, 79 Ill. 341.

[20] Cohen v. Reichman, 102 N. E. 284, 55 Ind. App. 164.

or which tend to lead the jury to think that more is demanded, are erroneous, and should be refused.[21] Under this rule, instructions which require the jury to have no doubt, or not to entertain any uncertainty, in order to find for the party having the burden of

[21] **Ala.** Monte v. Narramore, 77 So. 726, 201 Ala. 200; United States Fidelity & Guaranty Co. v. Charles, 31 So. 558, 131 Ala. 658, 57 L. R. A. 212; Phœnix Ins. Co. v. Moog, 81 Ala. 335, 1 So. 108.

Cal. Ellis v. Central California Traction Co., 174 P. 407, 37 Cal. App. 390.

Conn. Beach v. Clark, 51 Conn. 200.

Ill. Brady v. Mangle, 109 Ill. App. 172.

Ind. Hartman & Fehrenbach Brewing Co. v. Clark, 51 A. 291, 94 Md. 520.

Mich. Van Slyke v. Rooks, 147 N. W. 579, 181 Mich. 88.

Miss. Mardis v. Yazoo & M. V. R. Co., 76 So. 640, 115 Miss. 734; Gentry v. Gulf & S. I. R. Co., 67 So. 849, 109 Miss. 66.

Mo. State ex rel. Detroit Fire & Marine Ins. Co. v. Ellison, 187 S. W. 23, 268 Mo. 239, quashing record (App.) Rice v. Detroit Fire & Marine Ins. Co. of Detroit, Mich., 176 S. W. 1113.

N. Y. Kennealy v. Westchester Electric Ry. Co., 83 N. Y. S. 823, 86 App. Div. 293, affirmed 74 N. E. 1119, 181 N. Y. 582.

Tex. Gilmore v. Brown, 150 S. W. 964.

Instructions improper within rule. An instruction that, if upon any hypothesis a fact can be accounted for on any other theory than a dishonest one, the jury should so find. Nebraska Mercantile Mut. Ins. Co. v. Myers, 107 N. W. 747, 76 Neb. 460. An instruction that plaintiffs must establish their case "to the full satisfaction of the jury, by clear and convincing proof." Gage v. Louisville, N. O. & T. R. Co., 88 Tenn. 724, 14 S. W. 73. A charge that, if the jury cannot say who has told the truth, they must find the facts, so far as there is conflict, not proven. Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 So. 262. An instruction that, if the evidence showed "conclusively" that defendant violated the contract as charged, plaintiff would be entitled to recover a sufficient amount to cover his loss. Works v. Hill, 107 S. W. 581, 48 Tex. Civ. App. 631. An instruction that a party alleging fraud must produce stronger proof than would be sufficient to establish a mere debt, and that the burden is on a party alleging fraud to overcome the presumption of honesty. D. S. Giles & Son v. Horner, 149 N. W. 333, 97 Neb. 162. An instruction, in an action against a railroad for damages to plaintiff's pasture by fire, that, if the jury was in doubt as to the origin of the fire, and could not say of a certainty which fire caused the damage, they should find for defendant. Stevenson v. Yazoo & M. V. R. Co., 74 So. 132, 112 Miss. 899. In an action of claim and delivery, an instruction defining preponderance of the evidence, and adding that if, after a comparison and consideration of all the evidence, the evidence for and against any material allegations of the complaint is evenly balanced, the plaintiff has failed to prove her case, and verdict should be for the defendant, was properly refused as stating that, if plaintiff failed to prove any allegation, the entire cause of action would fail. Webster v. Sherman, 84 P. 878, 33 Mont. 448.

Proof to justify equitable relief. The rule that in a particular case the evidence must be clear and convincing to justify equitable relief by reformation of an instrument should not be given in the charge to the jury. Western Assur. Co. v. Hillver-Deutsch-Jarratt Co. (Tex. Civ. App.) 167 S. W. 816.

Proof that absolute deed was intended as mortgage. Though, to authorize a finding that an absolute deed was intended as a mortgage, such intention must be shown by the

proof, are erroneous.[22] So an instruction that requires the jury to find against the party having the burden of proof, if there is an element of uncertainty in the evidence which they cannot solve, is erroneous.[23]

So instructions are erroneous which require that, before the jury can find the existence of certain facts, the evidence must be clear and strong, and leave no doubt in the minds of the jury,[24] or which require that such facts be established with certainty, or clearness and certainty,[25] or which require them to be proved with reasonable certainty,[26] or to a reasonable and moral cer-

evidence with clearness and certainty, it is improper to so instruct the jury. Palm v. Chernowsky, 67 S. W. 165, 28 Tex. Civ. App. 405.

[22] **Ala.** Brown v. Master, 104 Ala. 451, 16 So. 443; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 17; Harris v. Russell, 93 Ala. 59, 9 So. 541; Rowe v. Baber, 93 Ala. 422, 8 So. 865.

Ark. A. L. Clark Lumber Co. v. Bolin, 133 S. W. 1116, 97 Ark. 343; Miller v. Hammock, 124 S. W. 769, 93 Ark. 312.

Ill. Reynolds v. Wray, 135 Ill. App. 527.

Miss. Brown v. Walker, 11 So. 724.

N. C. Willis v. Atlantic & D. R. Co., 29 S. E. 941, 122 N. C. 905.

R. I. Hobin v. Hobin, 80 A. 595, 33 R. I. 249.

Tex. Lewter v. Lindley, 121 S. W. 178.

Instruction improper within rule. A charge in an action on a note, which there was testimony to show was given to be returned, or for the true amount to be fixed in the future, that if the returning, standing by itself, was proved to their entire satisfaction, plaintiff could not use the note against defendant, but that defendant must satisfy them by the weight of evidence, by testimony in which they had implicit confidence. Ott v. Oyer's Ex'x, 106 Pa. 6.

[23] Louisville & N. R. Co. v. Bouchard, 67 So. 265, 190 Ala. 157; Louisville & N. R. Co. v. Mason, 64 So. 154, 10 Ala. App. 263; Birmingham Ry., Light & Power Co. v. Jackson, 63 So. 782, 9 Ala. App. 588; Monarch Livery Co. v. Luck, 63 So. 656, 184 Ala. 518; Louisville & N. R. Co. v. Penick, 62 So. 965, 8 Ala. App. 558; Alabama Great Southern R. Co. v. Robinson, 62 So. 813, 183 Ala. 265; Jesse French Piano & Organ Co. v. Forbes, 32 So. 678, 134 Ala. 302, 92 Am. St. Rep. 31.

Minds of jury in confusion. A charge that if, after fair consideration of all the evidence, the minds of the jury were in confusion whether plaintiff should recover, they should find for defendant, may properly be refused. O'Brien v. Birmingham Ry., Light & Power Co., 72 So. 343, 197 Ala. 97.

[24] Long v. Martin, 54 S. W. 473, 152 Mo. 668.

[25] First Nat. Bank v. Myer, 56 S. W. 213, 23 Tex. Civ. App. 302; Mixon v. Farris, 48 S. W. 741, 20 Tex. Civ. App. 253; Howard v. Zimpelman, 14 S. W. 59.

Reasonable degree of certainty. A phrase in a charge that "the minds of the jury should be satisfied to a reasonable degree of certainty" does not present reversible error. Liverpool & London & Globe Ins. Co. v. Farnsworth Lumber Co., 72 Miss. 555, 17 So. 445.

[26] American Lumber & Export Co. v. Love, 84 So. 559, 17 Ala. App. 251; Smiley v. Hooper, 41 So. 660, 147 Ala. 646; Anniston Mfg. Co. v. Southern Ry. Co., 40 So. 965, 145 Ala. 351; Leggett v. Illinois Cent. R. Co., 72 Ill. App. 577.

In civil cases reasonable satisfaction, not satisfaction beyond a reasonable doubt, is all that is required. Lowery v. Rowland, 104 Ala. 420, 16 So. 88.

tainty,[27] or which require them to be conclusively proved,[28] or to be absolutely shown,[29] or to be proven beyond a rational doubt,[30] or which require that no other rational conclusion can be drawn,[31] or which require such facts to be proven beyond a reasonable doubt.[32]

So instructions are erroneous, as demanding too high a degree of proof, which require that the jury be reasonably persuaded of the existence of essential facts,[33] or which require that the proof of such facts be sufficient to convince the minds of the jury,[34] or which require the consciences of the jury to be satisfied,[35] or that necessary facts must be established to the minds and con-

[27] Galloway v. United Railroads of San Francisco (Cal. App.) 197 P. 663; Whatley v. Long, 93 S. E. 887, 147 Ga. 323.

[28] Greathouse v. Moore (Tex. Civ. App.) 23 S. W. 226.

[29] Bolen-Darnall Coal Co. v. Williams (C. C. A. Ind. T.) 164 F. 665, 90 C. C. A. 481, reversing judgment 104 S. W. 867, 7 Ind. T. 648; Mann v. Darden, 60 So. 454, 6 Ala. App. 555.

[30] Neal v. Fesperman, 46 N. C. 446.

Contra. Yarbrough v. Arnold, 20 Ark. 592.

[31] Pelky v. Palmer, 109 Mich. 561, 67 N. W. 561.

[32] **Ala.** Decatur Car Wheel & Mfg. Co. v. Mehaffey, 29 So. 646, 128 Ala. 242.

Ga. Seymour v. Bailey, 76 Ga. 338.

Kan. Stille v. McDowell, 2 Kan. 374, 85 Am. Dec. 590.

Ky. Ætna Ins. Co. v. Johnson, (11 Bush) 587, 21 Am. Rep. 223.

Md. Shoop v. Fidelity & Deposit Co. of Maryland, 91 A. 753, 124 Md. 130, Ann. Cas. 1916D, 954.

Mo. Brooks v. Roberts, 220 S. W. 11, 281 Mo. 551.

N. Y. Yablonka v. Knickerbocker Ice Co. (Sup.) 161 N. Y. S. 257; Belzer v. Daub Storage Warehouse & Van Co. (Sup.) 130 N. Y. S. 153.

Pa. Catasauqua Mfg. Co. v. Hopkins, 141 Pa. 30, 21 A. 638, 28 Wkly. Notes Cas. 146.

W. Va. Jones v. Riverside Bridge Co., 73 S. E. 942, 70 W. Va. 374.

Instructions improper within rule. Where the court properly instructed that the burden was on the party alleging fraud to establish it by clear and satisfactory evidence, a further statement that it "might be established by proving circumstances from the existence of which fraud is the natural and irresistible inference," and that, "if the case made out is consistent with fair dealing and honesty, the charge of fraud fails," was erroneous; since the jury might infer that fraud must be established beyond a reasonable doubt. F. Dohmen Co. v. Niagara Fire Ins. Co. of City of New York, 71 N. W. 69, 96 Wis. 38.

Where it is doubtful whether under an instruction in a civil action, the jury are to find according to preponderance of evidence, or must be satisfied beyond a reasonable doubt, it should be refused. Hocum v. Weitherick, 22 Minn. 152.

Proper form of instruction. An instruction that "the plaintiff is not bound to prove his case beyond a reasonable doubt, but is merely bound to prove it by a preponderance of the evidence" is correct. Crouse v. Barber Asphalt Paving Co., 162 Ill. App. 271; Riordan v. Chicago City Ry. Co., 178 Ill. App. 323.

[33] White v. Farris, 27 So. 259, 124 Ala. 461.

[34] Southern Ry. Co. v. Hobbs, 43 So. 844, 151 Ala. 335; Newman v. Newman, 208 Ill. App. 97; Merchants' Loan & Trust Co. v. Lamson, 90 Ill. App. 18.

[35] Birmingham Ry. Light & Power Co. v. Martin, 42 So. 618, 148 Ala. 8; Birmingham Ry., Light & Power Co. v. Hinton, 37 So. 635, 141 Ala. 606.

sciences of the jury by a preponderance of the evidence,[36] or which call for clear and positive proof,[37] or for satisfactory affirmative proof,[38] or which demand that facts be clearly, or clearly and fairly, proven,[39] or which require abundant proof,[40] or an abiding conviction,[41] or that the jury be clearly convinced,[42] or that the evidence shall be clear and unequivocal,[43] or that it be clear, cogent and convincing,[44] or that it must be clear, convincing, and conclusive,[45] or that essential facts be clearly and distinctly proven,[46] or requiring such proof as clearly outweighs the evidence of the other side.[47]

An instruction requiring a party to establish his case or certain necessary facts has been held to require too high a degree of proof;[48] but there are decisions the other way.[49]

§ 248. Correctness of use of words "satisfy," "to the satisfaction," etc.

Taking the view that the burden of proof on a party is sustained by evidence sufficient reasonably to satisfy the jury, it is held in some jurisdictions that a charge that the jury must be satisfied

[36] McKay v. Seattle Electric Co., 136 P. 134, 76 Wash. 257.

[37] Simpson Bank v. Smith, 114 S. W. 445, 52 Tex. Civ. App. 349.

[38] Frick v. Kabaker, 90 N. W. 498, 116 Iowa, 494.

[39] McLeod v. Sharp, 53 Ill. App. 406; Hall v. Wolff, 61 Iowa, 559, 16 N. W. 710, following West v. Druff, 55 Iowa, 335, 7 N. W. 636.

[40] Swinney v. Booth, 28 Tex. 113.

[41] Battles v. Tallman, 96 Ala. 403, 11 So. 247.

[42] Wilkinson v. Searcy, 76 Ala. 176; Wilcox v. Henderson, 64 Ala. 535; Silverstone v. London Assur. Corporation, 142 N. W. 776, 176 Mich. 525.

In an equity suit, in which the findings of the jury are merely advisory, such an instruction is proper. Sweetser v. Dobbins (Cal.) 3 P. 116.

[43] McCord-Brady Co. v. Moneyhan, 81 N. W. 608, 59 Neb. 593.

[44] Dovich v. Chief Consolidated Mining Co., 174 P. 627, 53 Utah, 522.

[45] Roberge v. Bonner, 77 N. E. 1023, 185 N. Y. 265, affirming judgment 88 N. Y. S. 91, 94 App. Div. 342.

[46] Gehlert v. Quinn, 90 P. 168, 35 Mont. 451, 119 Am. St. Rep. 864.

[47] Callison v. Smith, 20 Kan. 28.

[48] McMasters v. Grand Trunk Ry. Co., 155 Ill. App. 648; Van Geem v. Cisco Oil Mill, 152 S. W. 1108; International & G. N. R. Co. v. Duncan, 121 S. W. 362, 55 Tex. Civ. App. 440.

[49] Gamble v. Martin (Tex. Civ. App.) 151 S. W. 327; Houston & T. C. R. Co. v. Swancey (Tex. Civ. App.) 128 S. W. 677.

Use of "establish" in the sense of "prove." An instruction that the burden of proof was on plaintiff, and that before he could recover he must establish all the facts necessary to his recovery by a preponderance of the evidence, the burden resting on defendant "to establish his plea of self-defense," was not erroneous in the use of the word "establish," as requiring too high a degree of proof, it being used in the sense of "prove"; the court having also charged that the jury should find for plaintiff, if they believed from a preponderance of the evidence that defendant made an unlawful assault on plaintiff, and to find for defendant, if they believed from a preponderance of the evidence that plaintiff was about to make an attack, real or apparent, on defendant. Sumner v. Kinney (Tex. Civ. App.) 136 S. W. 1192.

by a preponderance of the evidence of the existence of essential facts, or that a fact must be shown to the satisfaction of the jury, exacts too high a degree of proof, and is erroneous,[50] and such instructions are properly refused.[51] In other jurisdictions, however, a requirement of proof which "satisfies" the jury, or "to the satis-

[50] **Ala.** Gillespie v. Hester, 49 So. 580, 160 Ala. 444; Hackney v. Perry, 44 So. 1029, 152 Ala. 626; McEntyre v. Hairston, 44 So. 417, 152 Ala. 251; Loveman v. Birmingham Ry., L. & P. Co., 43 So. 411, 149 Ala. 515; Lawrence v. Doe, 41 So. 612, 144 Ala. 524; Birmingham Ry., Light & Power Co. v. Lindsey, 37 So. 289, 140 Ala. 312; Moore v. Heineke, 24 So. 374, 119 Ala. 627.

Ark. Arkansas M. R. Co. v. Canman, 52 Ark. 517, 13 S. W. 280.

Cal. Lawrence v. Goodwill (App.) 186 P. 781.

Ill. Ruff v. Jarrett, 94 Ill. 475; Protection Life Ins. Co. v. Dill, 91 Ill. 174; Thomas v. Ohio Coal Co., 199 Ill. App. 50; Briggs v. Kohl, 182 Ill. App. 484; Hutchinson Nat. Bank v. Crow, 56 Ill. App. 558; Wolff v. Van Housen, 55 Ill. App. 295; Connelly v. Sullivan, 50 Ill. App. 627; Gooch v. Tobias, 29 Ill. App. 268; Ottawa, O. & F. R. V. R. Co. v. McMath, 4 Ill. App. 356.

Iowa. Rosenbaum Bros. v. Levitt, 80 N. W. 393, 109 Iowa, 292.

Ohio. Cincinnati, H. & D. Ry. Co. v. Frye, 88 N. E. 642, 80 Ohio St. 289, 131 Am. St. Rep. 709; Buttermiller v. Schmid, 4 Ohio App. 100.

Tex. Brewer v. Doose (Civ. App.) 146 S. W. 323; Terrell Wholesale Grocery Co. v. Christian Peper Tobacco Co. (Civ. App.) 120 S. W. 565; Cantine v. Dennis (Civ. App.) 37 S. W. 184; Finks v. Cox (Civ. App.) 30 S. W. 512; McBride v. Banguss, 65 Tex. 174.

Instructions held improper within rule. An instruction that "if the claim made by either party is unusual, unreasonable, and unnatural, out of the ordinary course of affairs, you are not required to take the same for granted upon slight evidence, nor should you so find except upon proof of a reasonable character and which satisfies the mind." Gardner v. Ben Steele Weigher Mfg. Co., 142 Ill. App. 348. In an action for breach of contract, the existence of the contract alone being in issue, an instruction on the part of defendant that, "if the evidence fails to satisfy you, you will find for defendant." San Antonio & A. P. Ry. Co. v. Graves & Paterson (Tex. Civ. App.) 131 S. W. 613. In a suit to restrain the operation of a cotton gin as a nuisance, an instruction to find for defendant unless the jury should "find and be satisfied" that the evils complained of are imminent and certain to occur. Moore v. Coleman (Tex. Civ. App.) 195 S. W. 212.

"Thoroughly satisfied." An instruction, on the trial of a civil case, that the jury must be "thoroughly satisfied" of a fact in dispute, is erroneous. O'Donohue v. Simmons, 58 Hun, 467, 12 N. Y. S. 843.

Satisfying mind of truth. A preponderance, or "fair preponderance," of evidence means merely the greater weight of evidence, and it is error to instruct that it signifies "testimony of such superior weight and convincing force as satisfies the mind of its truth." Bryan v. Chicago, R. I. & P. Ry. Co., 63 Iowa, 464, 19 N. W. 295.

To require proof of a fact by "full and satisfactory" evidence is equivalent to asking for proof beyond a reasonable doubt. Carleton-Ferguson Dry Goods Co. v. McFarland (Tex. Civ. App.) 230 S. W. 208.

[51] **Ala.** Du Bose v. Conner, 55 So. 432, 1 Ala. App. 456; Alabama City, G. & A. Ry. Co. v. Sampley, 53 So. 142, 169 Ala. 372; Southern Ry. Co. v. Hobbs, 43 So. 844, 151 Ala. 335.

Ill. Dombrowski v. Metropolitan Life Ins. Co., 192 Ill. App. 16; Swigart v. Savely, 176 Ill. App. 369; Leslie v. Joliet Bridge & Iron Co., 149 Ill. App. 210.

Tex. Fraser-Johnson Brick Co. v.

faction of the jury," is not improper,[52] it being held that such phrases merely inform the jury that they are the judges as to where the preponderance of evidence lies,[53] and it can safely be affirmed that the use of such phrases will not be error in any jurisdiction where the charge as a whole clearly shows that the court does not intend to require more than a preponderance of the evidence.[54]

In Wisconsin it has been held by Judge Marshall that the jury should be told that they should find according as they shall be satisfied of the truth of the matter in controversy by a preponderance of the evidence, and that if it is thought best to give greater definiteness to the word "satisfied," or, if requested, the court should instruct that the jury, before finding in favor of the

Baird, 128 S. W. 460, 60 Tex. Civ. App. 538; Seligmann v. L. Greif & Bro. (Civ. App.) 109 S. W. 214; Western Cottage Piano & Organ Co. v. Anderson, 101 S. W. 1061, 45 Tex. Civ. App. 513; Fordyce v. Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181.

Undisputed facts. Where, in an instruction that, before plaintiffs could recover, the jury must be "satisfied" that certain facts exist, which it was incumbent on plaintiffs to show, the word "satisfied" is used with reference to a fact about which there is no dispute, error cannot be predicated thereon. Martin v. Missouri Pac. Ry. Co., 3 Tex. Civ. App. 133, 22 S. W. 195.

[52] **Ind.** Terre Haute Traction & Light Co. v. Payne, 89 N. E. 413, 45 Ind. App. 132.

Mich. Kaaro v. Ahmeek Mining Co., 146 N. W. 149, 178 Mich. 661.

Mo. Anderson v. Voeltz, 206 S. W. 584; Norris v. St. Louis, I. M. & S. Ry. Co., 144 S. W. 783, 239 Mo. 695; McMahon v. Supreme Tent, Knights of the Maccabees of the World, 52 S. W. 384, 151 Mo. 522.

N. C. Sigmon v. Shell, 81 S. E. 739, 165 N. C. 582.

Wis. McKone v. Metropolitan Life Ins. Co., 110 N. W. 472, 131 Wis. 243.

A charge that the burden of proof is on plaintiff to "establish" the facts essential to his cause of action by a preponderance, or greater weight, of evidence, sufficiently informs the jury that they must be "satisfied by a preponderance of the evidence" in order to find for plaintiff. Jones v. Monson, 119 N. W. 179, 137 Wis. 478, 129 Am. St. Rep. 1082.

[53] Surber v. Mayfield, 60 N. E. 7, 156 Ind. 375.

[54] St. Louis, I. & M. S. Ry. Co. v. Sparks, 99 S. W. 73, 81 Ark. 187.

Use of word "satisfy" in the sense of "find" or "believe." Where it is conceded that the court used the word "satisfy" as meaning to produce a belief, an instruction that the burden was on defendants to "satisfy" the jury by a preponderance of testimony as to certain propositions was not misleading. Sams Automatic Car-Coupler Co. v. League, 54 P. 642, 25 Colo. 129. An instruction, given as to an alleged failure to deliver a bank bill of a certain denomination in exchange for a like amount in bills of smaller denominations given to defendant, declaring that a prima facie case as to nondelivery must be made by plaintiff to the "satisfaction" of the jury, is not objectionable in requiring a greater degree of evidence than a preponderance, when followed by an instruction declaring the burden then shifted to defendant, under a plea of delivery, to establish the said delivery, and that, if from a "preponderance" the jury are satisfied of the nondelivery, they must find for plaintiff; otherwise for defendant. Callan v. Hanson, 86 Iowa, 420, 53 N. W. 282.

party on whom the burden of proof rests to establish any fact, should be satisfied of the existence thereof to a reasonable certainty, and that if it is thought desirable to define preponderance of evidence or if so requested the court should define it as outweighing in convincing force and not merely as that evidence which convinces the minds and judgments of the jury.[55] Accordingly, in this jurisdiction, a charge that the jury must be satisfied by the preponderance of the evidence, to a reasonable certainty, that a fact exists before they can find such fact, is not erroneous,[56] and it is misleading to instruct the jury to find for plaintiff if he "has proven his case by a fair preponderance of evidence, if his evidence weighs enough more than that of the defendant to turn the scale on plaintiff's side, even if it be but little, if that little be perceptible," etc., instead of charging that they must be "satisfied," by a preponderance of evidence, of the existence of all facts essential to his right of recovery,[57] although an instruction that the case is to be decided on the preponderance of the evidence, and that that evidence preponderates which weighs most, is not objectionable, where the court charges, in immediate connection therewith, that the jury must be "satisfied" by a preponderance of the evidence.[58]

§ 249. Instructions not objectionable as requiring too high a degree of proof

An instruction requiring the jury to find the necessary facts to their reasonable satisfaction does not, as already indicated, demand too high a degree of proof.[59] Instructions do not require

[55] Grotjan v. Rice, 102 N. W. 551, 124 Wis. 253.

[56] Pelitier v. Chicago, St. P., M. & O. Ry. Co., 88 Wis. 521, 60 N. W. 250.

An instruction to the jury to find according to their "conviction" as to what is true, and to find for plaintiff if they "believe" that the evidence preponderates in his favor, is proper. Curran v. A. H. Stange Co., 74 N. W. 377, 98 Wis. 598.

[57] Guinard v. Knapp, Stout & Co., 70 N. W. 671, 95 Wis. 482.

[58] Knopke v. Germantown Farmers' Mut. Ins. Co., 74 N. W. 795, 99 Wis. 289.

[59] O'Neill v. Blase, 68 S. W. 764, 94 Mo. App. 648.

Reasonably convinced. An instruction that defendant has the burden of proving a fact alleged, and that unless the jury shall be reasonably "convinced" that she has borne the burden, the verdict will be for plaintiff, is not erroneous because of the use of the word "convinced" instead of "satisfied." Meyrovitz v. Levy, 63 So. 963, 184 Ala. 293.

Necessity of using phrase "fair preponderance." A charge that plaintiff is entitled to a verdict, if the jury are "reasonably satisfied from all the evidence that the allegations of the complaint are true," is not erroneous because it fails to state that the jury must be satisfied from a "fair preponderance" of the evidence. Louisville & N. R. Co. v. White (C. C. A. Ala.) 100 F. 239, 40 C. C. A. 352.

In Texas, however, it is held that an instruction that the burden is on plaintiff to establish to the jury's reasonable satisfaction by a preponderance of the evidence the allega-

too high a degree of proof which demand that essential facts be established by a preponderance of the evidence satisfactory to the minds of the jurors,[60] or which say that the jury should be sure that such facts have been proven,[61] or which require facts to be established by the fair weight of all the evidence,[62] and it is proper to define preponderance of evidence as meaning the greater weight of evidence,[63] or that greater and superior weight of the evidence as "reasonably satisfies" the minds of the jury.[64]

§ 250. Requirement that each of the jurors be reasonably satisfied

As a general rule it is proper to charge, and error to refuse to charge, that if any one of the jurors is not reasonably satisfied from the evidence that the plaintiff is entitled to recover the jury cannot find for him.[65] Such a charge is properly refused, however, where the main question litigated is as to the kind and amount of damages rather than the right to recover at all,[66] and it is proper to refuse to charge that the verdict should be for the defendant in case of the failure of the plaintiff to reasonably satisfy any one of the jurors, since a mistrial would be the result of such failure.[67]

§ 251. "Clear" or "fair" preponderance

An instruction that the jury are to decide the contested issues of fact on the "clear" or "fair" preponderance of the evidence, or that a fact in issue must be established by a fair preponderance of the evidence,[68] is held in some jurisdictions not to be error, or at

tions in his petition is erroneous, because imposing on plaintiff a greater burden than the establishment of his cause by a preponderance of the evidence. Green v. Kegans, 118 S. W. 173, 54 Tex. Civ. App. 237.

[60] Carl v. Settegast (Tex. Civ. App.) 211 S. W. 506; Carstens v. Earles, 67 P. 404, 26 Wash. 676.

[61] Bodie v. Charleston & W. C. Ry. Co., 39 S. E. 715, 61 S. C. 468.

[62] McKeon v. Chicago, M. & St. P. Ry. Co., 69 N. W. 175, 94 Wis. 477, 35 L. R. A. 252, 59 Am. St. Rep. 910.

In Wisconsin by the phrase "weight of evidence" is meant the convincing power of the evidence. Guinard v. Knapp, Stout & Co., 70 N. W. 671, 95 Wis. 482.

[63] Western Union Tel. Co. v. James, 73 S. W. 79, 31 Tex. Civ. App. 503.

[64] Ball v. Marquis, 98 N. W. 496, 122 Iowa, 665, withdrawing on rehearing opinion in 92 N. W. 691.

[65] Birmingham Stove & Range Co. v. Lawler, 66 So. 897, 11 Ala. App. 534; Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415; Birmingham Ry., Light & Power Co. v. Moore, 42 So. 1024, 148 Ala. 115.

[66] Birmingham Ry., Light & Power Co. v. Goldstein, 61 So. 281, 181 Ala. 517.

[67] McLaughlin v. Beyer, 61 So. 62, 181 Ala. 427.

[68] **Ind.** Zonker v. Cowan, 84 Ind. 395.

Iowa. Bryan v. Chicago, R. I. & P. Ry. Co., 63 Iowa, 464, 19 N. W. 295.

Mich. Tyler v. Wright, 155 N. W. 353, 188 Mich. 561; Evans v. Montgomery, 95 Mich. 497, 55 N. W. 362.

Minn. Schmeisser v. Albinson, 138 N. W. 775, 119 Minn. 428.

Miss. Chambers v. Meaut, 66 Miss. 625, 6 So. 465.

Neb. Altschuler v. Coburn, 38

least not to be reversible error, because of the use of the words "clear" or "fair,"[69] while in other jurisdictions the use of such words constitutes error.[70]

§ 252. Slight preponderance

As a general rule an instruction that the plaintiff satisfies the rule requiring him to prove his case by a preponderance of the evidence, if he shows even a slight preponderance, or if the evidence preponderates in his favor although but slightly, is not im-

Neb. 881, 57 N. W. 836; Dunbar v. Briggs, 18 Neb. 94, 24 N. W. 449.

Requirement that certain facts clearly appear. An instruction that defendant has the burden to prove the plea of settlement by a preponderance of the evidence, and that to sustain the plea it must "clearly appear" that a definite and distinct proposition was made and accepted, will not be held to have placed too great a burden on defendant, the meaning of "preponderance of the evidence" having been properly defined by another instruction. Indianapolis St. Ry. Co. v. Haverstick, 74 N. E. 34, 35 Ind. App. 281, 111 Am. St. Rep. 163.

[69] Kirchner v. Collins, 53 S. W. 1081, 152 Mo. 394; Choate v. Pierce (Miss.) 88 So. 627; Carstens v. Earles, 67 P. 404, 26 Wash. 676.

In Missouri it is held that the rule that a jury should find in favor of the preponderance of the evidence is a very old one, and the addition of the words in qualification, such as "clear," "satisfactory," and "fair," should be avoided, lest they be construed by the jury as requiring a higher degree of proof than is furnished by the preponderance alone. Kirchner v. Collins, 152 Mo. 394, 53 S. W. 1081.

In Wisconsin the use of the word "fair" in the phrase "the burden of proof is upon plaintiff to satisfy you by a fair preponderance of the evidence" has been held not to render the charge misleading. Parker v. Fairbanks-Morse Mfg. Co., 110 N. W. 409, 130 Wis. 525. But in an action for injuries to a servant, a requested instruction that disputed questions of fact could not be determined on mere conjecture, but that there must be some direct evidence of the fact or evidence tending to establish circumstances from which the jury could reasonably say that the inferences therefrom clearly preponderated in favor of the existence of the fact, was held to be inaccurate, in that it required a clear preponderance of the evidence to justify a finding. Odegard v. North Wisconsin Lumber Co., 110 N. W. 809, 130 Wis. 659.

In Washington an instruction that the jury "should be satisfied by a clear preponderance of proof" is not erroneous when given with one that "this is a civil action, and it is not required in a civil action to establish the facts beyond a reasonable doubt, * * * but a fair preponderance of proof is all that is required." Hart v. Niagara Fire Ins. Co. of State of New York, 9 Wash. 620, 38 P. 213, 27 L. R. A. 86.

[70] **Ill.** Nelson v. Fehd, 67 N. E. 828, 203 Ill. 120, affirming judgment 104 Ill. App. 114; Bitter v. Saathoff, 98 Ill. 266; Draper v. Petrea, 147 Ill. App. 164; Schofield v. Baldwin, 102 Ill. App. 560; Chicago & E. I. R. Co. v. Storment, 90 Ill. App. 505, judgment affirmed 60 N. E. 104, 190 Ill. 42; Dow v. Higgins, 72 Ill. App. 302; Mitchell v. Hindman, 47 Ill. App. 431.

Neb. Search v. Miller, 1 N. W. 975, 9 Neb. 26.

Tex. Wyatt v. Chambers (Civ. App.) 182 S. W. 16; Cowans v. Ft. Worth & D. C. Ry. Co., 109 S. W. 403, 49 Tex. Civ. App. 463; B. Lantry Sons v. Lowrie (Civ. App.) 58 S. W. 837; Atkinson v. Reed (Civ. App.) 49 S. W. 260; Cabell v. Menczer (Civ. App.) 35 S. W. 206.

proper.[71] In one jurisdiction it is held that it is not error to instruct that the slightest difference in the weight of the evidence is a preponderance sufficient to justify a verdict in favor of the party in whose favor such preponderance exists, for all that the law requires is that the party having the burden of proof shall have a preponderance of the evidence, and this means only that the evidence shall be in some degree more convincing to sustain his contention than that of his adversary, and the term "fair preponderance of the evidence," often used in instructions, is really meaningless.[72]

Such an instruction, however, has been held subject to criticism,[73] and where the issue is one of fraud it is error to give it in some jurisdictions.[74]

§ 253. Evidence evenly balanced

It is, of course, error to give an instruction which would prevent the defendant from recovering if the evidence is evenly balanced.[75] Thus an instruction that if the plaintiff fails to prove

[71] **Ill.** Hancheft v. Haas, 76 N. E. 845, 219 Ill. 546; Chicago City Ry. Co. v. Bundy, 71 N. E. 28, 210 Ill. 39, affirming judgment 109 Ill. App. 637; Chicago City Ry. Co. v. Fennimore, 64 N. E. 985, 199 Ill. 9, affirming judgment 99 Ill. App. 174; Comorouski v. Spring Valley Coal Co., 203 Ill. App. 617; Meers v. Daley, 203 Ill. App. 515; Glascock v. Gerold, 199 Ill. App. 134; Young v. City of Fairfield, 173 Ill. App. 311; La Belle v. Grand Central Market Co., 172 Ill. App. 582; Ryan v. City of Chicago, 162 Ill. App. 252; Hamilton v. Kankakee Electric Ry. Co., 158 Ill. App. 422; Devine v. Ryan, 115 Ill. App. 498; Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269, judgment affirmed 71 N. E. 1024, 211 Ill. 373; Chicago & E. I. R. Co. v. Driscoll, 107 Ill. App. 615, judgment affirmed 69 N. E. 620, 207 Ill. 9; Donley v. Dougherty, 75 Ill. App. 379, affirmed 51 N. E. 714, 174 Ill. 582.

Tenn. Chapman v. McAdams, 1 Lea, 500.

Instructions held proper within rule. In an action against a city for damages occasioned by requiring the elevation of a railroad track, an instruction that if the jury, after having considered all the facts, including the numbers of witnesses and circumstances appearing on the trial, feel that from the testimony it is more probable that any fact is true or not, then such fact is proven by the preponderance of the testimony, however slight the preponderance may be, is not ground for reversal. City of Chicago v. Webb, 102 Ill. App. 232.

"However slight." The use in an instruction of the words "however slight," in speaking of the preponderance of the evidence, does not warrant a criticism of the instruction, where the party objecting thereto admits that the use of the words, "if the evidence preponderated but slightly," in the instruction would have been good; there being no material difference between the expressions. Smiley v. Barnes, 196 Ill. App. 530.

[72] Hammond, W. & E. C. Electric Ry. Co. v. Antonia, 83 N. E. 766, 41 Ind. App. 335;

[73] Chicago City Ry. Co. v. Nelson, 116 Ill. App. 609; O'Donnell v. Armour Curled Hair Works, 111 Ill. App. 516.

[74] St. Louis & S. F. R. Co. v. Bruner, 156 P. 649, 56 Okl. 682.

[75] Wall v. Hill's Heirs, 1 B. Mon. 290, 36 Am. Dec. 578.

his case by a preponderance of the evidence the verdict should be for the defendant is erroneous, as requiring the defendant to establish his case by such a preponderance.[76] In a proper case it will not be error to instruct that if the evidence is evenly balanced upon the whole case, or upon any material allegation of the complaint, the verdict must be against the party having the burden of proof or for the defendant,[77] and it will be error to refuse such an instruction [78] unless the issues include affirmative defenses raised by the defendant, as well as those set out in the complaint, in which case an instruction that, if the evidence is equally balanced on any point necessary to a recovery by the plaintiff, the verdict must be for the defendant, is incorrect, and is properly refused.[79]

Such an instruction may also be properly refused, where other instructions have been given at defendant's request, requiring the plaintiff to prove his cause by a preponderance of the evidence in order to recover.[80] Such an instruction requires the plaintiff to prove each paragraph of his complaint by a preponderance of the evidence.

An instruction on the burden of proof that, if the evidence as to either paragraph of the complaint is equally balanced so that it does not preponderate on either side, they should find for defendant is properly refused,[81] and an instruction that a preponderance of evidence is sufficient to authorize a verdict, and if the evidence is nearly equally balanced the jury may determine where the preponderance is from the credibility of the witnesses whose testimony is in conflict, is not objectionable on the ground that it

[76] Hillyard v. Bair, 155 P. 449, 47 Utah, 561.

[77] Dixon v. Great Falls & O. D. Ry. Co., 43 App. D. C. 206; Royal Trust Co. v. Overstrom, 120 Ill. App. 479; Jones v. Angell, 95 Ind. 376; Renard v. Grande, 64 N. E. 644, 29 Ind. App. 579.

[78] Brodie v. Connecticut Co., 87 A. 798, 87 Conn. 363; City of Streator v. Liebendorfer, 71 Ill. App. 625; Drena v. Travelers' Ins. Co., 183 N. Y. S. 439, 192 App. Div. 703; Schaefer v. Metropolitan St. Ry. Co., 69 N. Y. S. 980, 34 Misc. Rep. 554; Brockman v. Metropolitan St. Ry. Co., 66 N. Y. S. 339, 32 Misc. Rep. 728.

[79] Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Hickey v. Rio Grande Western Ry. Co., 82 P. 29, 29 Utah, 392.

[80] Porter v. St. Joseph Stockyards Co., 111 S. W. 1136, 213 Mo. 372; Blitt v. Heinrich, 33 Mo. App. 243; Hamel v. Brooklyn Heights R. Co., 69 N. Y. S. 166, 59 App. Div. 135; International & G. N. Ry. Co. v. Davis (Tex. Civ. App.) 84 S. W. 669; International & G. N. R. Co. v. Villareal, 82 S. W. 1063, 36 Tex. Civ. App. 532.

Where the court has charged that the burden of proof is on plaintiff, it is proper to refuse a further instruction that "if, upon the whole evidence, your minds are equally balanced, and you are unable to say that the preponderance of the evidence is in favor of plaintiff, then you will find for defendant." Gulf, C. & S. F. Ry. Co. v. Locker, 78 Tex. 279, 14 S. W. 611.

[81] Mortimer v. Daub, 98 N. E. 845, 52 Ind. 30.

tells the jury that if the evidence is equally balanced they may find for the plaintiff.[82]

§ 254. Instructions objectionable or criticized as requiring less than a preponderance of the evidence or as permitting jury to speculate upon probabilities

Instructions which require less than a preponderance of the evidence to sustain the burden of proof of the essential facts in the case, or which have a tendency to lead the jury to think that less is required, are equally erroneous with instructions which demand more than such a preponderance.[83] Thus an instruction in effect that, although the jury must be satisfied, it may be done by less than a preponderance of the evidence, is erroneous,[84] and an instruction that one is entitled to a verdict if his plea is sustained by the "weight" of evidence is incorrect; the word "weight" not being synonymous with "preponderance."[85] An instruction which permits the jury to speculate upon probabilities, or to balance one probability against another, in arriving at a verdict, instead of telling them to find the facts from a preponderance of the evidence, is improper.[86]

[82] Johnson v. People, 140 Ill. 350, 29 N. E. 895.

[83] Rathbun v. White, 107 P. 309, 157 Cal. 248; Grant v. Rowe, 83 Mo. App. 560.

Mere belief. It is improper to instruct that, if the jury "believe from the evidence" certain facts, certain consequences will follow, as a mere belief is not sufficient on which to found a verdict. Sossamon v. Cruse, 45 S. E. 757, 133 N. C. 470.

Instructions not objectionable as authorizing recovery without regard to the weight of the evidence. An instruction that "preponderance of proof" means that the jury are persuaded of the soundness of the claim more satisfactorily than the contrary was not objectionable in not employing the word "weigh," nor as implying that the jury might be persuaded by argument rather than the facts, as the jury could understand the term "persuaded" only to mean that the proof must be more persuasive and convincing. Toledo, St. L. & W. R. Co. v. Kountz (C. C. A. Ohio) 168 F. 832, 94 C. C. A. 244. In an action for slander, an instruction that the plaintiff must prove by a preponderance of the evidence that the defendant spoke the words alleged, and when plaintiff proves "to the satisfaction of the jury that defendant falsely spoke the words," etc., is not erroneous, in that the quoted words authorized a recovery without regard to the weight of the evidence, where in other instructions the jury were also told that they must base their findings of the facts and their verdict on the evidence. Childs v. Childs, 94 P. 660, 49 Wash. 27.

[84] Blue Ridge Land Co. v. Floyd, 88 S. E. 862, 171 N. C. 543.

[85] Street v. Sinclair, 71 Ala. 110; Shinn v. Tucker, 37 Ark. 580.

[86] **Ala.** Going v. Alabama Steel & Wire Co., 37 So. 784, 141 Ala. 537.

Ga. Parker v. Johnson, 25 Ga. 576.

Ill. Warner v. Crandall, 65 Ill. 195; Boon v. Bliss' Estate, 98 Ill. App. 341.

Iowa. Butler v. Chicago & N. W. Ry. Co., 71 Iowa, 206, 32 N. W. 262.

Mass. Haskins v. Haskins, 9 Gray, 390.

Duty to tell jury that evidence must satisfy them. Where the probabilities either way, in an issue

§ 255. Number of witnesses as element in determining preponderance of evidence

In most jurisdictions an instruction that the jury, in determining the preponderance of the evidence, may take into consideration the numerical preponderance of the testimony on one side or the other, is not improper,[87] and in a proper case it will be error to refuse such an instruction.[88] Ordinarily, however, in the absence of any request so to instruct,[89] or where the conflict between the greater number of witnesses and the lesser is not of a positive or decided character,[90] it will not be error for the court to fail to call attention to the numerical inequality of the witnesses.

Instructions having a tendency to lead the jury to think that the value of testimony or the preponderance of the evidence is to be determined by a count of the witnesses are erroneous.[91] Such an instruction is not rendered proper by the assumption that the witnesses are of equal credibility,[92] since credibility refers only to the integrity of the witness, and does not imply that he has intelligence or knowledge, or opportunity for knowledge, of the particular facts in the case;[93] and in some jurisdictions such an

of facts before the jury, are weak, it is error to direct the jury to find the fact by the greater probability, without an instruction that the evidence must satisfy them that the fact exists. Dunbar v. McGill, 64 Mich. 676, 31 N. W. 578.

[87] Osberg v. Cudahy Packing Co., 198 Ill. App. 551.

[88] Johnson v. Chicago City Ry. Co., 166 Ill. App. 79; Harvey v. McQuirk, 158 Ill. App. 50; Waskiewicz v. Public Service Ry. Corporation, 78 A. 159, 80 N. J. Law, 694.

In Pennsylvania it is held that, where the numerical preponderance of medical testimony favors the contention of one of the parties, this should be pointed out to the jury, leaving to them the credibility of the witnesses and the final determination of the question whether the weight of the evidence is on one side or the other. Frysinger v. Philadelphia Rapid Transit Co., 95 A. 257, 249 Pa. 555; Benson v. Altoona & L. V. E. Ry. Co., 77 A. 492, 228 Pa. 290.

[89] Mills v. Pope, 93 S. E. 559, 20 Ga. App. 820; McIntosh v. McIntosh, 79 Mich. 198, 44 N. W. 592.

[90] Eastman v. Washington & C. Ry. Co., 37 Pa. Super. Ct. 287.

[91] Fengar v. Brown, 57 Conn. 60, 17 A. 321; Phenix v. Castner, 108 Ill. 207; Fritzinger v. State, 67 N. E. 1006, 31 Ind. App. 350; Hoskovec v. Omaha St. Ry. Co., 115 N. W. 312, 80 Neb. 784; O'Brien v. State, 42 A. 841, 63 N. J. Law, 49.

Instructions improper within rule. Where six witnesses testified in favor of one party, and three in favor of the adverse party, an instruction defining a preponderance of the evidence as the greater weight thereof, "and necessarily the greater number of witnesses," was misleading. Heald v. Western Union Telegraph Co., 105 N. W. 588, 129 Iowa, 326.

Instructions not improper within rule. Instruction that the jury was to bear in mind the number of witnesses in determining the preponderance of proof, and that by preponderance was not necessarily meant the greater number of witnesses. Hanton v. Pacific Electric Ry. Co., 174 P. 61, 178 Cal. 616.

[92] Bierbach v. Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19.

[93] Madden v. Saylor Coal Co., 111 N. W. 57, 133 Iowa, 699; Schmitt v.

instruction is not redeemed by the fact that it is based on the hypothesis that all other things are equal,[94] or that the witnesses are of equal candor, fairness, intelligence, and credibility, with equal knowledge and opportunities for knowledge,[95] as the jury are thereby prevented from considering all the corroborating circumstances.[96]

Conversely it is proper to tell the jury that the preponderance of the evidence is not determined solely or necessarily by the number of witnesses testifying on either side,[97] the jury being at the same time told the various elements entering into such preponderance, including the number of witnesses,[98] and it is generally held that an instruction to the effect that the jury should be governed by the quality of the testimony rather than by the number of the witnesses is not improper.[99]

Milwaukee St. Ry. Co., 89 Wis. 195, 61 N. W. 834.

[94] Harman v. Appalachian Power Co., 86 S. E. 917, 77 ... Va. 48.

[95] Indianapolis Abattoir Co. v. Neidlinger, 92 N. E. 169, 174 Ind. 400; Warren Const. Co. v. Powell, 89 N. E. 857, 173 Ind. 207.

[96] Indianapolis & E. Ry. Co. v. Bennett, 79 N. E. 389, 39 Ind. App. 141.

[97] Newhouse Mill & Lumber Co. v. Keller, 146 S. W. 855, 103 Ark. 538; People v. Chun Heong, 86 Cal. 329, 24 P. 1021; Dunbar v. Jones, 87 A. 787, 87 Conn. 253; Money v. Seattle, R. & S. Ry. Co., 109 P. 307, 59 Wash. 120.

[98] Martin v. Vaught, 194 S. W. 10, 128 Ark. 293; Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; Strohmeyer v. Jamison, 208 Ill. App. 612; Gordon v. Stadelman, 202 Ill. App. 255; Meyer v. Mead, 83 Ill. 19; McCowan v. Northeastern Siberian Co., 84 P. 614, 41 Wash. 675.

Instructions held proper within rule. An instruction that the jury were not bound to decide in conformity with the declarations of any number of witnesses which did not produce conviction in their minds against a less number, or against a presumption of law, or other evidence satisfying them; in other words, that it was not the greater number of witnesses that should control where their testimony was not satisfactory to the jury against a less number whose testimony did satisfy them, and that it was upon the quality, rather than the quantity or number, of witnesses that the jury should act. People v. Botkin, 98 P. 861, 9 Cal. App. 244. An instruction that the weight of the testimony does not necessarily depend on the greater number of witnesses, but that the jury may consider all the facts and circumstances appearing from the evidence, and determine from that which of the witnesses are entitled to the greater weight, and that, if they believe that the evidence of the smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side, then the evidence preponderates on the side of the smaller number of witnesses. St. Louis & O. Ry. Co. v. Union Trust & Savings Bank, 70 N. E. 651, 209 Ill. 457. An instruction that the jury may consider the greater number of witnesses that may testify on one side or the other of contested issues, but that the preponderance of evidence is not necessarily with the greater number of witnesses, but it is that superior weight of evidence that inclines the minds of the jurors to accept one side in preference to the other, regardless of the number of witnesses. Quiggle v. Viming, 54 S. E. 74, 125 Ga. 98.

[99] Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 So. 262; Brodie v. Connecticut Co., 87 A. 798, 87 Conn. 363; Belk v. Cooper, 34 Ill.

On the other hand, the court should not unduly minimize the effect of the numerical inequality of the witnesses,[1] and an instruction which is so framed as to tend to lead the jury to believe that they are not to consider the number of witnesses, or which is susceptible of the inference that the number of witnesses upon any given question is of no consequence, is erroneous,[2] and if the court undertakes to inform the jury of the elements to be considered in determining the preponderance of the evidence, it should include the element of the number of the witnesses.[3] In one jurisdiction,

App. 649; Crowley v. Burlington, C. R. & N. Ry. Co., 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918; Divver v. Hall (City Ct. N. Y.) 46 N. Y. S. 533, 20 Misc. Rep. 677, reversed (Sup.) 47 N. Y. S. 630, 21 Misc. Rep. 452.

In Washington, however, such an instruction is considered erroneous, as being misleading and confusing. Gilmore v. Seattle & R. Ry. Co., 69 P. 743, 29 Wash. 150.

One credible witness as against many believed to be untruthful. Where there was conflict in evidence on questions of fact, an instruction that testimony of one credible witness is entitled to more weight than the testimony of many others, if the jury have reason to believe that such witnesses have knowingly testified untruthfully, is proper. Kemp v. Slocum, 110 N. W. 1024, 78 Neb. 440.

[1] Hodder v. Philadelphia Rapid Transit Co., 66 A. 239, 217 Pa. 110.

[2] Dupuis v. Saginaw Valley Traction Co., 109 N. W. 413, 146 Mich. 151; Pennington v. Gillaspie, 66 S. E. 1009, 66 W. Va. 643; Garske v. Town of Ridgeville, 102 N. W. 22, 123 Wis. 503, 3 Ann. Cas. 727.

Omission of word "necessarily." An instruction to a jury commencing, "By a preponderance of proof, the court does not mean a larger number of witnesses on a given point," is misleading because omitting the word "necessarily" before the word "mean." Gallagher v. Singer Sewing Mach. Co., 177 Ill. App. 198.

[3] Chicago Union Traction Co. v. Hampe, 81 N. E. 1027, 228 Ill. 346; Neville v. Chicago & A. R. Co., 210 Ill. App. 168; Horstman v. Chicago Rys. Co., 210 Ill. App. 144; Dodge v. Bruce, 208 Ill. App. 570; Richards v. Illinois Cent. R. Co., 197 Ill. App. 282; Doyle v. Chicago City Ry. Co., 189 Ill. App. 438; De Joannis v. Domestic Engineering Co., 185 Ill. App. 271; O'Donoghue v. City of Chicago, 167 Ill. App. 349; Thompson v. Dering Coal Co., 158 Ill. App. 289; Fisher v. City of Geneseo, 154 Ill. App. 288; Andreicyk v. Chicago & E. I. R. Co., 150 Ill. App. 539; Cummins v. Cleveland, C., C. & St. L. Ry. Co., 147 Ill. App. 291; Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543; Sullivan v. Sullivan, 139 Ill. App. 378.

Instructions improper within rule. An instruction which, after stating that the preponderance of the evidence does not necessarily depend on the number of witnesses testifying on either side, undertakes to enumerate the things the jury may take into consideration in determining on which side the preponderance of the evidence is, and in such enumeration entirely omits any reference to the number of the witnesses as one of those elements, where the number of witnesses is important, is error, as tending to lead the jury to believe that such number is not to be considered at all. Devine v. City of Chicago, 178 Ill. App. 39; Zamiar v. People's Gaslight & Coke Co., 204 Ill. App. 290; Lyons v. Joseph T. Ryerson & Son, 90 N. E. 288, 242 Ill. 409. An instruction "that the weight of the testimony does not necessarily depend upon the greater number of witnesses sworn on either side of the question in dispute," but that the jury are at liberty, as jurors, to consider all the facts and circumstances appearing from the evidence in the case and determine from that which of the witnesses are worthy of the greater cred-

however, the later cases have repudiated the numerical test of the preponderance of the evidence, and in this jurisdiction it is proper to instruct without qualification that such preponderance does not depend upon the number of witnesses and does not mean the greater number of witnesses.[4]

§ 256. Effect of error in defining preponderance of evidence

The mere fact that the charge of the court is technically faulty in defining preponderance of proof is not ground for reversing the judgment if the jury are not misled, or if the case as a whole is fairly presented to them, and especially if their verdict is obviously correct.[5] So, where instructions have been given properly laying down the rule of preponderance of evidence and defining it, the use of words in other instructions implying the necessity of a higher degree of proof than that involved in a mere preponderance may be harmless error.[6]

B. Doctrine of Reasonable Doubt in Criminal Cases

1. *Necessity of Instructions Requiring Proof Beyond a Reasonable Doubt*

§ 257. General rule

The jury should be left in no uncertainty in a criminal prosecution as to their duty to acquit the defendant if they are not convinced of his guilt beyond a reasonable doubt,[7] and ordinarily it

it. Eidem v. Chicago, R. I. & P. Ry. Co., 144 Ill. App. 320.

Instructions not improper within rule. An instruction that the preponderance of the evidence "is not alone to be determined by the number of witnesses" testifying to a particular state of facts, and naming several of the elements which the jury should consider in determining where the preponderance lay, was not objectionable on the ground that it omitted the element of the number of witnesses testifying to any particular fact or state of facts. Chicago City Ry. Co. v. Bundy, 71 N. E. 28, 210 Ill. 39, affirming judgment 109 Ill. App. 637; Kravitz v. Chicago City Ry. Co., 174 Ill. App. 182.

Harmless error. The omission from an instruction as to determining the preponderance of the evidence of the number of witnesses as one of the elements to be considered is not reversible error, except where the element of the number of witnesses is shown to be important. Powell v. Alton & S. R. R., 203 Ill. App. 60.

[4] Vivian Collieries Co. v. Cahall, 110 N. E. 672, 184 Ind. 473; Model Clothing House v. Hirsch, 85 N. E. 719, 42 Ind. App. 270.

[5] Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 P. 21.

[6] In re Goldthorp's Estate, 88 N. W. 944, 115 Iowa, 430.

[7] **Ala.** Smith v. State, 59 So. 190, 4 Ala. App. 678; Campbell v. State, 54 So. 107, 170 Ala. 55; Birt v. State, 46 So. 858, 156 Ala. 29.

Ark. Woodland v. State, 160 S. W. 875, 110 Ark. 15.

Ky. Hudson v. Commonwealth, 170 S. W. 620, 161 Ky. 257.

La. State v. Hagan, 22 So. 832, 49 La. Ann. 1625.

Requiring jury to be satisfied of defendant's innocence. An instruc-

will be reversible error to fail so to instruct,[8] where a proper request has been made for such an instruction;[9] this rule applying in misdemeanor cases.[10]

Accordingly it is error to direct the jury to find the defendant guilty, if from all the evidence they believe him to be so, without including the qualification that such belief must be so strong as to be beyond a reasonable doubt,[11] and it is reversible error to re-

tion requiring a jury to be satisfied of defendant's innocence before they should acquit him, and to convict him if they were satisfied of his guilt, is erroneous, as repealing the law of reasonable doubt. Long v. State, 115 P. 605, 4 Okl. Cr. xiii.

[8] **Ala.** Boyd v. State, 43 So. 204, 150 Ala. 101.

Ark. Bruce v. State, 75 S. W. 1080, 71 Ark. 475.

Fla. Barker v. State, 83 So. 287, 78 Fla. 477.

Ky. Gatliff v. Commonwealth, 107 S. W. 739, 32 Ky. Law Rep. 1063; Prater v. Commonwealth, 4 Ky. Law Rep. 344.

Mich. People v. Yund, 128 N. W. 742, 163 Mich. 504.

Mo. State v. Douglas, 167 S. W. 552, 258 Mo. 281; State v. Clark, 47 S. W. 886, 147 Mo. 20.

Pa. Commonwealth v. Hoskins, 60 Pa. Super. Ct. 230.

Tex. Fuller v. State, 113 S. W. 540, 54 Tex. Cr. R. 454; Logan v. State, 48 S. W. 575, 40 Tex. Cr. R. 85.

[9] **Ala.** Parker v. State, 59 So. 518, 5 Ala. App. 64; Rosenberg v. State, 59 So. 366, 5 Ala. App. 196; Black v. State, 55 So. 948, 1 Ala. App. 168; Huckabee v. State, 53 So. 251, 168 Ala. 27; Davidson v. State, 52 So. 751, 167 Ala. 68, 140 Am. St. Rep. 17; White v. City of Anniston, 49 So. 1030, 161 Ala. 662; Welch v. State, 46 So. 856, 156 Ala. 112; Griffin v. State, 43 So. 197, 150 Ala. 49; Young v. State, 43 So. 100, 149 Ala. 16; Walker v. State, 23 So. 149, 117 Ala. 42.

Cal. People v. Dole, 55 P. 581, 122 Cal. 486, 68 Am. St. Rep. 50, reversing judgment 51 P. 945.

Iowa. State v. Clark, 140 N. W. 821, 160 Iowa, 138; State v. Matheson, 120 N. W. 1036, 142 Iowa, 414, 134 Am. St. Rep. 426; State v. Bone, 87 N. W. 507, 114 Iowa, 537.

Mo. State v. Reppetto, 66 Mo. App. 251.

N. J. State v. Ackerman, 41 A. 697, 62 N. J. Law, 456.

Pa. Commonwealth v. Hull, 65 Pa. Super. Ct. 450.

Tex. Elder v. State, 151 S. W. 1052, 68 Tex. Cr. R. 520; Jordt v. State. 95 S. W. 514, 50 Tex. Cr. R. 2.

Duty to acquit unless jury believe from evidence that accused is guilty. In a murder case, it was error to refuse a charge that, unless the jury believed from the evidence that accused was guilty, they should find him not guilty, since unless they believed beyond a reasonable doubt that accused was guilty, it was their duty to acquit, and they would have to believe guilt before they could believe guilt beyond a reasonable doubt. Seawright v. State, 49 So. 325, 160 Ala. 33.

In Texas, in the trial of felonies, the doctrine of reasonable doubt should be given in charge to the jury, whether asked or not. Treadway v. State, 1 Tex. App. 668; Robinson v. State, 5 Tex. App. 519.

[10] Treadway v. State, 1 Tex. App. 668.

[11] **Ala.** Huff v. State, 77 So. 939, 16 Ala. App. 345; Kennedy v. State, 70 So. 957, 14 Ala. App. 23.

Ill. People v. Obermeyer, 190 Ill. App. 514; People v. Moore, 161 Ill. App. 56.

Ky. Ball v. Commonwealth, 99 S. W. 326, 30 Ky. Law Rep. 600; Arnold v. Commonwealth, 55 S. W. 894, 21 Ky. Law Rep. 1566.

Okl. Kimbrell v. State, 123 P. 1027, 7 Okl. Cr. 354; Remer v. State, 109 P. 247, 3 Okl. Cr. 706.

Tenn. Frazier v. State, 100 S. W. 94, 117 Tenn. 430.

Tex. Lewis v. State (Cr. App.) 231 S. W. 113.

fuse to charge that the burden is on the state to prove every element of the offense of which the defendant is accused beyond a reasonable doubt, where no other instruction is given stating the law of reasonable doubt.[12]

If the evidence of the state consists of statements of witnesses, of the truth of which the jury are in reasonable doubt, they cannot convict on such evidence, although they may not believe the witnesses of defendant, and the defendant is entitled to an instruction to this effect.[13]

§ 258. Qualifications of rule

Where there is no dispute of fact on any material issue, and there is no possible room for uncertainty as to the guilt of the accused, the court need not charge the doctrine of reasonable doubt,[14] since the jury should not be coaxed into a doubt by instructions when there is no foundation for it in the evidence.[15] Such an instruction may be rendered unnecessary by a presentation in the argument of the counsel for the defendant of a statement of the rule to which the state has assented.[16]

In some jurisdictions it is not error to omit to charge the law of reasonable doubt, where no request for instructions on such subject is made,[17] and this is the general rule in prosecutions for misdemeanors.[18]

[12] People v. Cohn, 76 Cal. 386, 18 P. 410.

In Alabama it has been held error to refuse to charge that the prosecution must prove every material fact charged in the indictment to a moral certainty, that it must satisfy the minds of the jury that defendant was guilty beyond all reasonable doubt, and that, if the jury can account for his innocence upon any reasonable hypothesis, they must acquit. McAdory v. State, 62 Ala. 154.

[13] Mills v. State, 55 So. 331, 1 Ala. App. 76.

[14] **Cal.** People v. Scott, 141 P. 945, 24 Cal. App. 440.

Ga. Wall v. State, 69 Ga. 766.

N. J. State v. Seifert (Sup.) 88 A. 947, 85 N. J. Law, 104, judgment affirmed 92 A. 345, 86 N. J. Law, 706.

Pa. Commonwealth v. Tresca, 31 Pa. Super. Ct. 557; Same v. Di Silvestro, Id., 537, 556.

Tex. Brown v. State (Cr. App.) 65 S. W. 906.

[15] State v. Schoenwald, 31 Mo. 147.

[16] State v. Johnson, 48 N. C. 266.

[17] Mabry v. State, 97 S. W. 285, 80 Ark. 345.

[18] United States v. Monongahela Bridge Co. (D. C. Pa.) 160 F. 712, judgment affirmed President, etc., of Monongahela Bridge Co. v. United States, 30 S. Ct. 356, 216 U. S. 177, 54 L. Ed. 435; Burgess v. State (Tex. Cr. App.) 42 S. W. 562.

2. *Sufficiency of Instructions on Necessity of Proof Beyond a Reasonable Doubt*

Application of doctrine of reasonable doubt to defenses, see post, § 320.
Instructions criticized as invading province of jury, see ante, § 66.

§ 259. General principles

No particular formula need be followed in charging upon reasonable doubt.[19] The governing principle to be observed in framing instructions upon this subject is that at all times during the deliberations of the jury, until they have arrived at their verdict, the presumption of innocence attends the accused.[20] If no such

[19] State v. Dobbins, 62 S. E. 635, 149 N. C. 465.

[20] People v. T. Wah Hing, 114 P. 416, 15 Cal. App. 195; Holmes v. State, 9 Tex. App. 313; Emery v. State, 78 N. W. 145, 101 Wis. 627.

Instructions held sufficient. On the question of reasonable doubt, it is sufficient to charge that the law presumes the innocence of defendant, and that, before he can be convicted, the state is bound to establish its guilt of the crime charged beyond a reasonable doubt. State v. Baker, 37 S. W. 810, 136 Mo. 74. An instruction that before the jury can convict they must be satisfied beyond reasonable doubt that defendant is guilty of the crime as alleged; that a charge of this nature is one peculiarly hard for a defendant to clear himself of; that from the nature of the case the prosecutrix and defendant are usually the only witnesses; that the jury should be perfectly satisfied from the case made out by the witnesses and corroborating evidence, if any, before finding defendant guilty; that, if not satisfied, they should acquit; and that the "reasonable doubt" mentioned is as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, by not the mere preponderance of evidence, but by evidence entirely convincing to the jury; and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." People v. Lenon, 79 Cal. 625, 631, 21 P. 967. An instruction: "If you believe the evidence given in this case, in order to convict the circumstances should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence. The circumstances ought to be of such a nature as not to be reasonably accounted for on the supposition of the prisoner's innocence, but perfectly reconcilable with the supposition of the prisoner's guilt." State v. Nelson, 11 Nev. 334. An instruction that "the presumption of law is that the defendants are innocent, and this presumption continues with them until it is overcome by evidence, beyond a reasonable doubt, that they are guilty as charged; a reasonable doubt is not a mere possibility of a doubt, but it must be a reasonable doubt, growing out of all the evidence and circumstances in evidence in the case." Chavez v. Territory, 6 N. M. 455, 30 P. 903. In a criminal prosecution, it is proper and sufficient, as a charge on reasonable doubt, to instruct that the law clothes defendant with a presumption of innocence, which attends and protects him until it is overcome by evidence of his guilt beyond a reasonable doubt, which means that the evidence must be clear, positive, and abiding, and fully satisfy the minds and consciences of the jury; that it is not sufficient to justify a verdict of guilty that there may be a strong suspicion, or even probability of guilt, but the law requires proof producing a clear, undoubted, an entirely satisfactory conviction of guilt, the burden of establishing which is on the prosecution; and that, as the prosecution

direction has been given in its main charge, the court should expressly charge, on request, that if the jury entertain a reasonable doubt of the guilt of the defendant they must acquit him.[21] It will not be error to fail to so charge in so many words, if such a direction can be clearly inferred from other instructions given.[22]

Instructions which imply that the doctrine of reasonable doubt is of questionable propriety,[23] or which permit the jury to weigh the evidence under the rule in civil cases,[24] or which are otherwise

seeks a conviction on circumstantial evidence alone, the jury cannot convict unless the state has proven defendant's guilt beyond a reasonable doubt, by facts and circumstances consistent with each other and with his guilt, and absolutely inconsistent with any reasonable theory of innocence. State v. Pyscher, 77 S. W. 836, 179 Mo. 140. A charge that "the defendant is entitled to the benefit of a reasonable doubt"; that "the duty is on the state to prove to the satisfaction of the jury, beyond a reasonable doubt, that the defendant has committed the specific crime with which she is charged in the indictment"; that "if the state fails to do so, the defendant is entitled to an acquittal"; that "you are to decide this case simply upon the evidence produced here, and in the consideration of that evidence to give the defendant the benefit of every reasonable doubt that arises in your minds as to the commission of the crime, and say on your oaths from the evidence whether she is guilty or not." Gardner v. State, 55 N. J. Law, 17, 26 A. 30. A charge that evidence is sufficient to remove a reasonable doubt when it convinces the judgment of an ordinarily prudent man of the truth of a proposition with such force that he would voluntarily act upon that conviction, without hesitation, in his most important affairs. It would be unsafe to convict any person of a felony when the facts proved and the supposition of guilt simply afford a solution of what would otherwise be mysterious; but, when the fact proved are susceptible of explanation, upon no reasonable hypothesis, consistent with innocence, and point to guilt beyond any other reasonable solution, then they are sufficient to rest a conviction upon, although the crime is of the utmost malignity and the penalty attached is the highest known to the law. This principle should guide the jury in determining the degree of an offence, as well as the question as to whether the accused is guilty of any offense. When there is a reasonable doubt whether a defendant's guilt has been satisfactorily shown, he must be acquitted; and, when there is a reasonable doubt in which of two or more degrees of an offense he is guilty, he must be convicted of the lowest degree only. Stout v. State, 90 Ind. 1.

[21] Duthey v. State, 111 N. W. 222, 131 Wis. 178, 10 L. R. A. (N. S.) 1032.

[22] Mitchell v. State, 34 S. E. 576, 110 Ga. 272; State v. Taylor, 71 S. W. 1005, 171 Mo. 465; Winfield v. State, 72 S. W. 182, 44 Tex. Cr. R. 475.

[23] State v. Kaufmann, 118 N. W. 337, 22 S. D. 433.

Instructions not erroneous as depreciating a reasonable doubt. An instruction is not erroneous, as giving the jury an idea that a reasonable doubt is but a small thing, which states that it "does not mean anything more than" that the jury should be satisfied beyond a doubt which, as reasonable men, they would entertain in matters of moment to themselves; that the doubt should arise on an examination of the case, from either the evidence, statement of defendant, conflict in the evidence, or lack of evidence; and that it does not mean the doubt of an eccentric mind, crank, or men with an oversensitive conscience. Lewis v. State, 90 Ga. 95, 15 S. E. 697.

[24] **Ark.** Jackson v. State, 126 S. W. 843, 94 Ark. 169.

Ga. Ponder v. State, 90 S. E. 365, 18 Ga. App. 703.

Mont. State v. Jones, 139 P. 441,

calculated to deprive the defendant of the right to an acquittal in case the jury are not satisfied of his guilt beyond a reasonable doubt, are, of course, erroneous.[25]

48 Mont. 505; State v. Schnepel, 59 P. 927, 23 Mont. 523.

N. Y. People v. Shanley, 62 N. Y. S. 389, 30 Misc. Rep. 290.

Pa. Commonwealth v. Deitrick, 70 A. 275, 221 Pa. 7; Commonwealth v. Stankus, 71 Pa. Super. Ct. 286.

Instructions held not objectionable as authorizing a verdict upon a mere preponderance of the evidence. A charge that defendant cannot be convicted unless the state has overcome the presumption of innocence, and has made out every material allegation of the indictment beyond all reasonable doubt, and that satisfactory proof is required, and that no mere preponderance of testimony will be sufficient to warrant a conviction, unless so strong as to remove all reasonable doubt of guilt. State v. Brown, 69 N. W. 277, 100 Iowa, 50. A charge, in a trial for theft, that "the credibility of witnesses and weight of evidence are committed entirely to the jury, and by their conclusions therein, under the law given them by the court in charge, they should determine their verdict." Webb v. State, 5 Tex. App. 65. Under an indictment for selling intoxicating liquors to an habitual drunkard, an instruction telling the jury "that the number of witnesses does not necessarily determine the weight of the evidence in any case," but the jury should consider all the evidence together, and determine from it "as to the weight of the evidence, and return a verdict accordingly," is not objectionable as authorizing a verdict of guilty upon a mere preponderance of the evidence, especially as other instructions distinctly told the jury the evidence must be such as to produce belief "beyond a reasonable doubt." Brown v. People, 65 Ill. App. 58.

[25] **U. S.** (C. C. A. La.) Adler v. United States, 182 F. 464, 104 C. C. A. 608.

Ala. Winter v. State, 20 Ala. 39.

Cal. People v. Ferry, 84 Cal. 31, 24 P. 33.

Miss. Gordon v. State, 49 So. 609, 95 Miss. 543.

Neb. Flege v. State, 142 N. W. 276, 93 Neb. 610, 47 L. R. A. (N. S.) 1106.

Tex. Dobbs v. State, 100 S. W. 946, 51 Tex. Cr. R. 113.

Va. Waller v. Commonwealth, 84 Va. 492, 5 S. E. 364.

Instructions insufficient within rule. A charge that the conclusion reached must be one which "thoroughly disciplined judgments will concur in and no pure conscience will disapprove." Batten v. State, 80 Ind. 394. On a prosecution for murder, an instruction that, if the "minds and the consciences of the jury are fully satisfied" of the existence of certain facts, they should convict. Jones v. State, 86 So. 243, 84 Miss. 194. An instruction, abstract in form, which concludes by saying to the jury "and such guilt may be established by proof of facts and circumstances from which it may be reasonably inferred." People v. Ezell, 155 Ill. App. 298. A charge, on a trial for incest, that "the law presumes every defendant to be innocent until his guilt is established beyond a reasonable doubt by proof. In other words, when the state prefers a charge against a citizen, before he can be convicted, the burden is upon the state to show, by proof, to your satisfaction, the material elements of the offense charged. If the proof in this case satisfies you" that defendant did the act charged, then defendant should be found guilty. Owen v. State, 89 Tenn. 698, 16 S. W. 114; Id., 89 Tenn. 704, 16 S. W. 115. An instruction that defendant must overcome any presumption, or establish any defense, "to the satisfaction of the jury," is error, as denying him the benefit of any reasonable doubt which may arise from the evidence. Bishop v. State, 62 Miss. 289. A charge on reasonable doubt, that the evidence should be such as would control and decide the conduct of reasonable men in the most important affairs of life, and not a mere conjecture, a trivial supposition, a bare pos-

An instruction that if all the facts and circumstances, together with all the direct evidence relied on to secure a conviction, can

sibility of the innocence of defendant, was not calculated to impress the jury that defendant should satisfy them beyond a reasonable doubt of his innocence. Clay v. State, 60 S. E. 1028, 4 Ga. App. 142.

Instructions not improper within rule. An instruction that if, after a careful comparison and candid consideration of all the evidence, the jury had a doubt of defendant's guilt, it would then be their duty to determine whether such doubt was reasonable, and, if they found that it was not a reasonable doubt, it would not be sufficient to acquit defendant. Shumway v. State, 117 N. W. 407, 82 Neb. 152, judgment affirmed on rehearing 119 N. W. 517, 82 Neb. 166. A charge that the state is required to demonstrate by competent evidence and beyond a reasonable doubt the guilt of accused before the jury could convict him. McGirt v. State, 54 S. E. 171, 125 Ga. 269. An instruction that, "in case of a reasonable doubt whether defendant's guilt is satisfactorily shown, he is entitled to an acquittal." People v. Wynn, 65 P. 126, 133 Cal. 72. An instruction that, unless the jury believes from all the evidence beyond reasonable doubt that the defendant has been proved guilty, they will acquit. Renaker v. Commonwealth, 189 S. W. 928, 172 Ky. 714. A charge that to warrant a conviction each material circumstance and the fact of guilt must be established to the satisfaction of the jury beyond every reasonable doubt. Spick v. State, 121 N. W. 664, 140 Wis. 104. A charge which requires the jury to affirmatively believe beyond a reasonable doubt the facts necessary to show accused's guilt before they can convict him, and which gives the statutory charge on reasonable doubt. Mitchell v. State, 158 S. W. 815, 71 Tex. Cr. R. 241. An instruction that if the jury were satisfied beyond a reasonable doubt that accused was guilty of murder, but had a reasonable doubt whether it was committed under express or implied malice, they must give accused the benefit of such doubt and not find him guilty of a higher grade than murder in the second degree, if he was guilty of any offense. Mingo v. State, 133 S. W. 882, 61 Tex. Cr. R. 14. A statement of the statutory doctrine of reasonable doubt in the court's charge, that in all criminal cases the burden of proof was on the state, that defendant was presumed innocent until his guilt was established by legal evidence beyond a reasonable doubt, and that in case the jury had a reasonable doubt as to defendant's guilt they should acquit. King v. State, 123 S. W. 135, 57 Tex. Cr. R. 363. An instruction that the law presumes defendant innocent until his guilt is proved beyond a reasonable doubt, and if on the whole case, or on any material fact necessary to establish his guilt, there is a reasonable doubt of his guilt, they should find him not guilty. Hargis v. Commonwealth, 123 S. W. 239, 135 Ky. 578. A charge that to justify a conviction the jury must be convinced of accused's guilt not by a preponderance of the evidence, but by testimony strong enough to convince them beyond a reasonable doubt. People v. Lalonde, 137 N. W. 74, 171 Mich. 286. In a prosecution for mule theft, defendant having claimed that he traded a pair of horses for the mules, an instruction that if the jury found from the evidence that defendant traded for the mules, or had a reasonable doubt as to whether he did or not, they should acquit him, sufficiently charged the doctrine of reasonable doubt, in accordance with the facts as defendant claimed them to be. Cleveland v. State, 123 S. W. 142, 57 Tex. Cr. R. 356. Accused's right to the benefit of reasonable doubt throughout the case, including the issue whether he wounded a witness to free himself or with intent to murder, was sufficiently covered by instructions that if the jury believed beyond reasonable doubt that the assault was unlawful, but had reasonable doubt as to whether it was with intent to murder or was an aggravated assault, accused was entitled to the benefit thereof, and that one accused is presumed to be innocent until his guilt is shown beyond

be reasonably accounted for on any theory consistent with the innocence of the defendant, the jury should acquit him, places too great a burden upon him, as all that he need do is to explain enough of the facts to raise a reasonable doubt.[26] On request the court

reasonable doubt. Perry v. State, 133 S. W. 685, 61 Tex. Cr. R. 2. On a trial for the theft of a hog, a charge that, if neither of the hogs found in the pen of defendant belonged to the person named as owner in the indictment, the defendant would not be guilty, and that, if there was a reasonable doubt whether the hogs in defendant's pen were the property of such owner, defendant should be found not guilty, considered as a whole, sufficiently informs the jury that, if they had reasonable doubts of the ownership alleged, they should acquit defendant. Holloway v. State, 140 S. W. 453, 63 Tex. Cr. R. 503. Where, on a prosecution for burglary, the court stated to the jury each fact essential to be proven by the state, and said that unless they believed, beyond a reasonable doubt, each of the facts, they must acquit the defendant; that nothing was to be taken by implication against the defendant; that the law presumed him innocent of the crime until he was proven guilty beyond a reasonable doubt, by competent evidence, and that, if the evidence left on the minds of the jury a reasonable doubt, they should acquit him, and that they must determine the question of his guilt from all the evidence in the case; and that unless they could say, after a consideration of all the evidence in the case, that every essential fact was proved beyond a reasonable doubt, they should find for the defendant—the instructions fully informed the jury as to their duty. State v. Simas, 62 P. 242, 25 Nev. 432. Where the court charged that, if the evidence or the lack of it left in the minds of the jury any reasonable doubt as to any of the facts required to be proved to sustain a conviction, they must acquit, an instruction that while the jury were not to find defendants, or either of them, guilty, if they entertained a reasonable doubt of guilt, they were not to search for a doubt and go beyond the evidence to hunt for doubts; that a doubt referred to as reasonable was such a doubt as would naturally arise in the mind of a reasonable man on a candid, impartial consideration of all the evidence—was not erroneous as leading the jury to believe that the state was not required to prove beyond a reasonable doubt the material elements of the offense. Van Wyk v. People, 99 P. 1009, 45 Colo. 1. Where the court correctly charged on presumption of innocence and the duty of the jury to convict only if convinced beyond a reasonable doubt of accused's guilt, an additional charge, on the jury being brought into court after some hours spent in consultation, that cases were to be decided on the weight of evidence, not by counting witnesses, and that a single witness might be more satisfying than half a dozen witnesses contradicting him, and that this was not a case of mistake, but some one had falsified, and that the jury might consider the motive of the prosecutor, if he had any motive, in making a false charge. was not misleading, as calculated to convey the impression that the jury could convict though they were not convinced beyond a reasonable doubt. Hack v. State, 124 N. W. 492, 141 Wis. 346, 45 L. R. A. (N. S.) 664.

"Entirely satisfied" or "fully satisfied." A statement, in an instruction, that if, on full consideration of all the evidence, you are "fairly and clearly satisfied" of defendant's guilt, is equivalent to saying that the jury must be "entirely satisfied." People v. Ribolsi, 89 Cal. 492, 26 P. 1082. Defendant is given the full benefit of the doctrine of reasonable doubt by an instruction that the jury must be "fully satisfied" of defendant's guilt before they can convict him; and if not "fully satisfied" that he did the act charged, they must acquit. State v. Charles, 76 S. E. 715, 161 N. C. 286.

[26] Horn v. Territory, 56 P. 846, 8 Okl. 52.

may be required to charge that before the jury can convict a defendant the evidence must be so convincing as to lead the minds of the jury to the conclusion that he is guilty,[27] or that the hypothesis of the defendant's guilt should flow naturally from the facts proven and be consistent with all the facts in the case.[28] Instructions which reduce the question of reasonable doubt to a mere matter of belief,[29] or which state in effect that all doubts as to the guilt of the defendant are prima facie unreasonable,[30] or that the jury are to determine the question of reasonable doubt from a consideration of the evidence of the state alone,[31] are erroneous.

The charge should be so framed as not to deprive the defendant of any reasonable doubt which may enter the mind of a juror, during the process of sifting out the evidence unworthy of belief, upon the consideration of any item of evidence, and as not to confine the jury to a reasonable doubt arising, after such sifting out process has been completed, on a consideration of the evidence remaining.[32] It is error to refuse to charge that, if the evidence of the state consists in the statements of witnesses of the truth of which the jury have a reasonable doubt, they cannot convict thereon, although they may not believe the witnesses for the defendant.[33] The accused is entitled to an instruction that, if the jury can reconcile the evidence upon any other reasonable theory or hypothesis than that of the guilt of the defendant, it will be their duty to acquit him.[34]

Instructions tending to lead the jury to suppose that the doctrine of reasonable doubt does not apply, unless they believe the defendant to be innocent, are erroneous.[35] Accordingly an instruc-

[27] Willis v. State, 33 So. 226, 134 Ala. 429.

[28] Neilson v. State, 40 So. 221, 146 Ala. 683.

[29] **Ala.** Burton v. State, 107 Ala. 108, 18 So. 284; Jackson v. State, 106 Ala. 12, 17 So. 333; Shields v. State, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17; Carr v. State, 104 Ala. 4, 16 So. 150; Harris v. State, 100 Ala. 129, 14 So. 538; Heath v. State, 99 Ala. 179, 13 So. 689; Hooks v. State, 99 Ala. 166, 13 So. 767; Pierson v. State, 99 Ala. 148, 13 So. 550; Green v. State, 97 Ala. 59, 15 So. 242.

Ky. Claxon v. Commonwealth, 30 S. W. 998.

Miss. Jeffries v. State, 28 So. 948, 77 Miss. 757; Webb v. State, 73 Miss. 456, 19 So. 238.

[30] Rose v. State, 13 Ohio Cir. Ct. R. 342, 7 O. C. D. 226.

[31] People v. Lee, 93 N. E. 321, 248 Ill. 64.

[32] Commonwealth v. Colandro, 80 A. 571, 231 Pa. 343.

[33] Mills v. State, 55 So. 331, 1 Ala. App. 76.

[34] Neilson v. State, 40 So. 221, 146 Ala. 683; Sanford v. State, 39 So. 370, 143 Ala. 78; Larrance v. People, 78 N. E. 50, 222 Ill. 155; Schwantes v. State, 106 N. W. 237, 127 Wis. 160.

[35] Bartels v. State, 136 N. W. 717, 91 Neb. 575; State v. Schreiber, 75 A. 476, 79 N. J. Law, 447.

Instructions not improper within rule. An instruction that the rule of reasonable doubt "was not intended to shield those who are actually

tion requiring a belief in the innocence of the defendant in order to acquit him is improper.[36]

Special instructions, the tenor of which is constantly to admonish the jury against entertaining an unreasonable doubt, there being no corresponding caution against convicting the defendant if a reasonable doubt of his guilt exists, are cause for reversal, although no instructions are asked on the subject of reasonable doubt,[37] and an instruction, in a misdemeanor case, tending to authorize a conviction on slighter evidence than in a prosecution for a felony, is erroneous.[38]

On the other hand, instructions which require an acquittal regardless of whether the jury entertain a reasonable doubt of the guilt of the accused,[39] or which tend to lead the jury to think that a higher degree of proof of guilt than that which satisfies beyond a reasonable doubt is required,[40] or which tell the jury to acquit unless they are absolutely certain of the guilt of the defendant,[41]

guilty from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime." Cook v. State, 82 N. E. 1047, 169 Ind. 430.

[36] Weber v. State, 101 P. 355, 2 Okl. Cr. 329; Smith v. State, 9 Tex. App. 150; Robertson v. Same, 9 Tex. App. 209.

[37] Cross v. State, 31 N. E. 473, 132 Ind. 65.

[38] People v. Chartoff, 75 N. Y. S. 1088, 72 App. Div. 555.

[39] Way v. State, 46 So. 273, 155 Ala. 52.

[40] **Ala.** Terry v. State, 69 So. 370, 13 Ala. App. 115; Olive v. State, 63 So. 36, 8 Ala. App. 178; Dungan v. State, 57 So. 117, 2 Ala. App. 235; Patton v. State, 46 So. 862, 156 Ala. 23; Rigsby v. State, 44 So. 608, 152 Ala. 9; Gordon v. State, 41 So. 847, 147 Ala. 42; Thayer v. State, 35 So. 406, 138 Ala. 39; McCormack v. State, 32 So. 268, 133 Ala. 202; Talbert v. State, 25 So. 690, 121 Ala. 33; Peagler v. State, 110 Ala. 11, 20 So. 363.

Cal. People v. Gibson, 178 P. 338, 39 Cal. App. 202.

Iowa. State v. Debolt, 73 N. W. 499, 104 Iowa, 105.

La. State v. Johnson, 29 So. 24, 104 La. 417, 81 Am. St. Rep. 139.

Full belief. An instruction that no preponderance nor any weight of preponderant evidence is sufficient to support a conviction, unless it generates full belief of the facts necessary to constitute guilt of accused to the exclusion of all reasonable doubt, was properly refused as requiring too high a degree of certainty in the use of the word "full." McDonald v. State, 51 So. 629, 165 Ala. 85.

[41] **Ala.** Keith v. State, 72 So. 602, 15 Ala. App. 129; McEwen v. State, 44 So. 619, 152 Ala. 38; Allen v. State, 111 Ala. 80, 20 So. 490; Jackson v. State, 18 So. 728; Webb v. State, 106 Ala. 52, 18 So. 491; Thomas v. State, 107 Ala. 13, 18 So. 229; Ross v. State, 92 Ala. 28, 9 So. 357, 25 Am. St. Rep. 20; Whatley v. State, 91 Ala. 108, 9 So. 236.

D. C. United States v. Heath, 20 D. C. 272.

Instructions improper within rule. An instruction that, to warrant a conviction, the evidence must be "absolutely incompatible with the innocence of the accused." Cornish v. Territory, 3 Wyo. 95, 3 P. 793. On a trial for murder, it is proper to refuse requests to charge requiring facts to be established by evidence equivalent to "absolute and positive proof." People v. Benham, 55 N. E 11, 160 N. Y. 402. An instruction requiring the jury to find accused not

or which direct the jury to acquit unless the evidence excludes every reasonable "supposition" except that of guilt,[42] or which permit a reasonable doubt on a consideration of only part of the evidence,[43] or on a view of something outside of the evidence,[44] or which require the jury to be satisfied beyond a reasonable doubt of the truth of the facts alleged in all the counts of the indictment, when proof of the facts alleged in either count is sufficient upon which to base a conviction,[45] or which predicate an

guilty unless the evidence generated a full belief as to his guilt. Zuckerman v. People, 72 N. E. 741, 213 Ill. 114. A charge that "the state is bound to prove every material fact necessary to constitute the guilt of the defendant fully, clearly, conclusively, satisfactorily, and to a moral certainty; and if, on the whole evidence adduced, the jury cannot say that they have an abiding conviction to a moral certainty of the guilt of the defendant, the jury are bound to give him the benefit of the doubt and acquit him." Dennis v. State, 23 So. 1002, 118 Ala. 72. A charge which requires full proof of guilt. Brooks v. State, 62 So. 569, 8 Ala. App. 277, judgment reversed 64 So. 295, 185 Ala. 1. An instruction to the jury that "their opinion of the guilt of the defendant, based upon the evidence in this case, must nearly approach absolute certainty; that is, a condition of their minds so perfect, complete, and unconditional as to exclude the possibility of a doubt." People v. Smith, 105 Cal. 676, 39 P. 38. No error can be predicated on the refusal to define a reasonable doubt as "an impression, after a full comparison and consideration of all the evidence, that does not amount to a certainty that the charge against the accused is true," since the word "certainty" therein is unqualified by the terms "reasonable and moral." State v. Powers, 37 S. E. 690, 59 S. C. 200. In a homicide case, an instruction, that no proof of guilt will satisfy the demands of the law if it does not convince the jury beyond reasonable doubt that the defendant is necessarily guilty, was properly refused, as the use of the word "necessarily" in effect asserted that the evidence must exclude all doubt of guilt. Daniel v. State, 71 So. 79, 14 Ala. App. 63, certiorari denied Ex parte Daniels, 72 So. 1019, 196 Ala. 700.

[42] Watson v. State, 72 So. 569, 15 Ala. App. 39; Diamond v. State, 72 So. 558, 15 Ala. App. 33, certiorari denied (Sup.) Ex parte State, 73 So. 1002, 198 Ala. 694; Richardson v. State, 68 So. 57, 191 Ala. 21; McCutcheon v. State, 59 So. 714, 5 Ala. App. 96; Sherrill v. State, 35 So. 129, 138 Ala. 8.

[43] **Ala.** Williams v. State, 69 So. 376, 13 Ala. App. 133; Dodson v. State, 65 So. 206, 10 Ala. App. 255; Roden v. State, 59 So. 751, 5 Ala. App. 247; Baker v. State, 58 So. 971, 4 Ala. App. 17; Deal v. State, 34 So. 23, 136 Ala. 52.

Fla. Hall v. State, 83 So. 513, 78 Fla. 420, 8 A. L. R. 1234.

[44] Conner v. State, 65 So. 309, 10 Ala. App. 206; Long v. State, 23 Neb. 33, 36 N. W. 310.

Instructions not improper within rule. An instruction that a reasonable doubt is such a doubt as naturally arises after considering all the evidence introduced, when reviewed in the light of all the facts and circumstances surrounding the same, was not erroneous, in that it permitted the jury to consider all the facts, whether in evidence or not. State v. Case, 96 Iowa, 264, 65 N. W. 149. Instruction that one accused is presumed innocent till proven guilty beyond a reasonable doubt, and that presumption attends him till you find, beyond a reasonable doubt, that he is guilty, does not allow conviction on anything other than the evidence; "proven" meaning established by competent and satisfactory evidence. People v. Riker, 168 N. W. 434, 202 Mich. 377.

[45] Littleton v. State, 29 So. 390, 128 Ala. 31.

acquittal upon a reasonable doubt of the guilt of a third person,[46] are erroneous, and are properly refused, and it is proper to instruct that the guilt of an accused need not be shown to an absolute certainty.[47]

Instructions should expressly characterize the doubt which will authorize or require the acquittal of an accused as a reasonable one,[48] and should indicate what facts are to be proven beyond a reasonable doubt,[49] and should be predicated upon a fair and impartial comparison and consideration of the evidence.[50] An instruction on reasonable doubt need not be applied in express terms to the concrete facts in the case,[51] and as a general rule such an instruction which substantially follows the language of a statute prescribing the effect of such a doubt will sufficiently protect the

[46] Moye v. State, 67 So. 716, 12 Ala. App. 127.

[47] Welsh v. State, 96 Ala. 92, 11 So. 450; Griffin v. State, 89 S. E. 625 18 Ga. App. 402; Flannigan v. State, 79 S. E. 745, 13 Ga. App. 663; Parrish v. State, 14 Neb. 60, 15 N. W. 357.

[48] **Ala.** Minor v. State, 74 So. 98, 15 Ala. App. 556; Hardeman v. State, 70 So. 979, 14 Ala. App. 35; Givens v. State, 62 So. 1020, 8 Ala. App. 122; Perry v. State, 59 So. 150, 177 Ala. 1; Black v. State, 55 So. 948, 1 Ala. App. 168; Green v. State, 53 So. 284, 168 Ala. 104; Thomas v. State, 47 So. 257, 156 Ala. 166; Kirby v. State, 44 So. 38, 151 Ala. 66; Thomas v. State, 43 So. 371, 150 Ala. 31; Brown v. State, 43 So. 194, 150 Ala. 25; Shirley v. State, 40 So. 269, 144 Ala. 35; Gordon v. State, 41 So. 847, 147 Ala. 42; Bowen v. State, 37 So. 233, 140 Ala. 65; McClellan v. State, 23 So. 653, 117 Ala. 140; Daughdrill v. State, 21 So. 378, 113 Ala. 7; Fleming v. State, 107 Ala. 11, 18 So. 263; Prince v. State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Kidd v. State, 83 Ala. 58, 3 So. 442; Jones v. State, 79 Ala. 23.

Fla. Ernest v. State, 20 Fla. 383.

Kan. State v. Cassady, 12 Kan. 550.

N. Y. People v. Reiss, 99 N. Y. S. 1002, 114 App. Div. 431; People v. Benham, 55 N. E. 11, 160 N. Y. 402.

Tex. Gibbs v. State, 1 Tex. App. 12.

Instructions improper within rule. An instruction that a reasonable doubt is such a doubt as will cause a prudent man to hesitate before he acts, and if there is "any doubt" accused must be acquitted. Carter v. State, 40 So. 82, 145 Ala. 679. An instruction that accused was entitled to the legal presumption in favor of his innocence, which in doubtful cases was always sufficient to turn the scale. Woodland v. State, 160 S. W. 875, 110 Ark. 15. A requested charge, that defendant be acquitted "if there is any doubt of the defendant's guilt which is not purely speculative doubt." Perry v. State, 91 Ala. 83, 9 So. 279. A requested instruction that if the evidence leaves in the mind of the jury any doubt as to the guilt of the defendant, or if after a fair consideration of the facts the guilt of the accused remains in doubt, they should acquit. Prior v. Territory, 89 P. 412, 11 Ariz. 169. An instruction that, if two persons were both charged with a homicide and the jury had a doubt which killed decedent, it should give accused the benefit of the doubt and acquit him. Hunter v. State, 65 S. E. 154, 133 Ga. 78.

[49] State v. Matheson, 120 N. W. 1036, 142 Iowa, 414, 134 Am. St. Rep. 426; Lamb v. State, 95 N. W. 1050, 69 Neb. 212.

[50] Claussen v. State, 133 P. 1055, 21 Wyo. 505, judgment affirmed on rehearing 135 P. 802, 21 Wyo. 505.

[51] State v. Arnett (Mo.) 210 S. W. 82.

rights of the accused.[52] Trial judges should adhere to the well-established precedents in framing or approving instructions on the subject of reasonable doubt,[53] and it is error to refuse an instruction which has been approved by the court of last resort, if the idea embodied therein has not been otherwise conveyed to the jury.[54]

§ 260. Necessity of defining reasonable doubt

In some jurisdictions it is not necessary for the court, at least in the absence of a request therefor, to define the phrase "reasonable doubt," [55] it being held that the phrase is self-explanatory,[56] and that therefore such a definition can serve no useful purpose,[57] and in some of the cases it is said that the court should not attempt to further clarify the term.[58]

[52] **Ga.** Butler v. State, 82 S. E. 654, 142 Ga. 286; Howell v. State, 52 S. E. 649, 124 Ga. 698.

Ky. Mearns v. Commonwealth, 175 S. W. 355, 164 Ky. 213; Clary v. Same, 173 S. W. 171, 163 Ky. 48; Minniard v. Commonwealth, 164 S. W. 804, 158 Ky. 210; Wigginton v. Commonwealth, 114 S. W. 1185; Tetterton v. Commonwealth, 89 S. W. 8, 28 Ky. Law Rep. 146.

Okl. Reeves v. Territory, 101 P. 1039, 2 Okl. Cr. 351; Douglas v. Territory, 98 P. 1023, 1 Okl. Cr. 583.

Tex. Sanchez v. State, 153 S. W. 1133, 69 Tex. Cr. R. 134; Holmes v. State, 150 S. W. 926, 68 Tex. Cr. R. 17.

[53] People v. Bickerstaff (Cal. App.) 190 P. 656.

[54] Foglia v. People, 82 N. E. 262, 229 Ill. 286.

[55] **Ga.** Bell v. State, 96 S. E. 861, 148 Ga. 352; Ponder v. State, 90 S. E. 365, 18 Ga. App. 703; Rice v. State, 84 S. E. 609, 16 Ga. App. 128; Roberts v. State, 84 S. E. 122, 143 Ga. 71; Hall v. State, 77 S. E. 893, 12 Ga. App. 571; Thigpen v. State, 76 S. E. 596, 11 Ga. App. 846; Buckanan v. State, 76 S. E. 73, 11 Ga. App. 756; Barker v. State, 57 S. E. 989, 1 Ga. App. 286; James v. State, 57 S. E. 959, 1 Ga. App. 779; Nash v. State, 55 S. E. 405, 126 Ga. 549; Battle v. State, 29 S. E. 491, 103 Ga. 53.

Ill. People v. Hansen, 104 N. E. 1069, 263 Ill. 44.

Mo. State v. Wheeler, 87 Mo. App. 580, 582.

Okl. Choate v. State (Cr. App.) 197 P. 1060.

Pa. Commonwealth v. Berney, 105 A. 54, 262 Pa. 176.

Tenn. Butler v. State, 7 Baxt. 35.

Tex. Marshall v. State, 175 S. W. 154, 76 Tex. Cr. R. 386.

Vt. State v. Marston, 72 A. 1075, 82 Vt. 250; State v. Costa, 62 A. 38, 78 Vt. 198; State v. Blay, 58 A. 794, 77 Vt. 56.

[56] **Kan.** State v. Killion, 148 P. 643, 95 Kan. 371; State v. Davis, 48 Kan. 1, 28 P. 1092.

Mich. People v. Stubenvoll, 28 N. W. 883, 62 Mich. 329.

Miss. Smith v. State, 60 So. 330, 103 Miss. 356.

Mo. State v. Robinson, 117 Mo. 649, 23 S. W. 1066.

Okl. Gransden v. State, 158 P. 157, 12 Okl. Cr. 417.

S. C. State v. Aughtrey, 27 S. E. 199, 49 S. C. 285; State v. Aughtry, 26 S. E. 619, 49 S. C. 285.

Tex. Massey v. State, 1 Tex. App. 563.

[57] People v. Hotz, 103 N. E. 1007, 261 Ill. 239.

[58] **Ga.** Wimberly v. State, 77 S. E. 879, 12 Ga. App. 540.

Ky. Mickey v. Commonwealth, 9 Bush, 593.

Me. State v. Reed, 62 Me. 129.

Mo. State v. Sykes, 154 S. W. 1130, 248 Mo. 708.

Juries are presumed to have common sense enough to need no metaphysical explanations of what will constitute a reasonable doubt,[59] and it would seem clear that an instruction defining reasonable doubt should not be given, if it has no tendency to assist the jury to a better understanding of the phrase.[60] However, in some jurisdictions, the court should, on request, give such a definition in capital cases,[61] and in other jurisdictions such a requirement is a general one.[62] High authority has declared that a careful explanation of the term "beyond a reasonable doubt" should be given to all juries in criminal cases, and especially in important trials, with a view particularly to emphasizing the word "reasonable," and minimizing the danger that the jury may believe that, although they have arrived at the degree of certainty indicated by the phrase, when broadly considered, they will yet be precluded from a conviction if they can honestly say that to their minds the defendant is possibly not guilty.[63] It cannot be doubted that in all jurisdictions the court will commit no error in failing to give such a definition, if no request is made therefor.[64]

Okl. Thompson v. State, 184 P. 467, 16 Okl. Cr. 716; Cannon v. Territory, 99 P. 622, 1 Okl. Cr. 600.

Tex. Abram v. State, 36 Tex. Cr. R. 44, 35 S. W. 389; Bland v. State, 4 Tex. App. 15; Ham v. Same, Id. 645.

W. Va. State v. Price, 97 S. E. 582, 83 W. Va. 71, 5 A. L. R. 1247; State v. Worley, 96 S. E. 56, 82 W. Va. 350.

[59] Hamilton v. People, 29 Mich. 173.

[60] People v. Moses, 123 N. E. 634, 288 Ill. 281, affirming judgment 212 Ill. App. 641.

[61] Terrell v. State, 64 S. W. 223, 69 Ark. 449; Commonwealth v. Varano, 102 A. 131, 258 Pa. 442.

[62] Davis v. State, 35 So. 76, 46 Fla. 137; Commonwealth v. Berney, 105 A. 54, 262 Pa. 176.

[63] Emery v. State, 78 N. W. 145, 101 Wis. 627.

[64] **Ariz.** Bush v. State, 168 P. 508, 19 Ariz. 195.

Cal. People v. Cuin, 149 P. 795, 27 Cal. App. 316; People v. Ahern, 93 Cal. 518, 29 P. 49.

Conn. State v. Smith, 65 Conn. 283, 31 A. 206.

Fla. Knight v. State, 53 So. 541, 60 Fla. 19; Bynum v. State, 35 So. 65, 46 Fla. 142; Shiver v. State, 27 So. 36, 41 Fla. 630.

Ga. Tolbert v. State, 85 S. E. 267, 16 Ga. App. 311; Elder v. State, 85 S. E. 197, 143 Ga. 383; Sheffield v. State, 83 S. E. 871, 15 Ga. App. 514; Hathaway v. State, 81 S. E. 260, 14 Ga. App. 415; Cook v. State, 79 S. E. 87, 13 Ga. App. 308; Jackson v. State, 64 S. E. 656, 132 Ga. 570.

Ind. Colee v. State, 75 Ind. 511.

Iowa. State v. Mahoney, 97 N. W. 1089, 122 Iowa, 168.

Mich. People v. Waller, 70 Mich. 237, 38 N. W. 261.

Mo. State v. Leeper, 78 Mo. 470.

Okl. Nelson v. State, 114 P. 1124, 5 Okl. Cr. 368.

Pa. Commonwealth v. Berney, 105 A. 54, 262 Pa. 176.

Wash. State v. Johnson, 53 P. 667, 19 Wash. 410.

Wis. Murphy v. State, 83 N. W. 1112, 108 Wis. 111; Miller v. State, 81 N. W. 1020, 106 Wis. 156.

§ 261. Sufficiency of definitions of reasonable doubt

In attempting to clarify the term "reasonable doubt," courts have usually done so—and this is undoubtedly the safer practice—by indicating what it does not mean, for if some positive form of expression is used the danger of misleading the jury arises, and the court feels it incumbent upon itself to qualify and hedge around its previous statement. It has been held proper to define a reasonable doubt as not a mere doubt,[65] as not a mere possible doubt,[66] as not a mere guess or surmise,[67] as not a merely imaginary or conjectural doubt,[68] as not a fanciful, forced, or captious doubt,[69] or as not a whimsical or vague doubt.[70]

If it is desired to give an affirmative definition it is proper to define a reasonable doubt as an actual, substantial doubt, and not one arising from a mere whim, vagary, or surmise,[71] as a substantial doubt touching the defendant's guilt based on the evidence or want of evidence in the case, and not a mere possibility of his innocence,[72] as one which would be raised in the minds of reasonable men by the evidence, and not one arising from some whim,

[65] Lodge v. State, 26 So. 200, 122 Ala. 107.

Not required to prove guilt beyond all doubt. A charge of the court, on a trial for murder, that "the state is not required to prove defendant's guilt beyond all doubt, but only to prove guilt beyond a reasonable doubt," was not objectionable as ambiguous and misleading. Littleton v. State, 29 So. 390. 128 Ala. 31.

[66] United States v. McKenzie (D. C. Cal.) 35 F. 826; Knight v. State, 49 So. 764, 160 Ala. 58; People v. Verduzco, 110 P. 970, 13 Cal. App. 789.

Instructions held proper. A charge on a trial for murder, that defendant was presumed to be innocent until proven guilty beyond a reasonable doubt; that a reasonable doubt was one conformable to reason, a doubt which a reasonable man would entertain, and that it did not mean a mere possible doubt, because everything relating to human affairs and depending on moral evidence was open to some possible doubt; that it was that state of the case which, after consideration of all the evidence, left the minds of the jurors in that condition that they could not say they felt an abiding conviction to a moral certainty of the truth of the charge. Vasquez v. State, 44 So. 739, 54 Fla. 127, 127 Am. St. Rep. 129. An instruction, "By reasonable doubt is meant that evidence of defendant's guilt must be clear and convincing and fully satisfy your minds and consciences, but it does not mean a mere imaginary, possible, or captious doubt," is sufficiently affirmative. Kelley v. State, 202 S. W. 49, 133 Ark. 261.

[67] People v. Ah Lee, 128 P. 1035, 164 Cal. 350.

[68] Bluett v. State, 44 So. 84, 151 Ala. 41.

[69] Cobb v. State, 74 S. E. 702, 11 Ga. App. 52; Hodgkins v. State, 89 Ga. 761, 15 S. E. 695; State v. Powers, 163 N. W. 402, 180 Iowa, 693.

[70] McGuire v. State, 43 Tex. 210.

[71] People v. Del Cerro, 100 P. 887, 9 Cal. App. 764.

[72] State v. Nerzinger, 119 S. W. 379, 220 Mo. 36; State v. Raice, 123 N. W. 708, 24 S. D. 111.

Instructions held proper within rule. An instruction that "reasonable doubt" does not mean that accused may possibly be innocent, but means some actual doubt having some reason for its basis, and it is a doubt reasonably arising from all

caprice, or prejudice on the part of the jurors,[73] as a doubt which must be supported by reason, and not by mere conjecture and idle supposition, irrespective of the evidence,[74] as a doubt based on some reason, and not some purely imaginary, fantastic, or chimerical doubt,[75] as a doubt founded on the consideration of all the circumstances and evidence, and not on mere conjecture or speculation,[76] as a doubt founded on some good reason, and not one arising from sympathetic feelings,[77] as a fair doubt based on reason and common sense, and not a mere imaginary, captious, or possible doubt,[78] or as a doubt which leaves the mind of the jury, in view of all the evidence, in a state of reasonable uncertainty as to the guilt of the defendant,[79] or which leaves the jury in such a

the evidence or want of evidence. Carter v. State, 154 N. W. 252, 98 Neb. 742. Defendant was not prejudiced by a charge that a reasonable doubt, to authorize an acquittal, must be a substantial doubt, and not a mere possibility of innocence; that a reasonable doubt exists when the jury do not feel an abiding conviction, to a moral certainty, of the truth of the charge; where the evidence does not satisfy the judgment with such certainty that a prudent man would feel safe in acting upon it in his own most important affairs, or unless the evidence convinces the understanding, so that there is an abiding conviction, to a moral certainty, of the truth of the charge; that the evidence need not exclude every possible hypothesis but the guilt of defendant. State v. Clancy, 52 P. 267, 20 Mont. 498.

[73] Kulp v. United States (C. C. A. Pa.) 210 F. 249, 127 C. C. A. 67.

[74] People v. Ross, 46 P. 1059, 115 Cal. 233; State v. Lewis, 159 P. 415, 52 Mont. 495.

An accused cannot complain of an instruction: "The presumption is that the defendant is innocent, and the presumption continues up until the moment that you are satisfied by the evidence beyond a reasonable doubt of his guilt. This reasonable doubt is such a doubt that fully arises from the evidence. It should not be a mere whim or surmise. There should be such a doubt as there is a reason for and which fully arises out of the evidence. * * * We would say further that the doubt arises from all of the evidence, and if the doubt arises from a single juryman the other eleven jurymen should come to the mind of that one. It of course takes twelve jurymen to arrive at the verdict." Commonwealth v. Campbell, 31 Pa. Super. Ct. 9.

[75] State v. Keehn, 160 N. W. 666.

[76] **U. S.** (D. C. Cal.) United States v. Knowles, Fed. Cas. No. 15,540, 4 Sawy. 517; (C. C. Mich.) United States v. Darton, Fed. Cas. No. 14,919, 6 McLean, 46; (C. C. Ohio) United States v. Foulke, Fed. Cas. No. 15,143, 6 McLean, 349.

Ind. Kennedy v. State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99.

Ohio. State v. Neil, 1 App. 120.

Pa. Commonwealth v. Shaub, 5 Lanc. Law Rev. 121; Same v. Lynch, 3 Pittsb. R. 412; Commonwealth v. Drum, 58 Pa. 9.

Tex. Brown v. State, 1 Tex. App. 154.

[77] State v. Harsted, 119 P. 24, 66 Wash. 158.

[78] People v. Swartz, 76 N. W. 491, 118 Mich. 292.

[79] Simmons v. State, 48 So. 606, 158 Ala. 8. See Mapp v. State (Ga. App.) 106 S. E. 801.

Minds of jurors wavering and unsettled. An instruction that "if, after an honest and impartial examination, your minds are wavering, unsettled, unsatisfied, that is the doubt of the law, and you should acquit; if that doubt does not exist, you should convict"—correctly states the

condition of mind that they cannot say that they have an abiding faith in the truth of the charge against the accused.[80]

It is proper to charge, under proper qualifications, that the jury must not go beyond the evidence to hunt up doubts, and that they must not entertain such doubts as are merely chimerical or conjectural.[81]

On the other hand, it is error to define a reasonable doubt as an insurmountable doubt,[82] or as an intelligent opinion or conviction that the guilt of the defendant has not been satisfactorily proven,[83] or as a doubt which would satisfy, or occur to, a reasonable man,[84] or as that want of repose and confidence which an honest man has in the correctness of a conclusion which he is about to make, after giving the question his best thought,[85] or as a doubt arising spontaneously from the evidence or lack of evidence,[86] or as such a doubt from all the evidence that the jury remain unsatisfied and unconvinced of the guilt of the accused after a full consideration of all the facts and circumstances of the case.[87]

An instruction defining a reasonable doubt in the language of the statute will ordinarily be sufficient.[88]

§ 262. Doubt arising out of the evidence or want of evidence

An instruction authorizing the jury to convict the defendant if they believe beyond a reasonable doubt that the charge made

law as regards reasonable doubt. Dumas v. State, 63 Ga. 600.

[80] Parrish v. State, 14 Neb. 60, 15 N. W. 357.

[81] Williams v. State (Ark.) 16 S. W. 816; Painter v. People, 147 Ill. 444, 35 N. E. 64; Voght v. State, 145 Ind. 12, 43 N. E. 1049.

[82] People v. Burke, 121 N. W. 282, 157 Mich. 108.

[83] Hoffman v. State, 73 N. W. 51. 97 Wis. 571.

[84] Avery v. State, 27 So. 505, 124 Ala. 20; Vaughn v. State, 41 So. 881, 52 Fla. 122; Hampton v. State, 39 So. 421, 50 Fla. 55; Padfield v. People, 146 Ill. 660, 35 N. E. 469.

In some jurisdictions, however, it has been held proper to charge that a reasonable doubt is one that would cause a reasonably prudent or upright man, after a careful consideration of the evidence, to hesitate to convict. Minich v. People, 8 Colo. 440, 9 P. 4; Johnson v. State, 89 Ga. 107, 14 S. E. 889; Peterson v. State, 47 Ga. 524; Commonwealth v. Irving, 1 Susq. Leg. Chron. 69; Same v. Burton, Id. 66.

[85] Brown v. State, 43 So. 194, 150 Ala. 25.

[86] Scott v. State, 60 So. 355, 64 Fla. 490.

[87] Smith v. State, 101 P. 847, 17 Wyo. 481.

[88] Frierson v. Commonwealth, 194 S. W. 914, 175 Ky. 684; Weatherford v. Commonwealth, 7 Ky. Law Rep. 827; Bramlette v. State, 21 Tex. App. 611, 2 S. W. 765, 57 Am. Rep. 622.

Under the Georgia statute, an instruction defining reasonable doubt as one that grows out of the testimony or absence of testimony and leaves a reasonable mind unsettled, and that a juror cannot raise an artificial doubt in order to acquit, but the doubt should be real, and honestly entertained, and that the proof should be such as to control the conduct of men in the highest affairs of life, and not a mere conjecture, is proper. Parker v. State, 59 S. E. 823, 3 Ga. App. 336.

against the defendant is true should state that the jury must be convinced from the evidence,[89] and, on the other hand, the jury should be told that the reasonable doubt justifying an acquittal must arise from a consideration of all the evidence in the case,[90] having regard both for what it shows and does not show,[91] since the reasonable doubt to which a defendant is entitled is not one raised by the juror's personal information, from hearsay or otherwise, or from his bias or prejudice,[92] and a charge that a reasonable doubt as to the guilt of the defendant arising out of the evidence, or any part of it, will require an acquittal, is properly refused as misleading.[93] A charge, however, that if the evidence,

[89] People v. Gray, 96 N. E. 268, 251 Ill. 431; Butler v. State, 35 So. 569, 83 Miss. 437; State v. Price, 97 S. E. 582, 83 W. Va. 71, 5 A. L. R. 1247.

[90] **Ala.** Haswell v. State, 86 So. 170, 17 Ala. App. 519; Edmonds v. State, 75 So. 873, 16 Ala. App. 157; West v. State, 75 So. 709, 16 Ala. App. 117; Jones v. State, 74 So. 843, 16 Ala. App. 7, certiorari denied 75 So. 1003, 200 Ala. 696; Minor v. State, 74 So. 98, 15 Ala. App. 556; Bowen v. State, 37 So. 233, 140 Ala. 65.

Mo. State v. Christian, 161 S. W. 736, 253 Mo. 382.

Rule in Texas. A charge that the jury should acquit if they have a reasonable doubt as to defendant's guilt is not erroneous by reason of the fact that it does not state that such doubt must arise from the evidence. Mikel v. State, 68 S. W. 512, 43 Tex. Cr. R. 615.

Doubt raised by ingenuity of counsel. An instruction that if a reasonable doubt of any of the facts necessary to convict was raised by the evidence itself "or by the ingenuity of counsel" upon any hypothesis reasonably consistent with the evidence, the jury should acquit, was properly refused. People v. Wells, 71 N. W. 176, 112 Mich. 648.

Instructions held proper within rule. A charge that reasonable doubt is a doubt which arises out of the evidence, and appeals to reasonable men, and causes them to hesitate to convict the defendant, and that, if there is such a doubt the jury shall acquit, and if there is no such doubt it is their duty to convict. Commonwealth v. Conroy, 56 A. 427, 207 Pa. 212. A charge, "After considering all the evidence, if the jury have a reasonable doubt of the guilt of the defendant, they will give the benefit of the doubt to the defendant, and return a verdict of not guilty." Letcher v. State, 48 So. 805, 159 Ala. 59, 17 Ann. Cas. 716. An instruction to acquit accused, if the jury had a reasonable doubt of his guilt, and that, to authorize an acquittal, the doubt must be a reasonable one, arising from a careful investigation of all the evidence. Foster v. Territory, 56 P. 738, 6 Ariz. 240. An instruction, in a prosecution for gambling, that a reasonable doubt is an actual subsisting doubt arising either from the evidence or want of evidence. Goemann v. State, 143 N. W. 800, 94 Neb. 582. An instruction as to reasonable doubt, that the jury, in considering the case, should not go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely conjectural, but a doubt, to justify an acquittal, must be reasonable, and arise from a candid investigation of all the evidence. Miller v. People, 39 Ill. 457; Moeck v Same, 100 Ill. 242, 39 Am. Rep. 38.

[91] Staton v. State, 62 So. 387, 8 Ala. App. 221.

[92] Commonwealth v. Di Silvestro, 31 Pa. Super. Ct. 537, 556; Same v. Tresca, Id., 557.

[93] Adkins v. State, 76 So. 465, 16 Ala. App. 181; Hall v. State, 65 So. 427, 11 Ala. App. 95; Davis v. State,

or any part thereof, after a consideration of the whole of such evidence, generates a well-founded doubt of the guilt of the defendant, the jury must acquit him, should be given on request.[94]

As has been indicated by the above discussion, a reasonable doubt may arise from a want of evidence, as well as out of the evidence.[95] Accordingly a definition of a reasonable doubt should not be confined to one growing out of the evidence, but should include doubts created by the want of evidence, or the manner and conduct of the witnesses when testifying,[96] or by the statement of

62 So. 1027, 8 Ala. App. 147, certiorari denied Ex parte Davis, 63 So. 1010, 184 Ala. 26; McClain v. State, 62 So. 241, 182 Ala. 67; Olden v. State, 58 So. 307, 176 Ala. 6; Thomas v. State, 43 So. 371, 150 Ala. 31; Andrews v. State, 43 So. 196, 150 Ala. 56; Bardin v. State, 38 So. 833, 143 Ala. 74; Gordon v. State, 36 So. 1009, 140 Ala. 29; Winter v. State, 32 So. 125, 133 Ala. 176; Winter v. State, 31 So. 717, 132 Ala. 32; Gordon v. State, 30 So. 30, 129 Ala. 113; Liner v. State, 27 So. 438, 124 Ala. 1; Lodge v. State, 26 So. 200, 122 Ala. 107; Nicholson v. State, 23 So. 792, 117 Ala. 32.

Doubt arising from testimony of prosecution. A requested charge that it is not necessary that reasonable doubt should result from the testimony affirmatiely produced at the trial by accused, but it may arise from the testimony of the prosecution, is properly modified by adding that a doubt to be reasonable is one arising from a consideration of all the evidence in the case. People v. Shimonaka, 116 P. 327, 16 Cal. App. 117.

[94] Turner v. State, 27 So. 272, 124 Ala. 59; Patterson v. Same, 41 So. 157, 146 Ala. 39.

[95] Hale v. State, 72 Miss. 140, 16 So. 387; Massey v. State, 1 Tex. App. 563.

[96] **Cal.** People v. Bartnett, 113 P. 879, 15 Cal. App. 89.

Colo. Mackey v. People, 2 Colo. 13.

Ind. Brown v. State, 105 Ind. 385, 5 N. E. 900; Wright v. State, 69 Ind. 163, 35 Am. Rep. 212; Densmore v. State, 67 Ind. 306, 33 Am. Rep. 96.

Iowa. State v. Smith, 180 N. W. 4.

Miss. Kelly v. State, 72 So. 928, 112 Miss. 245; Knight v. State, 20 So. 360, 74 Miss. 140.

Mo. State v. Blue, 37 S. W. 796, 136 Mo. 41.

N. J. State v. Andrews, 71 A. 109, 77 N. J. Law, 108.

Instructions held not improper within rule. An instruction that a reasonable doubt, to justify an acquittal, must grow out of the evidence after the consideration of all of it. Tribble v. State, 40 So. 938, 145 Ala. 23. A definition of "reasonable doubt" as "a substantial doubt arising from the evidence, and not a mere possibility of innocence." State v. Garrison, 49 S. W. 508, 147 Mo. 548. A charge that the term "reasonable doubt" meant a doubt having some good reason for it arising out of evidence in the case; such a doubt as the jury could find a reason for in the evidence, and, as applied to the evidence in criminal cases, meant an actual and substantial doubt growing out of the unsatisfactory nature of the evidence, and the entire evidence should be considered, and the jury should entertain only such doubts as arise from the evidence and are reasonable. People v. Del Cerro, 100 P. 887, 9 Cal. App. 764. A charge, after telling the jury that defendant was presumed to be innocent until proof of guilt, and that they could believe his statement in preference to the sworn evidence: "The defendant is entitled to any doubt you may have in your mind. That, however, must be a reasonable doubt. Then, if your minds are wavering, and you cannot decide, it is your duty to give the defendant the benefit of that doubt by

the accused, where such statement is not under oath and is not,

acquittal. These doubts extend to every material issue and question in the case. They may arise from a want of evidence or spring out of the evidence." Burney v. State, 25 S. E. 911, 100 Ga. 65. An instruction that, if on consideration of all the evidence, facts, and circumstances presented on the trial the jury entertained a reasonable doubt as to defendant's guilt, they should acquit. Dobbs v. State, 115 P. 370, 5 Okl. Cr. 475, denying rehearing 114 P. 358, 5 Okl. Cr. 475. A charge that "a doubt, to justify an acquittal, must be reasonable and arise from a candid and impartial consideration of all the evidence in the case." Moore v. State, 111 P. 822, 4 Okl. Cr. 212. An instruction defining a reasonable doubt as "not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case and growing out of the testimony. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such condition that he cannot say that he has an abiding conviction to a moral certainty of the defendant's guilt as charged." State v. De Lea, 93 P. 814, 36 Mont. 531.

It is not ground for new trial that the court charged that a reasonable doubt is not some vague or fanciful doubt, but such a doubt as arises from the testimony in the mind of a reasonable man and leaves it hesitating, unsettled, and undecided. Barnard v. State, 46 S. E. 644, 119 Ga. 436. An instruction that defendant is presumed to be innocent, and that, to warrant conviction, guilt must be established beyond a reasonable doubt, but to warrant a verdict of not guilty on that ground alone the doubt should be a substantial doubt of guilt arising from the evidence in the case, and not a mere possibility of innocence, is not objectionable as not allowing an acquittal on account of any reasonable doubt arising from any insufficiency in the evidence, because, whenever the sufficiency of the evidence is considered, its insufficiency is also considered. State v. Cushenberry, 56 S. W. 737, 157 Mo. 168. A charge that a reasonable doubt is one growing out of the evidence which leaves the mind uncertain is not improper as preventing the jury from considering a reasonable doubt, arising from the absence of evidence, or based on conflicts therewith and a consideration of accused's statement. Mulligan v. State, 89 S. E. 541, 18 Ga. App. 464. Where the court charged that reasonable doubt must be a rational doubt, fairly arising from the testimony and the circumstances surrounding the case; that the burden was on the state to satisfy the jury beyond a reasonable doubt of the existence of any fact and circumstance necessary to form a conclusion of defendant's guilt which must be affirmatively proven to a moral certainty; and that the presumption of innocence attends the accused from the beginning to the end of the trial, and prevails unless overcome by evidence sufficiently strong to convince and satisfy the jury beyond a reasonable doubt, it was held that such charge was not objectionable as depriving accused of the benefit of reasonable doubt arising from insufficiency or lack of evidence, in that the court in certain excerpts stated that a reasonable doubt which entitled accused to an acquittal was one arising from "all the evidence in the case." Hedger v. State, 128 N. W. 80, 144 Wis. 279. A charge that reasonable doubt is not a mere possible doubt; that it must be founded upon reason and must grow out of the evidence in the case; that it is a doubt for which a reason can be assigned, and which leads one to entertain a conscientious belief that there is an absence of necessary proof of guilt; that it is an honest, fair doubt, raised, not from an outside source, but by the evidence given in open court, and which appeals to the sound judgment of the jury—is not erroneous, when considered with a further charge that it is presumed that defendant is innocent, that such presumption continues

strictly speaking, evidence;[97] and the court should charge,[98] on request,[99] that a reasonable doubt, authorizing an acquittal, may arise from the want of satisfactory evidence of the truth of the matters alleged in the indictment.

A proper form of instruction in this connection is one to the effect that a reasonable doubt, beyond which guilt must be affirmatively proved in order to justify a verdict of guilty, is a doubt of guilt reasonably arising from all the evidence or want of evidence in the case.[1] On the other hand, it is error to instruct in effect that, if the jury have an abiding conviction of the guilt of the defendant arising from the lack of evidence from any source, they will be satisfied beyond a reasonable doubt, since this would include a failure of the defendant to testify to facts within his knowledge, or to produce evidence to meet the evidence for the state.[2] Where the evidence of the guilt of the defendant is overwhelm-

throughout the trial until satisfactory evidence of guilt is produced, that the burden of establishing guilt rests upon the people, and that the prosecution must prove defendant's guilt in all its elements. People v. Hoffmann, 105 N. W. 838, 142 Mich. 531.

In Wisconsin it has been held that the phrase "beyond any reasonable doubt arising out of or based on the evidence" and the expression "beyond any doubt arising out of or for want of evidence" mean the same thing, viewed in the light of the legal presumption of innocence. Emery v. State, 78 N. W. 145, 101 Wis. 627.

In Pennsylvania it is held that an instruction that, in order to convict, the jury must be convinced of guilt beyond a reasonable doubt, and that defendant should have the benefits of any doubt, and that a reasonable doubt is a doubt arising out of a consideration of all the evidence, is not reversible error. Commonwealth v. Knox, 105 A. 634, 262 Pa. 428.

Rule in Texas. A charge that if the jury had a reasonable doubt, "from the evidence," as to the guilt of defendant, they should acquit him, was not cause for reversal, although the doubt may arise from a want of evidence. Tomlinson v. State (Tex. Cr. R.) 43 S. W. 332; Whitesides v. Same, 58 S. W. 1016, 42 Tex. Cr. R. 151. In this jurisdiction it has been said that no one of ordinary sense could reach the conclusion that the defendant was guilty beyond a reasonable doubt merely because there was no evidence of his innocence. Zwicker v. State, 27 Tex. App. 539, 11 S. W. 633.

[97] McNeal v. State, 63 S. E. 224, 5 Ga. App. 368; Governor v. State, 63 S. E. 241, 5 Ga. App. 357; Passmore v. State, 63 S. E. 244, 5 Ga. App. 366.

Omission in instruction cured by other instructions. An instruction that a reasonable doubt, in terms of the law, is a doubt that legitimately springs from the evidence, from the want of evidence or from a conflict in the evidence, is not erroneous in failing to state that the reasonable doubt might arise from a consideration of accused's statement, where the court charges fully and correctly on the weight which the jury may give to such statement. Benton v. State, 71 S. E. 8, 9 Ga. App. 291.

[98] Howell v. State, 53 So. 954, 98 Miss. 439.

[99] Fealy v. City of Birmingham, 73 So. 296, 15 Ala. App. 367; Gaston v. State, 49 So. 876, 161 Ala. 37; Carwile v. State, 39 So. 220, 148 Ala. 576; State v. Herwitz, 186 P. 290, 109 Wash. 153.

[1] Baker v. State, 97 N. W. 566, 120 Wis. 135.

[2] People v. Jordan (Ill.) 127 N. E. 117.

ing, the failure of the court in its charge to include want of evidence as a basis of a reasonable doubt will not constitute cause for reversal.[3]

§ 263. Defining reasonable doubt as one for which reason can be given

It is proper to refuse a charge that a reasonable doubt is a doubt for which the jury can give a reason,[4] and in some jurisdictions it is error so to instruct.[5] The objection to such a definition is that it may convey to the jury the impression that the reason for the doubt must be one that can be expressed in words,[6] whereas a doubt arising out of the evidence is a mental operation for which it may be difficult or impossible to assign a reason, and yet, if honestly entertained by the jury, must be acted upon.[7] In some jurisdictions, however, while not approved or commended as being in any way enlightening or useful, such an instruction is not reversible error,[8] where the defendant is not shown to have been

[3] Mathis v. State, 32 So. 6, 80 Miss. 491.

[4] **Ala.** Howard v. State, 44 So. 95, 151 Ala. 22; Allen v. State, 42 So. 1006, 148 Ala. 588; Smith v. State, 39 So. 329, 142 Ala. 14; Bell v. State, 37 So. 281, 140 Ala. 57; Mitchell v. State, 37 So. 76, 140 Ala. 118, 103 Am. St. Rep. 17; Cawley v. State, 32 So. 227, 133 Ala. 128; Jimmerson v. State, 32 So. 141, 133 Ala. 18; Thompson v. State, 31 So. 725, 131 Ala. 18; Carroll v. State, 30 So. 394, 130 Ala. 99; Williams v. State, 30 So. 336, 130 Ala. 31; Bodine v. State, 29 So. 926, 129 Ala. 106; Harvey v. State, 27 So. 763, 125 Ala. 47; Avery v. State, 27 So. 505, 124 Ala. 20; Talbert v. State, 25 So. 690, 121 Ala. 33; Roberts v. State, 25 So. 238, 122 Ala. 47.

Ark. Darden v. State, 84 S. W. 507, 73 Ark. 315.

Iowa. State v. Cohen, 78 N. W. 857, 108 Iowa, 208, 75 Am. St. Rep. 213; State v. Lee, 85 N. W. 619, 113 Iowa, 348.

Contra, Ellis v. State, 25 So. 1, 120 Ala. 333; Hodge v. State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145, approving Cohen v. Same, 50 Ala. 108.

[5] **U. S.** (C. C. A. N. M.) Ayer v. Territory of New Mexico, 201 F. 497, 119 C. C. A. 589, reversing judgment Territory v. Ayers, 113 P. 604, 15 N. M. 581; (C. C. A. N. M.) Pettine v. Territory of New Mexico, 201 F. 489, 119 C. C. A. 581.

Ark. Bennett v. State, 128 S. W. 851, 95 Ark. 100.

Ind. Siberry v. State, 133 Ind. 677, 33 N. E. 681.

Iowa. State v. Cohen, 78 N. W. 857, 108 Iowa, 208, 75 Am. St. Rep. 213.

Miss. Klyce v. State, 28 So. 827, 78 Miss. 450.

Neb. Blue v. State, 125 N. W. 136, 86 Neb. 189; Childs v. State, 34 Neb. 236, 51 N. W. 837; Carr v. State, 23 Neb. 749, 37 N. W. 630; Cowan v. State, 22 Neb. 519, 35 N. W. 405.

Ohio. Morgan v. State, 48 Ohio St. 371, 27 N. E. 710.

Okl. Gransden v. State, 158 P. 157, 12 Okl. Cr. 417; Morgan v. State, 121 P. 1088, 7 Okl. Cr. 45; Gragg v. State, 106 P. 350, 3 Okl. Cr. 409; Reeves v. Territory, 99 P. 1021, 2 Okl. Cr. 82; Price v. State, 98 P. 447, 1 Okl. Cr. 358; Gibbons v. Same, 96 P. 466, 21 Okl. 340, 1 Okl. Cr. 198; Abbott v. Territory, 94 P. 179, 20 Okl. 119, 1 Okl. Cr. 1, 16 L. R. A. (N. S.) 260, 129 Am. St. Rep. 818.

[6] Griggs v. United States (C. C. A. Alaska) 158 F. 572, 85 C. C. A. 596.

[7] Owens v. United States (C. C. A. Alaska) 130 F. 279, 64 C. C. A. 525.

[8] **U. S.** (C. C. A. Alaska) Griggs

prejudiced by it.[9] In some jurisdictions it is proper to so instruct, in connection with other instructions intended to impress upon the jury the distinction between a reasonable doubt and a vague, imaginary one,[10] and in some of the cases the rule is laid down without qualification that it is proper to include in an instruction defining reasonable doubt the statement that it is a doubt for which some good reason, arising out of the evidence or the lack of evidence, can be given.[11]

v. United States, 158 F. 572, 85 C. C. A. 596.

Ala. Rose v. State, 42 So. 21, 144 Ala. 114; Hammond v. State, 41 So. 761, 147 Ala. 79; Caddell v. State, 34 So. 191, 136 Ala. 9.

Or. State v. Morey, 25 Or. 241, 36 P. 573.

Utah. State v. Overson, 185 P. 364, 55 Utah, 230.

[9] People v. Steubenvoll, 62 Mich. 329, 28 N. W. 883.

[10] **U. S.** (C. C. Ga.) United States v. Johnson, 26 F. 682; (C. C. S. C.) United States v. Butler, Fed. Cas. No. 14,700, 1 Hughes, 457.

Ga. Lampkin v. State, 88 S. E. 563, 145 Ga. 40; Powell v. State, 95 Ga. 502, 20 S. E. 483; Vann v. State, 83 Ga. 44, 9 S. E. 945.

Ill. People v. Grove, 120 N. E. 277, 284 Ill. 429.

La. State v. Jefferson, 43 La. Ann. 995, 10 So. 199.

Minn. State v. Newman, 101 N. W. 499, 93 Minn. 393.

N. Y. People v. Guidici, 100 N. Y. 503, 3 N. E. 493.

Pa. Commonwealth v. Knox, 105 A. 634, 262 Pa. 428.

S. D. State v. Lumber Co., 152 N. W. 708, 35 S. D. 410.

Instructions proper within rule. A charge that a reasonable doubt is just such a doubt as its name implies, not a vague conjecture nor fanciful doubt, but such a doubt that the jury, as such, can give a reason for having, was not open to the objection that it was calculated to impress the jury that they must have a sufficient reason for doubting defendant's guilt whereas the true rule is that, if the evidence leaves the mind wavering and unsettled, defendant should be given the benefit of such a doubt. Arnold v. State, 62 S. E. 806, 131 Ga. 494. An instruction defining reasonable doubt as one arising out of the case either from the want, weakness, insufficiency, or conflict in testimony, and which leaves the mind of an honest juror wavering and in doubt as to defendant's guilt a doubt which is not a mere conjecture, but one for which the jury can assign a reason, having heard the whole case, was not erroneous because characterizing such a doubt as one for which a reason can be assigned. Jordan v. State, 60 S. E. 1063, 130 Ga. 406.

[11] **Cal.** People v. Yun Kee, 96 P. 95, 8 Cal. App. 82.

Ga. Mundy v. State, 72 S. E. 300, 9 Ga. App. 835.

Kan. State v. Wolfley, 89 P. 1046, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412, rehearing denied 93 P. 337, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412.

N. Y. People v. Barker, 47 N. E. 31, 153 N. Y. 111.

S. C. State v. Ferguson, 74 S. E. 502, 91 S. C. 235.

S. D. State v. Sonnenschein, 159 N. W. 101, 37 S. D. 585; State v. Grant, 105 N. W. 97, 20 S. D. 164, 11 Ann. Cas. 1017.

Wis. Butler v. State, 78 N. W. 590, 102 Wis. 364; Emery v. State, 78 N. W. 145, 101 Wis. 627.

Instructions held properly given within rule. A reasonable doubt is a doubt for which a reason may be assigned, not necessarily sufficient to convince another, but such as may properly influence a juror honestly endeavoring to perform his duty. United States v. Stevens (C. C. Me.) Fed. Cas. No. 16,392, 2 Hask. 164. A reasonable doubt is properly defined, in charging the jury on homicide,

§ 264. Actual, real, strong, substantial, or well-founded doubt

It is proper to instruct that a reasonable doubt must be an actual, substantial doubt,[12] or a strong, substantial doubt,[13] arising from the evidence or want of evidence in the case, as contrasted with a mere possible doubt,[14] or a capricious or captious doubt,[15] or a doubt suggested by the ingenuity of counsel or the jury and unwarranted by the evidence,[16] or one which is sought for and in a manner created.[17] Thus it is proper to charge that a doubt, to justify an acquittal, must be reasonable, must be an actual and

as such a doubt as a man of reasonable intelligence can give some good reason for entertaining if he is called on to do so. People v. Lagroppo, 86 N. Y. S. 116, 90 App. Div. 219, affirmed 71 N. E. 737, 179 N. Y. 126. An instruction to the jury that defendant is presumed by the law to be innocent, that the burden is upon the state to establish his guilt beyond a reasonable doubt, and that "a reasonable doubt is a doubt for which you can give a reason; in other words, if the evidence of defendant's guilt satisfies you to such an extent as to leave you without a doubt that he may be innocent, for which you can give an intelligent reason, then it would be your duty to convict; such a doubt may arise either from affirmative evidence tending to show the defendant's innocence, or from the lack of evidence sufficient to establish his guilt"—may properly be given. Wallace v. State, 26 So. 713, 41 Fla. 547.

[12] People v. T. Wah Hing, 190 P. 662; People v. Cox, 70 Mich. 247, 38 N. W. 235; State v. Holloway, 56 S. W. 734, 156 Mo. 222; Ferguson v. State, 72 N. W. 590, 52 Neb. 432, 66 Am. St. Rep. 512.

Real, substantial doubt. The use of the word "real," in an instruction stating that a doubt, to authorize an acquittal, must be a real, substantial doubt, is not reversible error. State v. Davidson, 95 Mo. 155, 8 S. W. 413; State v. Walker, 98 Mo. 95, 9 S. W. 646; State v. Payton, 90 Mo. 220, 2 S. W. 394. Compare State v. Davidson, 44 Mo. App. 513; Cleavenger v. State, 65 S. W. 89, 43 Tex. Cr. R. 273.

[13] State v. McAlister, 103 S. E. 772, 114 S. C. 402.

[14] **Ala.** Gregory v. State, 42 So. 829, 148 Ala. 566; Parham v. State, 42 So. 1, 147 Ala. 57; Tribble v. State, 40 So. 938, 145 Ala. 23; Jackson v. State, 34 So. 188, 136 Ala. 22; Owens v. State, 52 Ala. 400.

Del. State v. Di Guglielmo, 55 A. 350, 4 Pennewill, 336.

Mo. State v. Spaugh, 98 S. W. 55, 200 Mo. 571; State v. Sacre, 41 S. W. 905, 141 Mo. 64; State v. Wells, 111 Mo. 533, 20 S. W. 232; State v. Heed, 57 Mo. 252.

Instructions held proper. Where the court charged that defendants were presumed to be innocent, and that it devolved on the state to prove by evidence beyond a reasonable doubt that defendants committed the crime as charged, and if, in view of the whole case, the jury had a reasonable doubt of defendants' guilt, or of that of either of them, the jury would give them, or either of them of whose guilt it had a reasonable doubt, the benefit thereof and acquit them or either of them of whose guilt the jury had such reasonable doubt, but that a reasonable doubt, to authorize an acquittal, must be a substantial doubt of defendants' guilt, formed on a careful consideration of all the facts and circumstances proven in the case, and not a mere possibility of innocence, etc., it was held that the instruction was not objectionable as unintelligible. State v. Brooks, 100 S. W. 416, 202 Mo. 106.

[15] Marshall v. United States (C. C. A. N. Y.) 197 F. 511, 117 C. C. A. 65.

[16] United States v. Newton (D. C. Iowa) 52 F. 275.

[17] State v. Lally, 43 A. 258, 2 Marv. 424.

substantial doubt, and that a reasonable doubt is not a mere possible doubt, because most things relating to human affairs and depending on moral evidence are open to some possible or imaginary doubt.[18]

A reasonable doubt has been defined as a well-founded doubt,[19] and in some jurisdictions it is proper to instruct that a reasonable doubt is a substantial and well-founded doubt, founded on the evidence,[20] or a serious, substantial, well-founded doubt, and not the mere possibility of a doubt,[21] although in some jurisdictions, while such an instruction is not ground for reversal, it is not commended,[22] and in other jurisdictions it is erroneous.[23]

A charge that a reasonable doubt is a strong, substantial doubt, and not a fanciful or imaginary doubt, has been sustained in some jurisdictions.[24]

§ 265. Possibility of innocence of accused

The possibility that one prosecuted for a criminal offense may be innocent does not require his acquittal.[25] An instruction to this effect is therefore proper,[26] and it is proper to refuse a charge authorizing the jury to acquit the defendant if they believe from the evidence that there is a reasonable possibility of his innocence,[27]

[18] Wright v. State, 42 So. 745, 148 Ala. 596; Jimmerson v. State, 32 So. 141, 133 Ala. 18; Little v. State, 89 Ala. 99, 8 So. 82.

[19] Creagh v. State, 43 So. 112, 149 Ala. 8; Du Bose v. State, 42 So. 862, 148 Ala. 560; State v. Rounds, 76 Me. 123.

[20] State v. Gann, 72 Mo. 374; State v. Senn, 32 S. C. 392, 11 S. E. 292.

Reasonable, well-founded doubt. Where the court charged that if the jury should find "beyond a reasonable, well-founded doubt that defendant * * *," they should find him guilty, but if on the whole evidence they had a reasonable doubt of guilt they should acquit, it was held that the use of the phrase "well-founded" was not error, as the jury must have known that it meant "not baseless, or founded on mere speculation, but real and substantial." State v. Mahoney, 97 N. W. 1080, 122 Iowa, 168.

[21] Earll v. People, 73 Ill. 329; Smith v. Same, 74 Ill. 144; State v. Coleman, 20 S. C. 441.

[22] State v. Young, 105 Mo. 634, 16 S. W. 408; State v. Blunt, 91 Mo. 503, 4 S. W. 394.

[23] Frazier v. State, 100 S. W. 94, 117 Tenn. 430.

[24] State v. Glover, 75 S. E. 218, 91 S. C. 562; State v. Summer, 32 S. E. 771, 55 S. C. 32, 74 Am. St. Rep. 707; State v. Bodie, 83 S. C. 117, 11 S. E. 624.

[25] **Ala.** Howard v. State, 44 So. 95, 151 Ala. 22; Sims v. State, 100 Ala. 23, 14 So. 560; Martin v. State, 77 Ala. 1.

Ill. Magee v. People, 139 Ill. 138, 28 N. E. 1077; Pate v. People, 3 Gilman, 644.

Mass. Commonwealth v. Leach, 160 Mass. 542, 36 N. E. 471.

Mo. State v. David, 131 Mo. 380, 33 S. W. 28; State v. Turner, 110 Mo. 196, 19 S. W. 645; State v. Evans, 55 Mo. 460.

N. Y. Poole v. People, 80 N. Y. 645.

Tex. Jackson v. State, 9 Tex. App. 114.

[26] Cain v. State, 86 So. 166, 17 Ala. App. 530; State v. Good, 132 Mo. 114, 33 S. W. 790; People v. Kerm, 8 Utah, 268, 30 P. 988.

[27] Leonard v. State, 43 So. 214, 150 Ala. 89; Barden v. State, 40 So. 948,

or if the jury believe that there is a possibility of mistake as to the identity of the defendant with the real criminal,[28] and it is proper to instruct that a reasonable doubt must not be based upon a mere possibility that the defendant may be innocent, since it may be possible that he is innocent, and yet at the same time there may be no reasonable doubt of his guilt.[29]

145 Ala. 1; White v. State, 32 So. 139, 133 Ala. 122; Morris v. State, 27 So. 336, 124 Ala. 44; Howard v. State, 108 Ala. 571, 18 So. 813.

Illustrations of instructions held properly refused as violating spirit of rule. An instruction that to warrant a conviction the evidence should be so clear and convincing as to lead to the conclusion that the accused "cannot be guiltless." Andrews v. State, 32 So. 665, 134 Ala. 47; Golson v. State, 26 So. 975, 124 Ala. 8; Yarbrough v. State, 22 So. 534, 115 Ala. 92; Thornton v. State, 21 So. 356, 113 Ala. 43, 59 Am. St. Rep. 97. An instruction that defendants should be acquitted, if there is evidence supporting any theory of their innocence, was properly refused. Reed v. State, 92 N. W. 321, 66 Neb. 184. A requested instruction that, "to warrant a conviction the circumstances ought fully to preclude all possibility that any other person could have committed the crime." People v. Foley, 31 N. W. 94, 64 Mich. 148. A requested charge that, if the evidence is reasonably consistent with the defendant's innocence, the jury should "promptly" acquit. Davis v. State, 62 So. 1027, 8 Ala. App. 147, certiorari denied Ex parte Davis, 63 So. 1010, 184 Ala. 26. A charge that, "if the conduct of the defendant was consistent with his innocence, then he is not guilty of any offense," was properly refused, as indefinite, uncertain, and tending to mislead. Adams v. State, 31 So. 851, 133 Ala. 166. A requested charge that one is presumed innocent till his guilt is established, and the evidence to induce conviction should not be a mere preponderance of probabilities, but it should be so convincing as to lead the mind to the conclusion that accused cannot be innocent, requires too high a state of proof. Sherrill v. State, 35 So. 129, 138 Ala. 3. A charge is properly refused at the request of the defendant which instructs the jury "that they must have not only justifying reasons for a conclusion of guilt, not only must they be able to say upon reason that the defendant is guilty, but this conclusion must impress itself upon the minds of the jury with such convincing clearness and force that they are unable to find in the whole evidence any reason for a contrary conclusion." Mitchell v. State, 30 So. 348, 129 Ala. 23. Where evidence of crime is direct and corroborated, defendant is not entitled to instruction that if evidence is reconcilable with innocence defendant is entitled to acquittal. Casper v. State, 160 N. W. 92, 100 Neb. 367. Where, on the trial of defendant, charged with carrying a concealed weapon, the only evidence to support a conviction was that of a witness who distinctly said he saw defendant draw his pistol from his pocket, an instruction that, "if there was a possibility that such witness was mistaken, they should acquit the defendant," was properly refused. Wilson v. State, 33 So. 171, 81 Miss. 404.

[28] Booker v. State, 76 Ala. 22.

[29] Dickey v. State, 72 So. 608, 15 Ala. App. 135, certiorari denied 73 So. 72, 197 Ala. 610; Jackson v. State, 34 So. 188, 136 Ala. 22; People v. Lucas, 91 N. E. 659, 244 Ill. 603; State v. Nueslein, 25 Mo. 111; State v. Lewis, 201 S. W. 80, 273 Mo. 518.

Instructions held proper within rule. Charges that if the jury have a fixed conviction of the truth of the charge, and are satisfied beyond a reasonable doubt, they must convict; that the doubt which will justify an acquittal must be actual and substantial, and not a mere possible doubt; and that if the jury believe beyond a reasonable doubt that defendant is guilty, they must convict, although

After the court has charged that defendant must be proven guilty beyond a reasonable doubt, and that a reasonable doubt is one that leaves the minds of the jurors in that condition that they cannot feel an abiding conviction to a moral certainty of defendant's guilt, it is not improper to instruct that the state is not called upon to free the case from any possible doubt by proving the guilt of defendant to an unassailable demonstration.[80] An instruction on this head, which has been approved in numerous cases, is to the effect that the law presumes that the defendant is innocent of the offense charged, and that it devolves upon the state to prove him guilty beyond a reasonable doubt, and if the jury have a reasonable doubt of his guilt they should acquit him, but that a doubt, to authorize an acquittal on that ground, should be a substantial doubt founded on the evidence, and not a mere possibility of innocence.[81]

§ 266. Opportunity of choice between two opposing theories

An instruction that, if two opposing conclusions can with equal propriety be drawn from the evidence, the one favoring innocence

they also believe it possible that he is not guilty. Brown v. State, 38 So. 268, 142 Ala. 287. An instruction on reasonable doubt, which concluded with the clause "that absolute certainty is not required, and it is rarely, if ever, possible in any case, but to justify a conviction the evidence, when taken as a whole and fairly considered, must so satisfy your judgments and consciences as to exclude every other reasonable conclusion." State v. Marshall, 74 N. W. 763, 105 Iowa, 38. An instruction to the jury defining a "reasonable doubt" as a substantial doubt, with a view to all the evidence in the case, and not a mere possibility of defendant's innocence, cannot be construed as inferring that defendant was guilty because there was no evidence of his innocence. State v. Duncan, 44 S. W. 263, 142 Mo. 456. It is proper to instruct that "beyond a reasonable doubt" does not mean beyond a mere doubt, or possibility of innocence; that, if guilt be established by evidence beyond any doubt founded in reason and common sense as applied thereto, a conviction should follow, though the jury may believe there is doubt on the question, not arising, however, to the certainty of a reasonable doubt, or though they yet believe in the possibility of innocence. Emery v. State, 78 N. W. 145, 101 Wis. 627. An instruction on reasonable doubt, that "if, however, all the facts established necessarily lead the mind to the conclusion that the defendant is guilty, though there be a bare possibility that he is innocent, you should find him guilty," is not error, where there are other clear instructions on the subject, favorable to defendant, and all the instructions on the subject requested by defendant were also given. McIntosh v. State, 51 N. E. 354, 151 Ind. 251.

[80] Crane v. United States (C. C. A. Cal.) 259 F. 480, 170 C. C. A. 456.

[81] State v. Maupin, 93 S. W. 379, 196 Mo. 164; State v. Temple, 92 S. W. 869, 194 Mo. 237, 5 Ann. Cas. 954; Id., 92 S. W. 494, 194 Mo. 228; State v. Smith, 164 Mo. 567, 65 S. W. 270; State v. Fisher, 162 Mo. 169, 62 S. W. 690; State v. Adair, 160 Mo. 391, 61 S. W. 187; State v. Edie, 147 Mo. 535, 49 S. W. 563; State v. Knock, 142 Mo. 515, 44 S. W. 235; State v. Sacre, 141 Mo. 64, 41 S. W. 905; State v. Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565; State v. Nueslein, 25 Mo. 111.

should be adopted,[32] or an instruction that, if the evidence is such that both a theory of the innocence of the defendant and of his guilt can be reasonably deduced therefrom, the jury should acquit him, is not improper in some jurisdictions,[33] although it is proper to refuse such an instruction where there is no question as to the construction of the testimony, the sole question being as to the credibility of the witnesses,[34] and in some jurisdictions it is condemned as an invasion of the province of the jury and misleading.[35]

It is proper to refuse to instruct that, if there arises from the evidence two reasonable theories, one favorable to the state and the other to the defendant, it will be the duty of the jury to accept the latter theory and acquit the defendant, although the other theory is the more reasonable and supported by the stronger evidence. In most cases such an instruction, if acted upon literally, would amount to a peremptory charge to find the defendant not guilty.[36]

§ 267. Probability or supposition of innocence

A probability of the innocence of an accused arising from the evidence is a just foundation for a reasonable doubt of his guilt and for his consequent acquittal,[37] and the accused is entitled to an instruction that in case of such a probability he is entitled to an acquittal.[38] On the other hand, the absence of such a proba-

[32] People v. Corey, 97 P. 907, 8 Cal. App. 720.

[33] Ruglass v. State, 196 S. W. 467, 129 Ark. 583.

[34] Cooper v. State, 224 S. W. 726. See Deshazo v. State, 179 S. W. 1012, 120 Ark. 494.

[35] Harvey v. State, 73 So. 200, 15 Ala. App. 311; Banks v. State (Ala.) 89 So. 921; Walker v. State, 32 So. 703, 134 Ala. 86.

[36] Roux v. City of Gulfport, 52 So. 485, 97 Miss. 559; Runnels v. State, 50 So. 499, 96 Miss. 92.

[37] People v. Rosenberg, 108 N. E. 54, 267 Ill. 202; Browning v. State, 30 Miss. 656.

Definition of "probability." An instruction that probability of innocence is a just foundation for a reasonable doubt of guilt is properly explained by defining probability as having more evidence for than against, and supporting or giving ground for a belief, but not to an absolute demonstration. Page v. State, 81 So. 848, 17 Ala. App. 70.

[38] **Ala.** Smith v. State, 62 So. 184, 182 Ala. 38; Davis v. State, 61 So. 483, 7 Ala. App. 122; Johnson v. State, 57 So. 593, 4 Ala. App. 47; Fleming v. State, 43 So. 219, 150 Ala. 19; Morris v. State, 41 So. 274, 146 Ala. 66; Nellson v. State, 40 So. 221, 146 Ala. 683; Bardin v. State, 38 So. 833, 143 Ala. 74; Shaw v. State, 28 So. 390, 125 Ala. 80; Henderson v. State, 25 So. 236, 120 Ala. 360; Bones v. State, 23 So. 138, 117 Ala. 138; Whitaker v. State, 106 Ala. 30, 17 So. 456; Prince v. State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Winslow v. State, 76 Ala. 42; Bain v. State, 74 Ala. 38.

Ill. People v. Fox, 110 N. E. 26, 269 Ill. 300.

Miss. Nelms v. State, 58 Miss. 362.

Contra, Graham v. State, 73 So. 594, 72 Fla. 510.

Reasonable probability. In a

bility is not inconsistent with the existence of a reasonable doubt of guilt.[39] An accused is accordingly entitled to have included in an instruction on reasonable doubt a statement that a reasonable doubt may arise, although there is no probability of his innocence,[40] and it is error to instruct that a probability of innocence exists only when the testimony showing innocence is stronger than that showing his guilt.[41]

§ 268. Probability of guilt

An instruction which authorizes a conviction of the defendant if the jury believe from the evidence that there is a high degree of probability of his guilt, even though they have a reasonable doubt thereof, is erroneous.[42] An instruction, however, which au-

criminal prosecution, a requested instruction that if, from the evidence, there was "a reasonable probability" of defendant's innocence, then that was a just foundation for a reasonable doubt, and would authorize an acquittal, was not erroneous because of the use of the word "reasonable" as qualifying the word "probability." Mims v. State, 37 So. 354, 141 Ala. 93.

Effect of other instructions. Where the court correctly charged as to reasonable doubt, it was not error to refuse to charge that if there was a probability of the innocence of the defendant he should be acquitted. Campos v. State, 95 S. W. 1042, 50 Tex. Cr. R. 102.

[39] Bailey v. State, 53 So. 296, 390, 168 Ala. 4; Smith v. State, 51 So. 632, 165 Ala. 74; Carter v. State, 40 So. 82, 145 Ala. 679.

[40] Fealy v. City of Birmingham (Ala. App.) 73 So. 296; Stewart v. State, 31 So. 944, 133 Ala. 105; Davis v. State, 31 So. 569, 131 Ala. 10; Carroll v. State, 30 So. 394, 130 Ala. 99; Rogers v. State, 23 So. 82, 117 Ala. 192.

Instructions held proper within rule. An instruction that if the jury were not satisfied beyond all reasonable doubt to a moral certainty, and to the exclusion of all other reasonable hypotheses but accused's guilt then they should find him not guilty, and that it was not necessary to raise a reasonable doubt that the jury should find from all the evidence a probability of accused's innocence, but such a doubt might arise even though there was no probability of innocence in the testimony, and, if the jury had not an abiding conviction to a moral certainty of guilt, they should acquit, was correct. Bailey v. State, 53 So. 296, 390, 168 Ala. 4; Olden v. State, 58 So. 307, 176 Ala. 6.

Strong probabilities. An instruction defining "reasonable doubt," and stating that the jury were required to decide the questions submitted on the "strong probabilities" of the case, and the "probabilities" need not be so strong as to exclude all doubt or possibility of error, but must be so strong as to exclude every reasonable doubt, is not objectionable because of the use of the words "strong probabilities" and "probabilites." State v. Harras, 65 P. 774, 25 Wash. 416.

[41] Nordan v. State, 39 So. 406, 143 Ala. 13.

[42] Byrd v. State, 64 S. W. 270, 69 Ark. 537.

Directing acquittal if evidence only establishes strong probabilities of guilt. An instruction that defendant should be convicted, if a full consideration of the evidence produced a conviction of guilt and satisfied the mind to a reasonable certainty, and that there should be an acquittal if the evidence only established strong probabilities of guilt, is not a denial of the benefit of a reasonable doubt. State v. Allen, 67 N. E. 1053, 68 Ohio St. 516.

thorizes a conviction if there is such a strong probability of guilt as to exclude reasonable doubt, is not improper.[43]

§ 269. Doubt which would influence, or cause one to hesitate in his private affairs

It is proper in some jurisdictions to define a reasonable doubt as one which would cause a reasonable and prudent man to hesitate or pause before acting in the graver transactions of life,[44] or in matters of grave importance to himself,[45] or in his own serious or important affairs, or in matters of as much importance to himself as the case on trial is to defendant,[46] or in his own most important affairs,[47] and to instruct that the evidence will be sufficient

[43] Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

[44] **Idaho.** State v. Nolan, 169 P. 295, 31 Idaho, 7.

Ill. Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320; Dunn v. People, 109 Ill. 635; May v. People, 60 Ill. 119.

Neb. Martin v. State, 98 N. W. 161, 67 Neb. 36; Maxfield v. State, 74 N. W. 401, 54 Neb. 44; Willis v. State, 61 N. W. 254, 43 Neb. 102.

[45] Mayfield v. State (Okl. Cr. App.) 190 P. 276.

[46] United States v. Hughes (D. C. Tex.) 34 F. 732; Minich v. People, 8 Colo. 440, 9 P. 4; State v. Nolan, 169 P. 295, 31 Idaho, 71; People v. Dewey, 2 Idaho, 83, 6 P. 103; Commonwealth v. Webb, 97 A. 189, 252 Pa. 187; State v. Harras, 65 P. 774, 25 Wash. 416.

Instructions held proper within rule. The jury having been instructed that defendant should be acquitted unless the evidence established his guilt beyond a reasonable doubt, and that, as the evidence was circumstantial, the circumstances proven must be wholly inconsistent with every other reasonable theory, except that of guilt, it was proper to charge that "a reasonable doubt is one which fairly and naturally rises in the mind after considering all the evidence, and carefully examining the whole case. If you are then not so satisfied and convinced of defendant's guilt that you would act upon that conviction in matters of importance to yourselves, you should give the defendant the benefit of your doubt and acquit. If you are so satisfied, you should convict him." State v. Schafer, 74 Iowa, 704, 39 N. W. 89. An instruction "that no mere weight of evidence will warrant a conviction, unless it be so strong and satisfactory as to remove from your minds all reasonable doubt of the guilt of the accused. * * * You are not to go beyond the evidence to hunt for doubts; nor should you entertain such doubts as are merely chimerical, or are based upon groundless conjecture. A doubt, to justify in acquittal, must be reasonable, and arise from a candid and impartial consideration of all the evidence in the case, and then it must be such a doubt as would cause a reasonable, prudent, and considerate man to hesitate and pause before acting in the grave and more important affairs of life. If, after a careful and impartial consideration of all the evidence, you can say and feel that you have a firm and abiding conviction of the guilt of the defendant, and are fully satisfied of the truth of the charge to a moral certainty, then you are satisfied beyond a reasonable doubt." State v. Elsham, 70 Iowa, 531, 31 N. W. 66. An instruction defining "reasonable doubt" as such a doubt as would make a man of ordinary prudence waver or hesitate in arriving at a conclusion, in considering a matter of like importance to himself as the case on trial is to defendant, is not objectionable as requiring less positive proof of facts in cases of minor importance than in those of a graver nature. State v. Rosener, 8 Wash. 42, 35 P. 357.

[47] State v. Crockett, 65 P. 447, 39

to authorize a conviction if the jury would act thereon, without hesitation, in their own important, or most important, concerns,[48] or if the evidence gives such certainty as would be acted upon

Or. 76. Butler v. State, 78 N. W. 590, 102 Wis. 364.

Instructions sufficient within rule. A contention that a portion of a charge, defining "reasonable doubt" to be a "doubt which would cause a reasonable or prudent man to pause or hesitate after giving the testimony that degree of consideration to which it is entitled," was inaccurate and prejudicial to the accused, in that it omitted the usual reference to the most important affairs of life, was untenable, in view of other portions of the charge, given in the same connection, that it is the duty of the jury to scrutinize the evidence with the utmost caution and care, and "bring to that duty the reason and prudence which you would exercise in the most important affairs of life," etc. Roszczyniala v. State, 104 N. W. 113, 125 Wis. 414.

Doubt in matters of deepest concern. An instruction that a reasonable doubt is not a captious, imaginary, or possible doubt, but must be such a doubt as a reasonable man would have in matters of deepest concern to himself, and must arise out of the evidence in the cause, while not so full and complete as it might be, contains no reversible error. Carpenter v. State, 62 Ark. 286, 36 S. W. 900.

Real, substantial doubt. An instruction that "reasonable doubt" is a real, substantial doubt existing after a fair consideration of the testimony, and such as would cause a reasonable and prudent man to pause before acting in a matter of grave importance to himself, and that if, after considering all the testimony, a juror is morally sure of the guilt of the defendant, then he has no reasonable doubt, is a correct definition of the term. Chandler v. State, 105 P. 375, 3 Okl. Cr. 254, rehearing denied 107 P. 735, 3 Okl. Cr. 254.

[48] **U. S.** (Sup.) Hopt v. Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708; (C. C. A. Cal.) Shepard v. United States, 236 F. 73, 149 C. C. A. 283; (C. C. La.) United States v. Wright, 16 F. 112; (C. C. Tex.) United States v. Meagher, 37 F. 875.

D. C. United States v. Heath, 20 D. C. 272; Id., 19 Wash. Law Rep. 818.

Ind. Toops v. State, 92 Ind. 13; Garfield v. State, 74 Ind. 60; Jarrell v. State, 58 Ind. 293.

Iowa. State v. Nash, 7 Iowa, 347.

Kan. State v. Kearley, 26 Kan. 77.

Mont. State v. Gleim, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655.

Neb. Lawhead v. State, 46 Neb. 607, 65 N. W. 779; Polin v. State, 14 Neb. 540, 16 N. W. 898.

Pa. Commonwealth v. Andrews, 83 A. 412, 234 Pa. 597.

S. D. State v. Fullerton Lumber Co., 152 N. W. 708, 35 S. D. 410.

Wis. Frank v. State, 68 N. W. 657, 94 Wis. 211; Ryan v. State, 83 Wis. 486, 53 N. W. 836.

Instructions held proper within rule. An instruction that by a reasonable doubt is meant a real, substantial doubt, based on reason, and reasonable in view of an impartial consideration of all the evidence, and if the jury is not satisfied therefrom of defendant's guilt there is a reasonable doubt, but if they have an abiding conviction of defendant's guilt, arising spontaneously from the evidence, which they would act on in more weighty matters relating to their own affairs, there is no reasonable doubt, is not erroneous. State v. Neel, 65 P. 494, 23 Utah, 541.

Doubt in grave and serious matter affecting private affairs. On the question of doubt it is not error to charge that reasonable doubt cannot be said to exist where the jury are so firmly convinced of the facts necessary to establish defendant's guilt that if it was a very grave and serious matter, affecting their own affairs, they would not hesitate to act on such conviction. People v. Hughes, 137 N. Y. 29, 32 N. E. 1105, following Miles v. United States, 103 U. S. 304, 26 L. Ed.

without hesitation in the graver and more important affairs of life.[49]

The phrases "graver transactions of life," or "important affairs," the use of which, under the foregoing statement, are permissible in some jurisdictions,[50] are not considered adequate in other jurisdictions to express the character of a reasonable doubt,[51] and in these jurisdictions instructions which permit the jury to convict on evidence upon which they would act in matters of grave concern, or in their more weighty and important matters, instead of in their "own most important affairs," or in matters of the highest concern and importance to their own dearest personal interests, are erroneous or defective.[52]

On the ground that persons of the highest sagacity often do, and must, act in the most important affairs of life on a slight preponderance of the evidence, the rule is in some jurisdictions that an instruction that evidence on which the jury would act in their most important affairs will authorize a conviction is erroneous,[53] unless accompanied by the statement that the evidence must be of such a character that a prudent man would feel safe in acting, without hesitation, upon the conviction produced by the evidence under circumstances where there is no compulsion resting upon him to act at all.[54]

481 and People v. Wayman, 128 N. Y. 585, 27 N. E. 1070.

[49] State v. Krampe, 140 N. W. 898, 161 Iowa, 48.

[50] Wacaser v. People, 134 Ill. 438, 25 N. E. 564, 23 Am. St. Rep. 683.

[51] **Cal.** People v. Wohlfrom (Sup.) 26 Pac. 236; People v. Bemmerly, 87 Cal. 117, 25 P. 266.

Dak. Territory v. Bannigan, 1 Dak. 451, 46 N. W. 597.

Ky. Jane v. Commonwealth, 2 Metc. 30.

Minn. State v. Shettleworth, 18 Minn. 208 (Gil. 191); State v. Dineen, 10 Minn. 407 (Gil. 325).

Nev. State v. Rover, 11 Nev. 343.

Wis. McAllister v. State, 88 N. W. 212, 112 Wis. 496; Emery v. State, 92 Wis. 146, 65 N. W. 848.

See People v. Montlake, 172 N. Y. S. 102, 184 App. Div. 578.

Grave and important concerns. On a prosecution for murder, where the evidence was purely circumstantial, a charge that "in a case of this kind the conclusion to which the jury is conducted is that degree of certainty that they would come to in their own grave and important concerns, and that is the degree of certainty, which the law requires, and which will justify them in returning a verdict of guilty," was erroneous. Jenkins v. State, 18 So. 182, 35 Fla. 737, 48 Am. St. Rep. 267.

[52] Morgan v. State (Ind.) 130 N. E. 528. See Brown v. State, 105 Ind. 385, 5 N. E. 900; Emery v. State, 65 N. W. 848, 92 Wis. 146.

In Indiana instructions setting up, as a standard of reasonable doubt, a doubt which would cause ordinarily prudent men to hesitate in their own important concerns have been held not cause for reversal, in absence of a request for fuller instructions. Bartlow v. State, 109 N. E. 201, 183 Ind. 398. See Arnold v. State, 23 Ind. 170.

[53] People v. Ah Sing, 51 Cal. 372; Lovett v. State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; Palmerston v. Territory, 3 Wyo. 333, 23 P. 73.

[54] Morgan v. State (Ind.) 130 N. E.

An instruction is erroneous which sets up as a standard of a reasonable doubt a doubt which would influence one in the ordinary and usual business transactions of life,[55] and in jurisdictions in which it is proper to tell the jury that a reasonable doubt is one which would cause an ordinarily prudent person to hesitate in an important affair of life it is error to instruct that a reasonable doubt is one which would, not only influence, but control, one in any of the important transactions of life, such an instruction imposing too great a burden on defendant.[56]

In Alabama it is proper to refuse an instruction that, unless the jury are so convinced by the evidence of the guilt of the defendant that they would each venture to act on that decision in matters of the highest concern and importance to his own interest, they must acquit him;[57] such an instruction being deemed argumentative or misleading.[58]

528; Garfield v. State, 74 Ind. 60; Bradley v. State, 31 Ind. 492.

[55] People v. Albers, 100 N. W. 908, 137 Mich. 678; Territory v. Lopez, 3 N. M. (Johns.) 104, 2 P. 364; Anderson v. State, 41 Wis. 430.

Trivial affairs. An instruction permitting the jury to convict upon evidence upon which they would act in the everyday walks of life is erroneous, as authorizing a verdict of guilty on evidence which would satisfy in the trivial affairs of life. Robinson v. State (Ark.) 231 S. W. 2.

[56] Commonwealth v. Miller, 139 Pa. 77, 21 A. 138, 27 Wkly. Notes Cas. 257, 23 Am. St. Rep. 170.

[57] Minor v. State, 74 So. 98, 15 Ala. App. 556; Diamond v. State, 72 So. 558, 15 Ala. App. 33, certiorari denied Ex parte State, 73 So. 1002, 198 Ala. 694; Phillips v. State 65 So. 444, 11 Ala. App. 15; McClain v. State, 62 So. 241, 182 Ala. 67; Stevens v. State, 60 So. 459, 6 Ala. App. 6; Whitmore v. State, 52 So. 909, 168 Ala. 45; Parker v. State, 51 So. 260, 165 Ala. 1; Phillips v. State, 50 So. 194, 162 Ala. 14; Williams v. State, 50 So. 59, 161 Ala. 52; Smith v. State, 49 So. 1029, 161 Ala. 94; Kelly v. State, 49 So. 535, 160 Ala. 48; Medley v. State, 47 So. 218, 156 Ala. 78; Mason v. State, 45 So. 472, 153 Ala. 46; Parker v. State, 45 So. 248, 153 Ala. 25; Rigsby v. State, 44 So. 608, 152 Ala. 9; Kirby v. State, 44 So. 38, 151 Ala. 66; Leonard v. State, 43 So. 214, 150 Ala. 89; Brown v. State, 43 So. 194, 150 Ala. 25; Toliver v. State, 38 So. 801, 142 Ala. 3; Bowen v. State, 37 So. 233, 140 Ala. 65; Walker v. State, 35 So. 1011, 139 Ala. 56; Goodlett v. State, 33 So. 892, 136 Ala. 39; Allen v. State, 32 So. 318, 134 Ala. 159.

[58] Smith v. State, 62 So. 184, 182 Ala. 38; Martin v. State, 56 So. 64, 2 Ala. App. 175; Shirley v. State, 40 So. 269, 144 Ala. 35; Banks v. State, 39 So. 921; Pitts v. State, 37 So. 101, 140 Ala. 70; Spraggins v. State, 35 So. 1000, 139 Ala. 93; Jarvis v. State, 34 So. 1025, 138 Ala. 17; Smith v State, 34 So. 396, 137 Ala. 22; Deal v. State, 34 So. 23, 136 Ala. 52; Willis v. State, 33 So. 226, 134 Ala. 429; Mann v. State, 32 So. 704, 134 Ala. 1; Sanders v. State, 32 So. 654, 134 Ala. 74; Thompson v. State, 31 So. 725, 131 Ala. 18; Amos v. State, 26 So. 524, 123 Ala. 50; Rogers v. State, 22 So. 666, 117 Ala. 9.

§ 270. Moral or mathematical certainty

The terms "beyond a reasonable doubt" and "to a moral certainty" are the legal equivalents of each other and may be used interchangeably,[59] and while it is not error to fail to so instruct,[60] it is proper,[61] and would seem advisable, to do so where both terms are used. It is therefore proper, where the court has fully explained the necessity of being satisfied of guilt beyond a reasonable doubt,[62] to instruct that the state is only required to prove the truth of its charge against the defendant to a moral certainty,[63] or to a moral and reasonable certainty and beyond a reasonable doubt.[64] On the other hand, the court may refuse to use the term "to a moral certainty," where the phrase "beyond a reasonable doubt" is employed.[65]

As is indicated by the statement of the above rule, there is a

[59] Jones v. State, 100 Ala. 88, 14 So. 772; Hendrix v. United States, 101 P. 125, 2 Okl. Cr. 240; State v. Wappenstein, 121 P. 989, 67 Wash. 502.

Reasonable and moral certainty. On a trial for murder, proof beyond a reasonable doubt is not such as to establish truth of the facts to an absolute certainty, but such as establishes them to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. State v. Staley, 14 Minn. 105 (Gil. 75). In a charge on circumstantial evidence, it was not error for the court to state that such evidence must produce, "in effect, a reasonable and moral certainty" of defendant's guilt, instead of that it must produce "the effect of a reasonable and moral certainty." Loggins v. State, 32 Tex. Cr. R. 364, 24 S. W. 512.

Fully satisfied to a moral certainty. An instruction defining reasonable doubt, that if "the jury are fully satisfied to a moral certainty" they are satisfied beyond a reasonable doubt, is not prejudicial because of the use of the word "fully." Wheeler v. State, 113 N. W. 253, 79 Neb. 491.

Moral evidence. An instruction that moral certainty is that degree of proof which the law requires of moral evidence, and is described as a state of impression produced by facts in which a reasonable mind feels coercion or necessity to act in accordance therewith, is not error. People v. Burns, 69 P. 16, 70 P. 1087, 138 Cal. 159, 60 L. R. A. 270.

[60] Chandler v. State, 68 So. 536, 12 Ala. App. 287.

[61] Killen v. State, 75 So. 176, 16 Ala. App. 31, certiorari denied Ex parte State, 76 So. 568, 200 Ala. 474; Varner v. State (Ga. App.) 108 S. E. 80.

[62] Griggs v. State, 86 S. E. 726, 17 Ga. App. 301; Smith v. State, 74 S. E. 447, 10 Ga. App. 840; Cole v. State, 53 S. E. 958, 125 Ga. 276; Bone v. State, 30 S. E. 845, 102 Ga. 387; Odeneal v. State, 157 S. W. 419, 128 Tenn. 60.

[63] Simmons v. State, 48 So. 606, 158 Ala. 8; Bailey v. State, 32 So. 57, 133 Ala. 155; People v. Chutuk, 124 P. 566, 18 Cal. App. 768; State v. Long, 43 A. 493, 72 Conn. 39.

[64] Ponder v. State, 90 S. E. 376, 18 Ga. App. 727.

Moral and legal certainty. A charge that all the law requires is moral and legal certainty, and that if jury had such certainty beyond a reasonable doubt they should convict, was not objectionable as applying to a criminal case the degree of proof applicable only to a civil case. Newsome v. State (Ga. App.) 102 S. E. 876.

[65] Wolf v. State, 197 S. W. 582, 130 Ark. 591; Stewart v. State, 115 S. W. 374, 88 Ark. 602; Commonwealth v. Costley, 118 Mass. 1.

hesitancy in some of the cases to use the term "moral certainty," or "to a moral certainty," [66] unless associated in some way with the phrase "beyond a reasonable doubt," and, while it is held to be error to refuse an instruction that the jury must be satisfied beyond all reasonable doubt and to a moral certainty of the guilt of the defendant before they can convict,[67] it is also held that a charge that before the jury is authorized to render a verdict of guilty the state must prove the defendant's guilt to a moral certainty is properly refused as elliptical.[68]

It is proper to refuse, as requiring too high a degree of proof, a charge that the state is bound to prove the guilt of the defendant clearly, fully, convincingly, and to a moral certainty,[69] or beyond a moral certainty,[70] or a charge that, unless the evidence against the defendant excludes to a moral certainty every hypothesis or supposition but that of guilt, there shall be no conviction,[71] and even when the phrase "every hypothesis or supposition but that of guilt," in the above instruction, has been qualified by the word "reasonable" or "rational," it has been held proper to refuse it.[72]

[66] Norman v. State, 74 S. E. 428, 10 Ga. App. 802.

[67] Sykes v. State, 44 So. 398, 151 Ala. 80; Rogers v. State, 22 So. 666, 117 Ala. 9; Williams v. State, 52 Ala. 411; McVay v. State (Miss.) 26 So. 947.

Proof of guilt to a moral certainty and beyond a reasonable doubt. Instruction that accused cannot be convicted upon suspicion, but his guilt must be determined upon an impartial consideration of the evidence, and unless that establishes his guilt to a moral certainty beyond all reasonable doubt he must be acquitted, is a sufficient charge on reasonable doubt. People v. Ashland, 128 P. 798, 20 Cal. App. 168. In a murder case an instruction that the prosecution is not required to establish accused's guilt beyond any possible doubt, but all that is required is moral certainty, that is, that degree of proof which produces conviction in an unprejudiced mind, and, if the jury are satisfied beyond a reasonable doubt of accused's guilt, they should convict, was not erroneous, because failing to state that the jury should be satisfied "to a moral certainty and beyond a reasonable doubt," especially where the instructions as a whole required that degree of proof. People v. Simmons, 95 P. 48, 51, 7 Cal. App. xiii.

[68] McMillan v. State, 75 So. 824, 16 Ala. App. 148; Minor v. State, 74 So. 98, 15 Ala. App. 556; Little v. State, 39 So. 674, 145 Ala. 662.

Contra, Walker v. State, 23 So. 149, 117 Ala. 42.

[69] Bullington v. State, 69 So. 319, 13 Ala. App. 61; Campbell v. State, 62 So. 57, 182 Ala. 18; Montgomery v. State, 49 So. 902, 160 Ala. 7.

[70] Roberson v. State, 99 Ala. 189, 13 So. 532.

[71] **Ala.** Keith v. State, 72 So. 602, 15 Ala. App. 129; Moss v. State, 67 So. 431, 190 Ala. 14; Ragsdale v. State, 82 So. 674, 134 Ala. 24; Andrews v. State, 32 So. 665, 134 Ala. 47; Gafford v. State, 25 So. 10, 122 Ala. 54.

Mich. Hall v. People, 39 Mich. 717.

[72] Thomas v. State, 65 So. 863, 11 Ala. App. 85; Griffin v. State, 43 So. 197, 150 Ala. 49; Nevill v. State, 32 So. 596, 133 Ala. 99.

Instruction requiring state to prove that no other person than defendant could possibly have committed the offense charged. A charge in a homicide case that there

As has been stated elsewhere, instructions should not be so framed as to tend to lead the jury to think that they must be convinced beyond all doubt, and an accused is not entitled to an instruction that the truth of the charge against him must be established to an absolute moral certainty,[73] and it is proper to charge that in order to convict there need not be absolute mathematical certainty of proof of guilt.[74]

§ 271. Abiding conviction to a moral certainty

It is proper in some jurisdictions to instruct the jury that a reasonable doubt is such a doubt as leaves the minds of the jury, after a consideration of all the evidence, in such a condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge against the defendant,[75] although it may not be error to refuse such an instruction, in view of other instructions given,[76] and in some jurisdictions such an instruction is erroneous, or is properly refused, as likely to confuse the jury, and as not making the meaning of reasonable doubt

should not be a conviction unless to a moral certainty the evidence excludes every other reasonable hypothesis than that of guilt of accused, and no matter how strong may be the facts if they can be reconciled with the theory that some other person may have done the act, then the guilt of accused is not shown by that full measure of proof that the law requires, is properly refused, as requiring too high a degree of proof. Parham v. State, 42 So. 1, 147 Ala. 57; Bailey v. State, 53 So. 296, 390, 168 Ala. 4.

[73] People v. Hecker, 109 Cal. 451, 42 P. 307, 30 L. R. A. 403; People v. Davis, 64 Cal. 440, 1 P. 889.

Instructions held properly refused within rule. An instruction that the law is that not only must the jury have justifying reasons for conclusion of guilt, not only must they be able to say upon reason that the accused is guilty, but that their conclusion must be so reasonable to their minds as to exclude all doubts of their correctness to a moral certainty. Greer v. State, 47 So. 300, 156 Ala. 15.

[74] **Ala.** King v. State, 87 So. 701, 17 Ala. App. 536; Winter v. State, 26 So. 949, 123 Ala. 1; Hicks v. State, 26 So. 337, 123 Ala. 15; Martin v. State, 77 Ala. 1.

Ga. Loyd v. State (App.) 106 S. E. 601; Jackson v. State, 45 S. E. 604, 118 Ga. 780; Hodge v. State, 43 S. E. 255, 116 Ga. 852; Davis v. State, 39 S. E. 906, 114 Ga. 104.

Neb. St. Louis v. State, 8 Neb. 405, 1 N. W. 371.

[75] **U. S.** (D. C. Ala.) United States v. Zes Cloya, 35 F. 493.

Ala. Coleman v. State, 59 Ala. 52.

Cal. People v. Davis, 67 P. 59, 135 Cal. 162; People v. Ashe, 44 Cal. 288.

Kan. State v. Patton, 71 P. 840, 66 Kan. 486.

Mich. People v. Finley, 38 Mich. 482.

Minn. State v. Couplin, 178 N. W. 486, 146 Minn. 189.

Nev. State v. Van Winkle, 6 Nev. 340.

Tex. Chapman v. State, 3 Tex. App. 67.

Abiding conviction of guilt. An instruction that, before defendant could be found guilty, the jury must have a "fixed abiding conviction of guilt," was not erroneous. Thompson v. State, 184 P. 467, 16 Okl. Cr. 716.

[76] Woodruff v. State, 31 Fla. 320, 12 So. 653.

any clearer than the phrase itself.[77] It is proper to give the converse of the above instruction to the effect that the jury are satisfied beyond a reasonable doubt of the fact of the guilt of the accused if, after a consideration of all the evidence in the case, they have an abiding conviction to a moral certainty of such fact.[78]

§ 272. Conscientious belief

An instruction that a conscientious belief that the defendant is guilty of the crime charged against him will authorize his conviction is erroneous,[79] since mere conscientious belief is not belief beyond a reasonable doubt,[80] and such an instruction in effect, requires the jury to convict if they believe the defendant to be guilty.[81]

Such an instruction is not cured by an instruction that the jury must believe the defendant guilty beyond a reasonable doubt before they can convict,[82] but a charge to convict if the jury conscientiously believe the defendant to be guilty beyond a reason-

[77] Little v. People, 157 Ill. 153, 42 N. E. 389; Claussen v. State, 133 P. 1055, 21 Wyo. 505, judgment affirmed on rehearing 135 P. 802, 21 Wyo. 505.

In New Jersey a reasonable doubt has not as yet been authoritatively defined as the want of an abiding conviction of guilt. State v. Silverio, 76 A. 1069, 79 N. J. Law, 482.

[78] **U. S.** (Sup.) Miles v. United States, 103 U. S. 304, 26 L. Ed. 481.

Ala. Frazier v. State, 86 So. 173, 17 Ala. App. 486; Harrison v. State, 40 So. 568, 144 Ala. 20; McKee v. State, 82 Ala. 32, 2 So. 451.

Ark. Snyder v. State, 111 S. W. 465, 86 Ark. 456.

Neb. Willis v. State, 43 Neb. 102, 61 N. W. 254.

N. J. Donnelly v. State, 26 N. J. Law, 601.

Abiding conviction of guilt. An instruction that, if, from all the circumstances, the jury are convinced of accused's guilt, "and that you have an abiding conviction that the defendant is guilty of murder," they should convict was misleading and argumentative in requiring the jury to be convinced that they had an abiding conviction of guilt, instead of that they be convinced of the fact of guilt. People v. Rischo, 105 N. E. 8, 262 Ill. 596.

Abiding conviction based on want of evidence. An instruction that, if from careful consideration of all the evidence or want of evidence the jury could say that they had an abiding conviction of truth of charge, they would be satisfied beyond a reasonable doubt, has been held to be error. Gammel v. State, 166 N. W. 250, 101 Neb. 532, modifying on rehearing opinion in 163 N. W. 854, 101 Neb. 532.

[79] Taylor v. State, 42 So. 608, 89 Miss. 671; Ellerbee v. State, 30 So. 57, 79 Miss. 10; Orr v. State, 18 So. 118; Brown v. State, 72 Miss. 997, 17 So. 278; Hemphill v. State, 16 So. 491; Burt v. State, 72 Miss. 408, 16 So. 342, 48 Am. St. Rep. 563; Brown v. State, 72 Miss. 95, 16 So. 202.

Belief as reasonable and conscientious men. An instruction is erroneous which, after stating that a reasonable doubt cannot be defined, tells the jury that they should convict if they are satisfied from all the evidence, as reasonable and conscientious men, of defendant's guilt. Powers v. State, 21 So. 657, 74 Miss. 777.

[80] Johnson v. State (Miss.) 16 So 494.

[81] Rucker v. State (Miss.) 18 So. 121.

[82] Campbell v. State (Miss.) 17 So. 441.

able doubt is not an improper qualification of the doctrine of reasonable doubt.[83]

§ 273. Effect of doubt upon any particular fact

There is generally such a relation between the definitive elements of a public offense and mutual corroboration in the proofs of them as to make it improper to single them out for isolated detached consideration. But in the end, all things considered, the established measure of proof of an offense charged is also the measure of the proof of each essential constituent element.[84] Accordingly, on principle and by the weight of authority, an instruction that it is not necessary, to convict an accused, that every material allegation in the indictment shall be established beyond a reasonable doubt if the jury are satisfied after a consideration of the entire case of his guilt beyond a reasonable doubt, is erroneous,[85] and defendant is entitled to have the jury instructed that, unless every element necessary to constitute the crime charged is proven beyond a reasonable doubt, they must acquit him,[86] al-

[83] Moore v. State, 38 So. 504, 86 Miss. 160; Hammond v. State, 21 So. 149, 74 Miss. 214.

Proof which satisfies judgment and conscience of jury. An instruction which defines proof beyond a reasonable doubt to be "such proof as satisfies the judgment and conscience of the jury, as reasonable men applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible," is correct. People v. Ezzo, 104 Mich. 341, 62 N. W. 407.

[84] Spear v. United States (C. C. A. Ark.) 228 F. 485, 143 C. C. A. 67.

[85] Heard v. United States (C. C. A. Ark.) 228 F. 503, 143 C. C. A. 85; Spear v. United States (C. C. A. Ark.) 228 F. 485, 143 C. C. A. 67; State v. Ottley, 126 N. W. 334, 147 Iowa, 329; State v. Kimes, 124 N. W. 164, 145 Iowa, 346.

"Each and every" material allegation. An instruction that, if the state has failed to establish "each and every" of the material allegations beyond a reasonable doubt, the jury must acquit, is not erroneous because of the use of the quoted words instead of "any." Larson v. State, 137 N. W. 894, 92 Neb. 24.

[86] Dunn v. State, 84 S. E. 488, 16 Ga. App. 9; Frazier v. State, 100 S. W. 94, 117 Tenn. 430.

In the federal courts, a request for such an instruction, which also required that each individual juror be satisfied beyond a reasonable doubt of each essential fact, has been held properly refused. Richards v. United States (C. C. A. Neb.) 175 F. 911, 99 C. C. A. 401.

"All the phases of the case." While every material allegation in an indictment should be proven beyond a reasonable doubt, it is not error to refuse to charge "that all the phases of the case" should be proven beyond a reasonable doubt. Price v. State, 40 S. E. 1015, 114 Ga. 855.

Doubt raised by ingenuity of counsel. It was proper to refuse an instruction that if a reasonable doubt of any fact necessary to convict is raised in the mind of the jury by the evidence itself, or by the ingenuity of the counsel, on any hypothesis consistent therewith, that doubt is decisive of the defendant's acquittal as misleading. Horton v. Commonwealth, 38 S. E. 184, 99 Va. 848.

though an instruction laying down this rule in so many words is not necessarily required,[87] and such an instruction may be refused where the insanity of the defendant is the only issue.[88]

As is indicated by the foregoing statement there are decisions in some jurisdictions which seem to be at variance with the rule above laid down. In Alabama, while there are cases to the contrary,[89] the preponderance of authority and the later decisions are to the effect that the court may properly refuse a charge that the proof of one single fact to the satisfaction of the jury inconsistent with the guilt of the accused is sufficient to raise a reasonable doubt requiring an acquittal.[90] In Illinois the court may and should instruct that a reasonable doubt which will warrant the acquittal of a defendant in a criminal case must be as to his guilt upon the whole evidence, and not as to any particular fact in the case,[91] and an instruction which applies the doctrine of reasonable doubt to any single fact, and not to all the evidence, is erroneous.[92]

The reasoning which underlies these decisions is somewhat obscure. Apparently they have been influenced largely by the apprehension that to tell the jury that before they can convict they must find beyond a reasonable doubt the existence of every fact essential to make out the crime charged would divert the attention of the jury from a consideration of the entire evidence to particu-

[87] Benge v. Commonwealth, 71 S. W. 648, 24 Ky. Law Rep. 1466.

[88] State v. Soper, 49 S. W. 1007, 148 Mo. 217.

[89] Doty v. State, 64 So. 170, 9 Ala. App. 21; Roberson v. State, 57 So. 829, 175 Ala. 15; Simmons v. State, 48 So. 606, 158 Ala. 8; Walker v. State, 45 So. 640, 153 Ala. 31.

[90] Richardson v. State, 85 So. 789, 204 Ala. 124; Love v. State, 82 So. 639, 17 Ala. App. 149; Watkins v. State (App.) 82 So. 628; Pinson v. State, 78 So. 876, 201 Ala. 522; Cain v. State, 77 So. 453, 16 Ala. App. 303; Butler v. State, 77 So. 72, 16 Ala. App. 234; Suttles v. State, 74 So. 400, 15 Ala. App. 582; Pippin v. State, 73 So. 340, 197 Ala. 613; Cowan v. State, 72 So. 378, 15 Ala. App. 87; Pearson v. State, 69 So. 485, 13 Ala. App. 181; Thomas v. State, 68 So. 799, 13 Ala. App. 246, certiorari denied Ex parte Thomas, 69 So. 1020, 193 Ala. 682; Moss v. State, 67 So. 431, 190 Ala. 14; Ex parte Davis, 63 So. 1010, 184 Ala. 26, denying certiorari Davis v. State, 62 So. 1027, 8 Ala. App. 147; Wingate v. State, 55 So. 953, 1 Ala. App. 40; Moss v. State, 44 So. 598, 152 Ala. 30; Morris v. State, 27 So. 336, 124 Ala. 44.

[91] People v. Probst, 86 N. E. 588, 237 Ill. 390; Henry v. People, 65 N. E. 120, 198 Ill. 162; Gorgo v. People, 100 Ill. App. 130.

Instructions held proper within rule. An instruction on reasonable doubt, that the rule requiring the jury to be satisfied of defendant's guilt beyond a reasonable doubt in order to convict, is complied with if taking the testimony altogether the jury is satisfied beyond a reasonable doubt, and that the reasonable doubt which the jury may entertain must be as to the guilt of accused on the whole evidence, and not as to any particular fact "material to the issue in the case," cannot be complained of by the defendant because of the addition of the quoted words, People v. Scarbak, 92 N. E. 286, 245 Ill. 435.

[92] People v. Zurek, 115 N. E. 644, 277 Ill. 621.

lar features thereof. But it is hard to resist the conclusion that the form of instruction approved in these jurisdictions is likely in some cases to mislead the jury into the belief that, although they may not be convinced beyond a reasonable doubt that some fact essential to conviction has been proven, they may yet bring in a verdict of guilty.

An instruction which applies the doctrine of reasonable doubt to each and every incident connected with the case is too broad,[93] as is an instruction that the jury must acquit if they have a reasonable doubt of material facts, without regard to whether they are facts essential to the establishment of the guilt of defendant.[94] Thus, in a prosecution for seduction, it is error to charge that the corroborating evidence must be proven beyond a reasonable doubt.[95] The reasons which render proper an instruction that not every circumstance offered in evidence tending to prove ultimate facts must be established beyond a reasonable doubt are as applicable where the prosecution rests its case upon direct evidence as where it relies upon circumstantial evidence.[96]

The defendant has no right to single out each material fact and have the court direct the jury that if they have a reasonable doubt as to the existence of such fact they ought to acquit.[97]

§ 274. Necessity of convincing each juror beyond a reasonable doubt in order to convict or to prevent an acquittal

Instructions are erroneous which tend to convey the impression that the doubt of an individual juror of the guilt of the accused cannot be put into the scales against the conviction of his fellow jurors beyond a reasonable doubt of such guilt.[98] On the con-

[93] State v. Watkins, 81 So. 10, 106 La. 380.

[94] Leonard v. State, 43 So. 214, 150 Ala. 89; Burton v. State, 37 So. 435, 141 Ala. 32.

[95] Lasater v. State, 94 S. W. 59, 77 Ark. 468.

[96] Hollywood v. State, 120 P. 471, 19 Wyo. 493, Ann. Cas. 1913E, 218, rehearing denied 122 P. 588, 19 Wyo. 493, Ann. Cas. 1913E, 218; Horn v. State, 73 P. 705, 12 Wyo. 80.

[97] City of Topeka v. Roberts, 141 P. 240, 92 Kan. 667; State v. Robinson, 139 S. W. 140, 236 Mo. 712; State v. Garth, 65 S. W. 275, 164 Mo. 553; State v. Crawford, 34 Mo. 200; State v. Dunn, 18 Mo. 419.

[98] Shanon v. State, 83 S. E. 156, 15 Ga. App. 346; State v. Louie Moon, 117 P. 757, 20 Idaho, 202, Ann. Cas. 1913A, 724; People v. Faber, 92 N. E. 674, 199 N. Y. 256, 20 Ann. Cas. 879.

Instructions held improper within rule. An instruction that to vote time after time in accordance with the first ballot, and not try to reach a verdict was to violate the oaths of the jurors to return a verdict according to the evidence, and "this each of you can do and do no violence to your consciences as fair-minded, conscientious, and intelligent jurymen." People v. Whitlow, 139 P. 826, 24 Cal. App. 1. An instruction defining a reasonable doubt to be such as "arises in the minds of the whole jury" is prejudicial, as being capable of the construction that

trary, it is proper to instruct that before the jury can convict the defendant in a criminal case each juror must be convinced of his guilt beyond a reasonable doubt,[99] that each juror should act for himself upon his individual convictions,[1] and that if any juror entertains a reasonable doubt of the guilt of the defendant he should not vote for a verdict of guilty because a majority of the jurors believe him to be guilty.[2]

they must convict unless they all entertain such doubt. State v. Stewart, 52 Iowa, 284, 3 N. W. 99; State v. Sloan, 55 Iowa, 217, 7 N. W. 516.

Instructions held not improper within rule. An instruction that a reasonable doubt is not a mere possible doubt, but a fair doubt, growing out of the evidence or lack of evidence, and exists when each juror is unable to say that he has an abiding conviction to a moral certainty of the truth of the charge, etc., was not objectionable as in effect charging that such doubt exists only when all the jurors have a reasonable doubt. State v. Thompson, 87 P. 709, 31 Utah, 228.

[99] **Ala.** Russell v. State, 78 So. 916, 201 Ala. 572; McDade v. State, 64 So. 519, 10 Ala. App. 241; Hooten v. State, 64 So. 200, 9 Ala. App. 9; Doty v. State, 64 So. 170, 9 Ala. App. 21; Green v. State, 53 So. 284, 168 Ala. 104; Phillips v. State, 47 So. 245, 156 Ala. 140; Leonard v. State, 43 So. 214, 150 Ala. 89; Whatley v. State, 39 So. 1014, 144 Ala. 68; Fletcher v. State, 31 So. 561, 132 Ala. 10; Mitchell v. State, 30 So. 348, 129 Ala. 23; Hale v. State, 26 So. 236, 122 Ala. 85; Carter v. State, 103 Ala. 93, 15 So. 893.

Ind. Rains v. State, 36 N. E. 532, 137 Ind. 83.

[1] Simon v. State, 108 Ala. 27, 18 So. 731; Fassinow v. State, 89 Ind. 235.

[2] People v. Singh, 128 P. 420, 20 Cal. App. 146.

Instructions held proper within rule. An instruction that defendant on trial for murder was entitled to the independent judgment of every juror and that if any juror entertained a reasonable doubt as to defendant's guilt and should, for convenience, vote for the conviction of murder in the second degree, or even manslaughter, he would be violating his oath and doing a grievous wrong to defendant. People v. Watson, 133 P. 298, 165 Cal. 645. An instruction that a juror entertaining a reasonable doubt of accused's guilt should vote to acquit and continue to so vote until convinced to the contrary, and that a juror should not hesitate to change his views when convinced that they are erroneous. People v. Wilt, 160 P. 561, 173 Cal. 477. A charge, on a prosecution for murder, that if any one or any number of the jury, after deliberating on all the evidence, should be of the opinion that defendant had not been proven guilty by the evidence to a moral certainty and beyond every reasonable doubt, those entertaining such opinion should vote for an acquittal, and should adhere to their opinion until convinced of their error beyond all reasonable doubt; that mere probabilities were not sufficient to warrant a conviction, and that it was not sufficient that the greater weight of the evidence support the allegations of the information, or sufficient that on the doctrine of reasonable chances it was more probable that defendant was guilty than innocent. People v. Murphy, 80 P. 709, 146 Cal. 502. An instruction that, if any juror entertained a reasonable doubt of guilt, it was his duty not to vote for a verdict of guilty nor to be influenced to so vote for the sole reason that other jurors favored such verdict was not erroneous as permitting the juror to entertain a reasonable doubt to vote for verdict of guilty because other jurors did so provided he finds some additional reason. Salt Lake City v. Robinson, 125 P. 657, 40 Utah, 448.

In some jurisdictions the rule is that an accused is entitled to an instruction that he cannot be convicted so long as any juror entertains a reasonable doubt of his guilt,[3] or that jurors need not surrender their honest convictions in order to agree upon a verdict,[4] or that it is the duty of a juror having a reasonable doubt of the guilt of the defendant not to surrender his position merely because the majority of the jurors disagree with him.[5] In other jurisdictions, however, an instruction that the jury cannot bring in a verdict of guilty if any juror has a reasonable doubt of the guilt of the defendant is properly refused, as stating a proposition already obvious to the jury,[6] or as misleading or tending to encourage a disagreement,[7] where the court has instructed as to the presumption of innocence and as to reasonable doubt on the part of the jury generally.[8]

[3] Grimes v. State, 105 Ala. 86, 17 So. 184; Parker v. State, 136 Ind. 284, 35 N. E. 1105; McGuire v. State, 2 O. C. D. 318, 3 Ohio Cir. Ct. R. 551.

[4] People v. Wong Loung, 114 P. 829, 159 Cal. 520.

[5] People v. Dole, 55 P. 581, 122 Cal. 486, 68 Am. St. Rep. 50, reversing judgment 51 P. 945.

Instructions not improper within rule. A charge to the effect that, "if any one, or any number, of you," should believe that accused has not been proven guilty by the evidence, to a moral certainty and beyond every reasonable doubt, those holding that opinion should vote for acquittal, and should so adhere to their opinion until convinced, beyond all reasonable doubt, that they are wrong; "but it is the duty of every juror to reason with his fellow jurors, to the end that he may join in a lawful verdict, and to discard any opinion he may have formed, when convinced that such opinion is not justified by the evidence," but that a mere probability or a preponderance of the evidence is not sufficient to convict, nor is it sufficient that upon the doctrine of chances guilt be more probable than innocence, is not erroneous, as liable to lead the jury to believe that any juror should vote to convict, unless satisfied of guilt beyond a reasonable doubt. People v. Davenport, 120 P. 451, 17 Cal. App. 557. Where the court, after the jury had considered a criminal case for a time, stated that he had no knowledge as to how the jury stood, that it might be the proper thing for a minority to consider whether they might be wrong and a majority right, that no juror should yield his well-grounded conviction or violate his oath, and that, if upon further consideration a juror could not conscientiously yield, he ought not to do so, directed the jury to further consider the case, it was held that the remarks were not erroneous as instructing for a majority verdict. People v. Coulon, 114 N. W. 1013, 151 Mich. 200.

[6] People v. Curtis, 56 N. W. 925, 97 Mich. 489; State v. Young, 105 Mo. 634, 16 S. W. 408; State v. Coleman, 98 N. W. 175, 17 S. D. 594.

[7] **U. S.** (C. C. A. Neb.) Richards v. United States, 175 F. 911, 99 C. C. A. 401.

Fla. Cook v. State, 35 So. 665, 46 Fla. 20.

Ga. Fogarty v. State, 80 Ga. 450, 5 S. E. 782; Smith v. State, 63 Ga. 168.

Ill. People v. Lee, 86 N. E. 575, 237 Ill. 272.

Mo. State v. Taylor, 134 Mo. 109, 35 S. W. 92.

Ohio. Davis v. State, 57 N. E. 1099, 63 Ohio St. 173.

[8] State v. Hamilton, 57 Iowa, 596, 11 N. W. 5; Walford v. State, 63 So. 316, 106 Miss. 19; State v. Cushing, 50 P. 512, 17 Wash. 544.

Instructions should not be so framed as to pretermit the deliberation of the jurors together, or prevent them from freely consulting with each other.[9] While each juror must decide the question of the guilt of the defendant for himself, he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his views or opinions of the case, when convinced that they are wrong, even although in so doing he defer to the views or opinions of others.[10]

Instructions which overemphasize the duty of each juror to adhere to his own opinion, and thereby tend to lead him arbitrarily to disregard the opinions of his fellow jurors, are properly refused,[11]

In Mississippi, early cases at variance with the text (Ammons v. State, 42 So. 165, 89 Miss. 369; Bell v. State, 42 So. 542, 89 Miss. 810, 119 Am. St. Rep. 722, 11 Ann. Cas. 431) have been overruled.

Instructions held sufficient within rule. A charge that, before the jury can convict, they must find accused guilty beyond a reasonable doubt, and that a "reasonable doubt" is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge—that is, to a certainty that causes and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it—is ordinarily a sufficient admonition as to the separate individual duty of each juror. State v. Smith, 114 P. 1074, 84 Kan. 646. Compare, State v. Witt, 8 P. 769, 34 Kan. 488. Where the court instructs that the jury should acquit unless they are satisfied beyond a reasonable doubt that accused is guilty, it sufficiently informs the jury that each juror should pass his own judgment on the evidence. Oborn v. State, 126 N. W. 737, 143 Wis. 249, 31 L. R. A. (N. S.) 966.

[9] Diamond v. State, 72 So. 558, 15 Ala. App. 33, certiorari denied Ex parte State, 73 So. 1002, 198 Ala. 694; Lewis v. State, 25 So. 1017, 121 Ala. 1; Biddle v. State, 199 S. W. 913, 131 Ark. 537; Little v. People, 157 Ill. 153, 42 N. E. 389; State v. Hennessy, 90 P. 221, 29 Nev. 320, 13 Ann. Cas. 1122.

Instructions not objectionable within rule. An instruction that each juror should act for himself and form his own judgment uninfluenced by the judgment of others, and thus determine the guilt or innocence of the defendant from his own standpoint, was not objectionable as preventing the jury from discussing the evidence or indulging in an interchange of views concerning the guilt or innocence of accused. Knapp v. State, 79 N. E. 1076, 168 Ind. 153, 11 Ann. Cas. 604.

[10] People v. Rodley, 63 P. 351, 131 Cal. 240.

[11] **Ala.** Burk v. State, 75 So. 702, 16 Ala. App. 110; Holmes v. State, 34 So. 180, 136 Ala. 80; Cunningham v. State, 23 So. 693, 117 Ala. 59.

Conn. State v. Rathbun, 51 A. 540, 74 Conn. 524.

D. C. Horton v. United States, 15 App. D. C. 310.

Fla. Hall v. State, 83 So. 513, 78 Fla. 420, 8 A. L. R. 1234.

Kan. State v. Logan, 85 P. 798, 73 Kan. 730.

Mich. People v. Wood, 99 Mich. 620, 58 N. W. 638.

Minn. State v. Rue, 75 N. W. 235, 72 Minn. 296.

N. C. State v. Bowman, 80 N. C. 432.

Instructions improper within rule. A requested charge that "before you can convict each one of you must believe beyond all reasonable doubt" that accused committed the

and while it is not the duty of the court to exhort the jury to agree,[12] it is proper to instruct that a juror should not shut his ears to anything said by his fellow jurors in opposition to his own views.[13]

An instruction which requires the jury to acquit the defendant unless every member of the jury is persuaded of his guilt beyond a reasonable doubt is properly refused,[14] since, while there may be a mistrial because of the reasonable doubt of one or more jurors less than twelve, there cannot be an acquittal unless all the jurors are reasonably doubtful of the guilt of the defendant,[15] and in some jurisdictions it is proper to charge, after having instructed

act charged, "and if either member of the jury have a reasonable doubt" thereof he must so find, did more than require unanimity of belief of guilt beyond a reasonable doubt, and was bad, as making each juror the keeper of the consciences of the others, by asserting the duty of a single juror who doubts to find in accordance with his doubt. Troup v. State, 49 So. 332, 160 Ala. 125. An instruction on reasonable doubt, that defendant was entitled to the verdict of 12 men, each of whom on the whole evidence must be free from any reasonable doubt in his own mind, not the minds of the prosecutors or the court, and each juror should be allowed to have his own conception of what a reasonable doubt is to him, not what it is to the prosecution, and was under no legal compulsion to give or be able to formulate and state the reason which may raise a reasonable doubt in his mind and conscience, it being sufficient if any member of the jury in fact had any reasonable doubt, the defendant being then entitled to his vote of not guilty on the verdict, was erroneous, and properly refused. Taylor v. State, 42 So. 608, 89 Miss. 671.

[12] People v. Rodley, 63 P. 351, 131 Cal. 240.

[13] Jackson v. State, 91 Wis. 253, 64 N. W. 838.

[14] **Ala.** Wood v. State, 88 So. 28, 17 Ala. App. 654; Baader v. State, 75 So. 820, 16 Ala. App. 144; Strother v. State, 72 So. 566, 15 Ala. App. 106; Smith v. State, 72 So. 316, 197 Ala. 193; Bryant v. State, 68 So. 704, 13 Ala. App. 206, certiorari denied 69 So. 1017, 193 Ala. 673; Buckhanon v. State, 67 So. 718, 12 Ala. App. 36; Phillips v. State, 65 So. 444, 11 Ala. App. 15; Hall v. State, 65 So. 427, 11 Ala. App. 95; Harper v. State, 63 So. 23, 8 Ala. App. 346; Gaston v. State, 60 So. 805, 179 Ala. 1; Graves v. State, 52 So. 34, 166 Ala. 671; Crain v. State, 52 So. 31, 166 Ala. 1; Smith v. State, 51 So. 610, 165 Ala. 50; Parker v. State, 51 So. 260, 165 Ala. 1; Howard v. State, 50 So. 954, 165 Ala. 18; Reaves v. State, 48 So. 373, 158 Ala. 5; Shelton v. State, 42 So. 30, 144 Ala. 106; Yeats v. State, 38 So. 760, 142 Ala. 58.

Fla. Ayers v. State, 57 So. 349, 62 Fla. 14; McCall v. State, 46 So. 321, 55 Fla. 108; Boyd v. State, 33 Fla. 316, 14 So. 836.

Iowa. State v. Rorabacher, 19 Iowa, 154.

Mo. State v. Taylor, 134 Mo. 109, 35 S. W. 92.

[15] **Ala.** Turner v. State, 49 So. 828, 160 Ala. 40; Outler v. State, 41 So. 460, 147 Ala. 39; Bardin v. State, 38 So. 833, 143 Ala. 74; Andrews v. State, 32 So. 665, 134 Ala. 47; Nevill v. State, 32 So. 596, 133 Ala. 99; Jimmerson v. State, 32 So. 141, 133 Ala. 18; Davis v. State, 31 So. 569, 131 Ala. 10; Littleton v. State, 29 So. 390, 128 Ala. 31.

Ga. Price v. State, 40 S. E. 1015, 114 Ga. 855.

Okl. Hodge v. Territory, 69 P. 1077, 12 Okl. 108.

W. Va. State v. McCausland, 96 S. E. 938, 82 W. Va. 525.

that there can be no conviction if any juror is not convinced beyond a reasonable doubt, that the jury cannot acquit unless they all entertain a reasonable doubt,[16] but in other jurisdictions such a charge constitutes reversible error.[17]

Where the general charge covers the individual responsibility of each juror as to reasonable doubt, a special charge on the same subject is properly refused.[18]

§ 275. Belief or doubt as men

In some jurisdictions an instruction that the oath taken by a juror imposes no obligation on him to doubt as a juror what he would believe from the evidence as a man without having taken an oath, or that a juror is not at liberty to disbelieve as a juror what he believes as a man, is proper.[19] It is an essential element of such an instruction that it require that the belief of the jurors as men should be derived from the evidence; the proper form being that "you are not at liberty to disbelieve as jurors, if from the evidence you believe as men."[20] Such an instruction is not re-

[16] Whittle v. State, 89 So. 43, 205 Ala. 639; State v. Rogers, 56 Kan. 362, 43 P. 256.

Requiring agreement either to convict or acquit. In a prosecution for homicide, a charge that all of the jury must agree before defendant can be acquitted or convicted was proper. Tribble v. State, 40 So. 938, 145 Ala. 23. Jury could not have been misled by an instruction that "the whole of your number must agree in finding the defendant guilty or not guilty." State v. Inich, 173 P. 230, 55 Mont. 1.

[17] Stitz v. State, 104 Ind. 359, 4 N. E. 145.

[18] State v. Phelps, 5 S. D. 480, 59 N. W. 471.

[19] **Cal.** People v. Worden, 45 P. 844, 113 Cal. 569.

Colo. Perry v. People, 87 P. 796, 38 Colo. 23.

Idaho. State v. Louie Moon, 117 P. 757, 20 Idaho, 202, Ann. Cas. 1913A, 724.

Ill. People v. Zajicek, 84 N. E. 249, 233 Ill. 198; Watt v. People, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403; Spies v. People, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

Neb. Bothwell v. State, 99 N. W. 669, 71 Neb. 747; Reed v. State, 92 N. W. 321, 66 Neb. 184; Savary v. State, 87 N. W. 34, 62 Neb. 166; Leisenberg v. State, 84 N. W. 6, 60 Neb. 628; Bartley v. State, 73 N. W. 744, 53 Neb. 310; Fanton v. State, 69 N. W. 953, 50 Neb. 351, 36 L. R. A. 158; Barney v. State, 68 N. W. 636, 49 Neb. 515.

Pa. Clark v. Commonwealth, 123 Pa. 555, 16 A. 795, 23 Wkly. Notes Cas. 317, following McMeen v. Commonwealth, 114 Pa. 300, 9 A. 878.

Doubt of an honest man outside the jury box. An instruction that a reasonable doubt in the jury box is exactly the same kind of reasonable doubt that an honest man meets up with in human life was not error. State v. Pitt, 80 S. E. 1060, 166 N. C. 268, Ann. Cas. 1916C, 422.

[20] People v. Kingcannon, 114 N. E. 508, 276 Ill. 251; Highley v. People, 177 P. 975, 65 Colo. 497; Robinson v. State, 106 P. 24, 18 Wyo. 216.

Instruction held not to permit jury to return verdict based on their belief as men without regard to the evidence. An instruction correctly defining "reasonable doubt" and charging that the jury were not at liberty to disbelieve as jurors, if they believed as men, that their oath imposed no obligation on them to doubt where no doubt would

garded as of much service in guiding the jury to a correct conclusion as to the amount of proof required in order to convict,[21] it not being commended even in jurisdictions where it is proper to give it,[22] and in some jurisdictions such an instruction is erroneous, and should be refused, as tending to relieve the jury from the obligation of their oath,[23] or as being of no benefit and likely to mislead.[24]

§ 276. Doubt as to grade or degree of offense charged

The court should so frame its charge as to leave no question that if the jury believe the defendant to be guilty of the crime charged against him, but have a reasonable doubt as to whether defendant is guilty of the highest degree of the offense alleged, or of a lower degree, they should convict only of the lower degree,[25] and in some jurisdictions, the court should specially so charge, either of its own motion or on request.[26] In other jurisdictions, where the

exist, if no oath had been administered, was not erroneous, in that it relieved the jury from the obligation of their oath and permitted them to return a verdict of guilty, based on their belief as men that accused was guilty, without regard to the evidence. McQueary v. People, 110 P. 210, 48 Colo. 214, 21 Ann. Cas. 560.

[21] People v. Clark (Cal.) 192 P. 521; People v. Whitney, 53 Cal. 420.

[22] Holmes v. State, 118 N. W. 99, 82 Neb. 406; Clements v. State, 114 N. W. 271, 80 Neb. 313; Fife v. Commonwealth, 29 Pa. 429.

[23] **Ind.** Siberry v. State, 133 Ind. 677, 33 N. E. 681, following Cross v. State, 132 Ind. 65, 31 N. E. 473.

N. Y. People v. Johnson, 140 N. Y. 350, 35 N. E. 604.

W. Va. State v. Ringer, 100 S. E. 413, 84 W. Va. 546; State v. Price, 97 S. E. 582, 83 W. Va. 71, 5 A. L. R. 1247; State v. Young, 97 S. E. 134, 82 W. Va. 714; State v. McCausland, 96 S. E. 938, 82 W. Va. 525.

[24] State v. Worley, 96 S. E. 56, 82 W. Va. 350; State v. Alderson, 82 S. E. 1021, 74 W. Va. 732; State v. Taylor, 50 S. E. 247, 57 W. Va. 228.

Instructions held improper. An instruction closing, "In other words, what satisfies the mind outside of the jury box should do so within," is erroneous, as tending to mislead the jury into believing that it would not be necessary for them to carefully weigh the facts proved. State v. Ruby, 61 Iowa, 86, 15 N. W. 848.

Instructions held not improper within rule. Where, in a prosecution for manslaughter, the court instructed that a reasonable doubt is not a vague or uncertain doubt, and that what the jury believes from the evidence as men they should believe as jurors, but later the court qualified this instruction as follows: "The court instructs the jury that notwithstanding the instruction, given at the instance of the state, that a juror is not at liberty to doubt as a juror and believe as a man, yet if, on the evidence of this case, such doubt is raised as would cause a juror to hesitate, and to refrain from acting, were it a grave business matter, then such doubt is a reasonable doubt, and such juror should give the defendant the benefit of that doubt," it was held that the instructions were correct. State v. Dickey, 37 S. E. 695, 48 W. Va. 325.

[25] Shelton v. Commonwealth, 140 S. W. 670, 145 Ky. 543; Ewing v. Commonwealth, 111 S. W. 352, 129 Ky. 237; Walker v. State, 214 S. W. 331, 85 Tex. Cr. R. 482; Lagrone v. State, 209 S. W. 411, 84 Tex. Cr. R. 609.

[26] **Ind.** Koehler v. State, 123 N. E. 111, 188 Ind. 387; Coolman v. State, 72 N. E. 568, 163 Ind. 503.

court has charged the doctrine of reasonable doubt on the whole case, such an instruction is not required,[27] in the absence of a request,[28] or in the absence of some special showing of a necessity for it.[29] Such a charge is not one on the weight of the evidence, nor is it objectionable as intimating that the court is of the opinion that defendant is guilty of some degree of the offense charged.[30]

Where such an instruction is given, it should be expressed in language comprehensible to nonprofessional men,[31] and it should require the doubt to be a reasonable one.[32]

§ 277. Giving benefit of doubt to state

Instructions which give the benefit of a reasonable doubt to the state, or which tend to lead the jury to think that the defendant must prove his innocence beyond a reasonable doubt, are, of course, under the principles discussed in the preceding sections, erroneous.[33]

Iowa. State v. Walters, 45 Iowa, 389.

Ky. McCandless v. Commonwealth, 185 S. W. 1100, 170 Ky. 301; Demaree v. Commonwealth, 82 S. W. 231, 26 Ky. Law Rep. 507; Arnold v. Commonwealth, 72 S. W. 753, 24 Ky. Law Rep. 1921; Mullins v. Commonwealth, 67 S. W. 824, 23 Ky. Law Rep. 2433; Williams v. Commonwealth, 80 Ky. 313, 4 Ky. Law Rep. 3; Fields v. Commonwealth, 5 Ky. Law Rep. (abstract) 861.

Duty to conform to statute. An instruction telling the jury that if they believed from the evidence beyond a reasonable doubt that defendant was guilty, but had a reasonable doubt as to the degree of his offense, "they should find him guilty of that offense highest in degree of which they have no reasonable doubt." while not conforming to the Code provision, as would have been better, was not prejudicial. Ireland v. Commonwealth, 57 S. W. 616, 22 Ky. Law Rep. 478.

[27] Abbott v. State, 86 N. Y. 460; Smith v. State (Tex. Cr. App.) 78 S. W. 517; Little v. State, 47 S. W. 984, 39 Tex. Cr. R. 654.

[28] Hall v. State, 28 Tex. App. 146, 12 S. W. 739.

Applying doctrine of reasonable doubt as between murder in second degree and manslaughter. Under the rule that, in a prosecution for homicide, the charge of the court should apply the doctrine of reasonable doubt, as between the different degrees involved in the case, an instruction that, in order to warrant a verdict of murder in the second degree, the jury must believe from the evidence beyond a reasonable doubt that defendant committed the homicide with implied malice, etc., sufficiently applies the doctrine as between murder in the second degree and manslaughter, in the absence of a request for a special instruction. Powell v. State, 28 Tex. App. 393, 13 S. W. 599.

[29] McKinney v. State, 55 S. W. 175.

[30] Tinsley v. State, 106 S. W. 347, 52 Tex. Cr. R. 91.

[31] Eanes v. State, 10 Tex. App. 421.

[32] Daughdrill v. State, 21 So. 378, 113 Ala. 7; Jackson v. State, 91 Ga. 271, 18 S. E. 298, 44 Am. St. Rep. 22; State v. May, 72 S. W. 918, 172 Mo. 630.

[33] **Ark.** Bell v. State, 98 S. W. 705, 81 Ark. 16.

D. C. Le Cointe v. United States, 7 App. D. C. 16.

Ky. Hall v. Commonwealth, 13 Ky. Law Rep. (abstract) 399.

Neb. Hayward v. State, 149 N. W. 105, 97 Neb. 9.

Tex. Terrell v. State, 111 S. W. 152, 53 Tex. Cr. R. 604; Godsoe v.

§ 278. Repetition of instructions

After the court has once fully charged the jury as to the law of reasonable doubt, it is not required in each separate subsequent instruction to inform the jury as to its duty in the event of entertaining a reasonable doubt of the guilt of the defendant.[84] One instruction on the doctrine of reasonable doubt is sufficient, and a great number of additional instructions are open to objection on the ground that they are liable to lead the jury to believe that the

State, 108 S. W. 388, 52 Tex. Cr. R. 626.

Instructions improper within rule. An instruction in a homicide case that "by 'reasonable doubt' is not meant that which of possibility may arise, but it is doubt engendered by the investigation of the whole proof, and an inability after such investigation to let the mind rest easily upon the certainty of guilt or innocence." State v. Moss, 61 S. W. 87, 106 Tenn. 359. An instruction, on a prosecution for murder, on the issue of manslaughter, that if the jury believed beyond a reasonable doubt that defendant shot deceased, and that previous thereto defendant had been informed by his wife that deceased had used insulting language to her, etc. Melton v. State, 83 S. W. 822, 47 Tex. Cr. R. 451. An instruction, "If you have a reasonable doubt that the animal slaughtered by defendant was not the property of C., the prosecutor, you will find defendant not guilty." Landers v. State (Tex. Cr. App.) 63 S. W. 557.

Application of doctrine of reasonable doubt to defenses, see post, § 320.

[84] **Cal.** People v. Waysman, 81 P. 1087, 1 Cal. App. 246; People v. McRoberts, 81 P. 734, 1 Cal. App. 25.

Fla. Sylvester v. State, 35 So. 142, 46 Fla. 166.

Ga. Miller v. State (App.) 107 S. E. 784; Thomas v. State, 91 S. E. 247, 19 Ga. App. 104, conforming to answers to certified questions, 91 S. E. 109, 146 Ga. 346; Hayes v. State, 88 S. E. 752, 18 Ga. App. 68; Thomas v. State, 88 S. E. 718, 18 Ga. App. 21; Montford v. State, 87 S. E. 797, 144 Ga. 582; Bowen v. State, 84 S. E. 793, 16 Ga. App. 179; Raper v. State, 84 S. E. 560, 16 Ga. App. 121; Watts v. State, 71 S. E. 766, 9 Ga. App. 500; Harris v. State, 57 S. E. 937, 1 Ga. App. 136; Fargerson v. State, 57 S. E. 101, 128 Ga. 27; Tolbert v. State, 56 S. E. 1004, 127 Ga. 827; Goodin v. State, 55 S. E. 503, 126 Ga. 560; Cress v. State, 55 S. E. 491, 126 Ga. 564; Williams v. State, 54 S. E. 167, 125 Ga. 265; Davis v. State, 54 S. E. 126, 125 Ga. 299; Smith v. State, 52 S. E. 329, 124 Ga. 213; Carter v. State, 49 S. E. 280, 121 Ga. 360; Barnes v. State, 35 S. E. 396, 113 Ga. 189; Carr v. State, 84 Ga. 250, 10 S. E. 626; Vann v. State, 83 Ga. 44, 9 S. E. 945.

Ill. Delahoyde v. People, 72 N. E. 732, 212 Ill. 554.

Ind. Wheeler v. State, 63 N. E. 975, 158 Ind. 687; Deilks v. State, 141 Ind. 23, 40 N. E. 120; McCulley v. State, 62 Ind. 428; Jones v. State, 49 Ind. 549.

Iowa. State v. Christ, 177 N. W. 54; State v. Crouch, 107 N. W. 173, 130 Iowa, 478.

Kan. State v. McDonald, 193 P. 179, 107 Kan. 568; State v. Ryno, 74 P. 1114, 68 Kan. 348, 64 L. R. A. 303; State v. Fox, 62 P. 727, 10 Kan. App. 578.

Ky. Lake v. Commonwealth, 104 S. W. 1003, 31 Ky. Law Rep. 1232; Powers v. Commonwealth, 63 S. W. 976, 110 Ky. 386, 23 Ky. Law Rep. 146, 53 L. R. A. 245; Id., 61 S. W. 735, 110 Ky. 386, 22 Ky. Law Rep. 1807, 53 L. R. A. 245; McClernand v. Commonwealth, 12 S. W. 148; Davis v. Commonwealth, 4 Ky. Law Rep. 717.

Mo. State v. Washington, 146 S. W. 1164, 242 Mo. 401; State v. Strickland, 90 S. W. 725, 191 Mo. 616; State v. Layton, 90 S. W. 724, 191 Mo. 613; State v. Coleman, 84 S. W. 978, 186 Mo. 151, 69 L. R. A. 381; State v.

court is in doubt as to the guilt of the accused.[35] A statement in the opening part of the charge of the court that the jury must be satisfied of the guilt of the defendant beyond a reasonable doubt need not be repeated every time the court refers to any finding from the evidence,[36] and where the court properly charges on the presumption of innocence and reasonable doubt in its main charge, it is not required to repeat such matter in giving additional instructions after receiving an informal verdict from the jury.[37]

Under the above rule, an instruction which sets out the facts necessary to constitute the offense charged, and tells the jury that if they find those facts they shall bring in a verdict of guilty, is

Pyscher, 77 S. W. 836, 179 Mo. 140; State v. McLaughlin, 50 S. W. 315, 149 Mo. 19; State v. Wright, 42 S. W. 934, 141 Mo. 333; State v. Good, 132 Mo. 114, 33 S. W. 790.

Neb. Dunn v. State, 79 N. W. 719, 58 Neb. 807; Davis v. State, 70 N. W. 984, 51 Neb. 301; Carleton v. State, 43 Neb. 373, 61 N. W. 699.

N. J. Brown v. State, 42 A. 811, 62 N. J. Law, 666.

N. M. Territory v. Price, 91 P. 733, 14 N. M. 262.

N. D. State v. Currie, 80 N. W. 475, 8 N. D. 545.

Okl. Cole v. State (Cr. App.) 195 P. 901.

Tex. Miller v. State, 189 S. W. 259, 80 Tex. Cr. R. 226; Condron v. State, 155 S. W. 253, 69 Tex. Cr. R. 513; Price v. State, 70 S. W. 966, 44 Tex. Cr. R. 304; Ramirez v. State, 66 S. W. 1101, 43 Tex. Cr. R. 455; Ford v. State (Cr. App.) 56 S. W. 338; Ediens v. State, 55 S. W. 815, 41 Tex. Cr. R. 522; Sanches v. State (Cr. App.) 55 S. W. 44.

See State v. Calkins, 109 N. W. 515, 21 S. D. 24.

Illustrations of instructions properly refused within rule. Where, in a prosecution for assault, the court charged that the burden was on the prosecution to prove every element of the offense beyond a reasonable doubt, an instruction that, if the jury found from the evidence that some other person willfully, feloniously, and with malice aforethought assaulted prosecutor or committed any one of the lesser offenses included in that charge, and defendant aided and abetted in the commission of the offense, then he was himself guilty of the same crime was not objectionable for failure to require that such aiding and abetting must have been proved beyond a reasonable doubt. People v. Grow, 116 P. 369, 16 Cal. App. 147. Where the court has instructed the jury that, before they could convict the defendant of the offense charged, every material fact necessary to constitute such offense must be proved by the evidence beyond a reasonable doubt, it was not reversible error to instruct them that: "It is for you to determine from all the evidence in the case whether or not the liquors sold by the defendant, if any, upon which the state relies for conviction, were intoxicating, within the meaning of our statute," without repeating therein the charge with respect to burden of proof. State v. Kyne, 62 P. 728, 10 Kan. App. 277. Where the court charged that the state had the burden of establishing guilt beyond a reasonable doubt, and that, if such guilt was not so established, the jury should acquit, it was not error to refuse to charge that "if, from the evidence, there was any other hypothesis than the guilt of the accused, they must acquit him." State v. McDonald, 65 Me. 465.

[35] People v. Miller, 127 N. E. 58, 202 Ill. 318; State v. Ferrell, 152 S. W. 33, 246 Mo. 322.

[36] State v. Killian, 92 S. E. 499, 173 N. C. 792.

[37] Johnson v. State (Tex. Cr. App.) 67 S. W. 412.

sufficient, if there is a separate instruction on reasonable doubt;[38] so where, in a homicide case, the defendant interposes the plea of self-defense,[39] or where the defense is an alibi,[40] the court need not, in instructing on such defense, charge with respect to reasonable doubt, if it elsewhere gives a general charge on the subject of reasonable doubt, and, after charging that the guilt of defendant must be established to the satisfaction of the jury beyond a reasonable doubt, it is not necessary to repeat such statement in discussing the question whether a witness was an accomplice or an accessory.[41]

An instruction reiterating the right to convict on finding the defendant guilty beyond a reasonable doubt is improper.[42] A mere redundancy of instructions as to reasonable doubt, however, will not necessarily, and perhaps not usually, be a ground for reversal.[43]

[38] State v. Lawson, 145 S. W. 92, 239 Mo. 591.

[39] Eggleston v. State, 128 S. W. 1105, 59 Tex. Cr. R. 542; Wallace v. State (Tex. Cr. App.) 97 S. W. 1050.

[40] State v. Rockett, 87 Mo. 666.

[41] State v. Brandell, 129 N. W. 242, 26 S. D. 642.

[42] Comegys v. State, 137 S. W. 349, 62 Tex. Cr. R. 231.

[43] People v. Kuhn, 125 N. E. 882, 291 Ill. 154; People v. Sobzcak, 121 N. E. 592, 286 Ill. 157.

CHAPTER XVIII

FACTS CONCLUSIVELY ESTABLISHED OR FAILURE OR ABSENCE OF PROOF

§ 279. Facts established by uncontroverted evidence.
280. Failure or absence of proof.

§ 279. Facts established by uncontroverted evidence

Power of court to instruct as to undisputed facts, see ante, §§ 69, 70.

In some jurisdictions, where a material fact is established by the uncontroverted evidence, the court should charge on request as to the existence of such fact.[1] In other jurisdictions the giving of such an instruction is within the discretion of the trial court.[2] The court is not bound to charge the uncontroverted opinion of an expert as an absolute fact.[3]

§ 280. Failure or absence of proof

Power of court to affirm failure or absence of proof, see ante, § 71.

Where there is no evidence tending to prove a particular issue of fact, the court may properly so instruct the jury, whether requested to do so or not,[4] and the rule in most jurisdictions is that where there is no evidence to sustain an issue or establish a fact,[5] or where the evidence adduced is so light and inconclusive that no rational, well-constructed mind can infer from it the fact which it is offered to establish, it is the duty of the court, when applied to for that purpose, to inform the jury that there is no evidence

[1] Knight Iron & Metal Co. v. Orr, 81 So. 633, 202 Ala. 677; Fields v. Karter, 25 So. 800, 121 Ala. 329.

[2] New Ware Furniture Co. v. Reynolds, 84 S. E. 491, 16 Ga. App. 19; Scott v. Valdosta, M. & W. R. Co., 78 S. E. 784, 13 Ga. App. 65.

[3] Lawlor v. French (Com. Pl.) 14 Misc. Rep. 497, 35 N. Y. Supp. 1077.

[4] Feitl v. Chicago City Ry. Co., 113 Ill. App. 381, judgment affirmed 71 N. E. 991, 211 Ill. 279; King v. King, 56 S. W. 534, 155 Mo. 406; State v. Fiore, 108 A. 363, 93 N. J. Law, 362, judgment affirmed 110 A. 909; Eggleston v. City of Seattle, 74 P. 806, 33 Wash. 671; Drumheller v. American Surety Co., 71 P. 25, 30 Wash. 530.

[5] **Ind.** Hynds v. Hays, 25 Ind. 31.

Mass. Lane v. Old Colony & F. R. Co., 80 Mass. (14 Gray) 143.

Mich. Scripps v. Reilly, 38 Mich. 10.

Miss. Garnett v. Kirkman, 33 Miss. 389.

Neb. Hiatt v. Brooks, 17 Neb. 33, 22 N. W. 73.

N. C. Satterwhite v. Hicks, 44 N. C. 105, 57 Am. Dec. 577; Brown's Heirs v. Patton's Heirs, 35 N. C. 446.

Pa. Thomas v. Thomas, 21 Pa. (9 Harris) 315.

Proof of fraud. Where there is an allegation of fraud, but no evidence is adduced in its support, the court is properly requested to charge that fraud is not to be presumed; the presumption being against it. Price v. Heath, 41 Hun (N. Y.) 585.

to warrant their finding the particular fact in issue.[6] In some jurisdictions, however, the court cannot be required to declare to the jury that there is no evidence of a particular fact,[7] and in one jurisdiction it is held that a general prayer for a charge that there is no evidence of a particular fact is bad practice, since the court may not remember, and that the best method is to have opposing counsel indicate the evidence relied on to establish the fact in issue, and then have the court charge as to its effect.[8] Such an instruction with respect to material facts will, of course, be reversible error, if there is some evidence of the fact in question.[9]

[6] Belt v. Marriott, 9 Gill (Md.) 331; Lewis v. Baltimore & O. R. Co., 38 Md. 588, 17 Am. Rep. 521.

[7] **Ala.** Huguley v. State, 72 So. 764, 15 Ala. App. 189; McLaughlin v. Beyer, 61 So. 62, 181 Ala. 427; Southern Ry. Co. v. Hobson, 58 So. 751, 4 Ala. App. 408; Louisville & N. R. Co. v. Perkins, 51 So. 870, 165 Ala. 471, 21 Ann. Cas. 1073; Ætna Ins. Co. v. Kennedy, 50 So. 73, 161 Ala. 600, 135 Am. St. Rep. 160; Western Union Telegraph Co. v. McMorris, 48 So. 349, 158 Ala. 563, 132 Am. St. Rep. 46; Dorough v. G. M. Harrington & Son, 42 So. 557, 148 Ala. 305.

S. D. Cannon v. South Dakota Cent. Ry. Co., 137 N. W. 347, 29 S. D. 433.

Tex. Texas & P. R. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308.

[8] Lancaster County Bank v. Albright, 21 Pa. (9 Harris) 228.

[9] Wiese v. Gerndorf, 106 N. W. 1025, 75 Neb. 826; Zibbell v. City of Grand Rapids, 89 N. W. 563, 129 Mich. 659; Speed v. Herrin, 4 Mo. 356.

CHAPTER XIX

SUMMING UP THE WHOLE CASE OR SUMMARIZING THE ENTIRE EVIDENCE

§ 281. Duty of court.
282. Sufficiency of summary.
283. Remedy for inaccuracies or omissions.

Power of court to review the evidence, see ante, §§ 38, 39.

§ 281. Duty of court

On the ground of the impracticability of doing so, it has been held that instructions purporting to state all the facts of a case are not to be commended.[1] But in some jurisdictions, particularly in criminal cases, it is considered to be the duty of the court to aid the jury by recalling and collating the details of the evidence,[2] and to present the evidence to the jury in such light and with such comment that they may see its relevancy and pertinency to the particular issue on which it is admitted;[3] this duty existing, although a just, clear, and accurate presentation of the evidence may be regarded by the jury as bearing hardly on the accused.[4]

§ 282. Sufficiency of summary

If the court attempts to summarize and declare the contentions made by either party, it should do so with great care, and only after being assured that it appreciates, not only what those contentions are, but their relative importance as viewed by the counsel.[5] Where the trial judge undertakes to define the issues,

[1] Mayr v. Hodge & Homer Co., 78 Ill. App. 556.

[2] Bank of La Fayette v. Phipps, 101 S. E. 696, 24 Ga. App. 613; State v. Means, 50 A. 30, 95 Me. 364, 85 Am. St. Rep. 421.

If a cause is complicated, or the law applicable to it not to be supposed to be within the knowledge of the jury, and particularly if the trial is of a charge of a high criminal offense, it is the duty of the court to point out to the jury the controverted questions of fact, and see that the law applicable thereto is given to the jury, either in the instructions of counsel or in its own charge; and where this is not done, if justice is not accomplished a new trial will be granted. State v. Brainard, 25 Iowa, 572.

[3] People v. Fanning, 131 N. Y. 659, 30 N. E. 569.

[4] People v. Fanning, 131 N. Y. 659, 30 N. E. 569.

[5] Turner v. State, 63 S. E. 294, 131 Ga. 761; Duthey v. State, 111 N. W. 222, 131 Wis. 178.

Designating contention of one party as a theory. Charge referring to plaintiff's and defendant's "claims," and thereafter referring to plaintiff's claim as the "theory" of the plaintiff, was not objectionable as presenting plaintiff's case as a mere theory, instead of one supported by evidence; the terms "claims" and "theory" having been used in the same sense, as is customary by trial courts. Di Maio v. Yolen Bottling Works, 107 A. 497, 93 Conn. 597.

his statement should be complete and accurate,[6] and an instruction which, after stating substantially the allegations of the complaint, only says that the defendant denies certain of these allegations, without specifying them, is insufficient.[7] A summary by the court of the entire cause, or of the facts proven, must not omit some of the facts, or ignore any issue material to the cause.[8]

A statement of the evidence should be fair and impartial,[9] and if the court recapitulates the evidence for one side, it must give a like summary for the other.[10] When the trial judge undertakes to state the tendencies of the evidence, care should be exercised that the statement sets forth the tendencies making for the support of the contentions of both parties.[11]

Instructions purporting to summarize the principal facts, which minimize the evidence for one side,[12] or call the attention of the jury only to those facts which are favorable to one of the parties,[13] are consequently erroneous.

How far the trial judge should go in such a summary, however, depends very largely on the circumstances of the case, and to some extent upon the arguments of counsel.[14] The trial judge need only give the substance of the testimony, if counsel, after being asked if they wish a recapitulation of the evidence in detail, do not request it,[15] and the court is not required to recapitulate every item of the evidence,[16] it being sufficient if the review of the evidence fairly presents the course of the respective contentions of the parties, calls the attention of the jury to the principal questions at

[6] Key v. State, 94 S. E. 283, 21 Ga. App. 300.

[7] Rand v. Butte Electric Ry. Co., 107 P. 87, 40 Mont. 398.

[8] Belvidere City Ry. Co. v. Bute, 128 Ill. App. 620; Mayr v. Hodge & Homer Co., 78 Ill. App. 556; Delmar Oil Co. v. Bartlett, 59 S. E. 634, 62 W. Va. 700.

[9] Sawyer v. Worcester Consol. St. Ry., 120 N. E. 404, 231 Mass. 215; Siracusa v. Miller Const. Co., 43 Pa. Super. Ct. 466.

[10] Lamar v. King, 53 So. 279, 168 Ala. 285; Moon v. State, 77 S. E. 1088, 12 Ga. App. 614; Hash v. Commonwealth, 88 Va. 172, 13 S. E. 398; Sullivan v. Mauston Milling Co., 101 N. W. 679, 123 Wis. 360.

[11] Bates v. Birmingham Ry., Light & Power Co., 82 So. 14, 203 Ala. 54.

[12] McCabe v. City of Philadelphia, 12 Pa. Super. Ct. 383.

[13] Tanner v. Clapp, 139 Ill. App. 353.

[14] Commonwealth v. Colandro, 80 A. 571, 231 Pa. 343; Commonwealth v. Penrose, 27 Pa. Super. Ct. 101.

[15] State v. Gould, 90 N. C. 658.

[16] **U. S.** Stilson v. U. S., 40 S. Ct. 28, 250 U. S. 583, 63 L. Ed. 1154, affirming judgment (D. C. Pa.) U. S. v. Stilson, 254 F. 120; Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

N. C. State v. Morris, 10 N. C. (3 Hawks) 388.

Or. State v. Newlin, 182 P. 133, 92 Or. 589.

Pa. Wally v. Clark, 106 A. 542, 263 Pa. 322; Commonwealth v. Dennery, 102 A. 874, 259 Pa. 223.

issue,[17] and assists the jury to recall the evidence as a substantial whole and to appreciate its bearing;[18] nor is it reversible error for the court to recite the testimony for one side more fully than that for the other, if the substance of the testimony for both parties is stated impartially,[19] and the fact that the court takes more time in charging the jury in regard to the evidence for one side than he does in summing up the evidence for the other side does not of itself show an impropriety,[20] nor is it necessary to give the testimony of each witness separately,[21] or to give the exact words of witnesses,[22] or to recapitulate the testimony of each witness in the consecutive order in which he is examined.[23]

It is not improper for the court to state its memory of the evidence,[24] and where the facts or evidence are not complicated, it may be a sufficient summing up of the case for the court merely to read the notes of the evidence and charge the law in general terms.[25]

In a criminal case, in the absence of a request for more definite

[17] State v. Haney, 19 N. C. 390; Taylor v. Burrell, 7 Pa. Super. Ct. 461.

Rule under statute requiring summary. Where a statute required the court, in charging the jury, to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon," and defendant did not request the court so to charge, nor was there any objection or exception to the charge for failure to comply with the statute, it was held that error could not be predicated of the failure of the court to go fully into the evidence, as it was plain and simple, and the jury's attention was directed to the material evidence in behalf of defendant, and they were instructed that, if it was true, he was not guilty. State v. Pritchett, 106 N. C. 667, 11 S. E. 357. Where a defendant charged with a capital offense has pleaded "Not guilty," his consent that the judge need not read over his notes is not a waiver of his right under such statute to have the judge set forth such evidence as is required to give proper instructions. State v. Groves, 28 S. E. 262, 121 N. C. 563.

[18] Commonwealth v. Kaiser, 39 A. 299, 184 Pa. St. 493, 42 Wkly. Notes Cas. 26; McCosh v. Myers, 25 Pa. Super. Ct. 61.

Undesirability of referring to every item of evidence. It is not possible nor even desirable that the judge should refer to and emphasize every item of evidence on both sides in a way that counsel would consider adequate. In doing so he would run the risk of coming to speak as an advocate rather than a judge. Nor is he required to go over all the evidence on a particular point every time he refers to the point in the course of his charge. Commonwealth v. House, 36 Pa. Super. Ct. 363, judgment reversed 72 A. 804, 223 Pa. 487.

[19] Jamison v. Hawkins, 13 Pa. Super. Ct. 372.

[20] Commonwealth v. Clemmer, 42 A. 675, 190 Pa. 202, 43 Wkly. Notes Cas. 539.

[21] Maynard v. Tyler, 168 Mass. 107, 46 N. E. 413.

[22] Berkman v. Friedman, 174 N. Y. S. 163, 105 Misc. Rep. 350.

[23] State v. Jones, 97 N. C. 469, 1 S. E. 680.

[24] Haskell v. Cape Ann Anchor Works, 59 N. E. 1113, 178 Mass. 485, 4 L. R. A. (N. S.) 220.

[25] State v. Beard, 32 S. E. 804, 124 N. C. 811.

instructions, a statement that the grand jury has indicted the defendant for a named offense, and that he has filed a plea of not guilty, which makes the issue to be tried, sufficiently presents the issues.[26] The issues as defined by the statement of the court should be those finally presented to the jury on the pleadings and the evidence adduced.[27]

§ 283. Remedy for inaccuracies or omissions

A party complaining of any inadequacy in the presentation by the court of his contentions to the jury, or of any inaccuracy of the trial judge in stating the testimony or of the failure of such summary to include certain details of the evidence should call the attention of the judge to such inaccuracy or omission and give him an opportunity to rectify it.[28]

[26] Parks v. State, 100 S. E. 724, 24 Ga. App. 243. Faison v. State, 79 S. E. 39, 13 Ga. App. 180.

[27] Dawson County Irr. Co. v. Dawson County, 173 N. W. 696, 103 Neb. 692.

[28] **Ga.** Pettigrew v. State, 81 S. E. 446, 14 Ga. App. 462; Williams v. State, 48 S. E. 368, 120 Ga. 870.

Neb. Barton v. Shull, 97 N. W. 292, 70 Neb. 324.

N. C. State v. Chambers, 104 S. E. 670, 180 N. C. 705; State v. Coleman, 101 S. E. 261, 178 N. C. 757; Storey v. Stokes, 100 S. E. 689, 178 N. C. 409; State v. Martin, 92 S. E. 597, 173 N. C. 808; State v. Burton, 90 S. E. 561, 172 N. C. 939; State v. Grady, 83 N. C. 643.

Pa. Oehmler v. Pittsburg Rys. Co., 25 Pa. Super. Ct. 617.

Wis. Horr v. C. W. Howard Paper Co., 105 N. W. 668, 126 Wis. 160.

CHAPTER XX

GROUPING FACTS FOR PURPOSE OF DECLARING LAW THEREON OR DIRECTING VERDICT

§ 284. Necessity of hypothetical statement.
285. Propriety and necessity of instruction grouping facts.
286. Duty to include essential facts.
287. Duty not to include more than essential facts.

Power of court to declare law on hypothetical statement of facts, see ante, §§ 116, 117.

§ 284. Necessity of hypothetical statement

As we have seen in a preceding chapter, section 74, a charge asserting disputed facts, instead of stating them hypothetically, constitutes an invasion of the province of the jury. It follows, therefore, that, on conflicting evidence, an instruction declaring the law on a certain state of facts should be hypothetical in form.[1] Where the facts in a case are admitted, or not disputed, the court may charge directly on them without hypothesis,[2] and in some jurisdictions the rule is that in such case direct instructions ought to be given.[3]

[1] **Ala.** Shipp v. Shelton, 69 So. 102, 193 Ala. 658; Green v. Brady, 44 So. 408, 152 Ala. 507; Westbrook v. Fulton, 79 Ala. 510.

Ill. Hopkinson v. People, 18 Ill. 264.

Ky. Thompson v. Thompson, 56 Ky. (17 B. Mon.) 22; Barclay v. Blackburn, 29 Ky. (6 J. J. Marsh.) 115.

Md. Ricards v. Wedemeyer, 75 Md. 10, 22 Atl. 1101.

Mo. Watson v. Musick, 2 Mo. 29.

N. Y. Chapman v. Erie R. Co., 55 N. Y. 579; Gardner v. Clark, 17 Barb. 538; Gurney v. Smithson, 20 N. Y. Super. Ct. (7 Bosw.) 396.

N. C. Wilson v. Holley, 66 N. C. 408.

Pa. Bartley v. Williams, 66 Pa. 329; Delaware, L. & W. R. Co. v. Smith, 1 Walk. 88.

Using figures by way of illustration. Although it is not considered a safe practice, it is not reversible error for a judge, in charging the jury in a personal injury suit, to use figures by way of illustration in directing the jury how to estimate the present value of the loss of future earnings, where he clearly states to the jury that the figures are used merely by way of illustration, and with no intention of indicating what he thinks the verdict should be. Reed v. American Dyewood Co., 80 A. 873, 231 Pa. 431.

[2] **Ala.** Bynon v. State, 23 So. 640, 117 Ala. 80, 67 Am. St. Rep. 163; Carter v. Chambers, 79 Ala. 223; South & N. A. R. Co. v. McLendon, 63 Ala. 266; Nelms v. Williams, 18 Ala. 650; Williams v. Shackelford, 16 Ala. 318; Henderson v. Mabry, 13 Ala. 713.

Tex. Hedgepeth v. Robertson, 18 Tex. 858.

[3] **Ala.** Swift v. Fitzhugh, 9 Port. 39.

Ga. Thornton v. Lane, 11 Ga. 459.

Mich. Wisner v. Davenport, 5 Mich. 501.

N. Y. Powers v. Ingraham, 3 Barb. 576.

§ 285. Propriety and necessity of instruction grouping facts

In some jurisdictions the court is prohibited by statute from charging upon the effect of evidence, in the absence of a request so to do by one of the parties.[4] But while it is held that the practice of grouping facts on which a party relies is not to be encouraged, because not the safest method,[5] and because it tends unduly to magnify the importance of the matters suggested for special mention,[6] and because such grouping does not harmonize with the recognized distinction between the function of the court and jury in the determination of questions of fact,[7] it is nevertheless held in most jurisdictions that an instruction grouping the facts, so as to present the theory of one party or the other, and charging the law thereon, will not be erroneous,[8] where the grouping is

[4] **Ala.** Edmunds v. State, 76 So. 466, 16 Ala. App. 182; Birmingham Southern R. Co. v. Morris, 63 So. 768, 9 Ala. App. 530; Birmingham Ry., Light & Power Co. v. Elmitt, 57 So. 1015, 3 Ala. App. 664; Hughes v. Albertville Mercantile Co., 57 So. 98, 3 Ala. App. 462; Birmingham Ry., Light & Power Co. v. Murphy, 56 So. 817, 2 Ala. App. 588; Campbell v. State, 43 So. 743, 150 Ala. 70; Gafford v. State, 28 So. 406, 125 Ala. 1; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292.

Instructions improper within rule. Fidelity & Deposit Co. of Maryland v. Art Metal Const. Co., 50 So. 186, 162 Ala. 323.

Under the Alabama statute, the court may, however, when the evidence is in dispute, state the evidence and its tendencies, and in so doing may state the respective theories of the parties. Murray v. State, 69 So. 354, 13 Ala. App. 175; Dennis v. State, 20 So. 925, 112 Ala. 64. Shoemake v. State, 86 So. 151, 17 Ala. App. 461.

[5] St. Louis, B. & M. Ry. Co. v. Roddy (Tex. Civ. App.) 114 S. W. 902.

An instruction which states the facts from the standpoint of plaintiff, and tells the jury, if they believe these facts to be true, to find for plaintiff, is objectionable, as detailing the facts in evidence. Mitchell-Tranter Co. v. Ehmett, 65 S. W. 835, 23 Ky. Law Rep. 1788, 55 L. R. A. 710.

[6] Hanson v. City of Anamosa, 158 N. W. 591, 177 Iowa, 101; Van Norman v. Modern Brotherhood of America, 121 N. W. 1080, 143 Iowa, 536.

[7] Peterson v. Baker, 97 P. 373, 78 Kan. 337; Roberson v. Stokes, 106 S. E. 151, 181 N. C. 59.

Giving supplemental instructions to avoid misleading jury. Where an instruction groups together a number of facts or circumstances similar to, or identical with, those disclosed by the evidence and, assuming or taking for granted the existence of such facts or circumstances, draws legal conclusions therefrom, an improper impression may be made upon the minds of the jury, unless some other instruction is given, leaving it to the jury to determine the existence of such facts or circumstances, Swigart v. Hawley, 29 N. E. 883, 140 Ill. 186, and it is accordingly proper, and may be the duty of the court, to give such a supplemental instruction. People v. Chadwick, 76 Pac. 884, 143 Cal. 116; Swigart v. Hawley, 29 N. E. 883, 140 Ill. 186.

[8] Pittsburgh, C. & St. L. R. Co. v. Noel, 77 Ind. 110, following Louisville, N. A. & C. R. Co. v. Richardson, 66 Ind. 43, 32 Am. Rep. 94; Skiles v. State, 123 N. W. 447, 85 Neb. 401; Kerr Grain & Hay Co. v. Marion Cash Feed Co., 103 S. E. 375, 179 N. C. 654; State v. Watkins, 75 S. E. 22, 159 N. C. 480.

not such as to confuse or mislead the jury or indicate the opinion of the court,[9] and that in a proper case a party is entitled to such an instruction,[10] and in some jurisdictions it is held that a general instruction to render a certain verdict on finding certain facts is wrong only when it omits facts necessary to the conclusion.[11]

Such a hypothetical statement should have support in the evidence,[12] and should fairly present the case shown in evidence.[13] The facts included in such a statement must be the ultimate ones,[14] since, as shown in another place,[15] inferences of fact from other facts are exclusively for the jury to make.

§ 286. Duty to include essential facts

As indicated by the foregoing statement, an instruction which directs a particular verdict, if the jury find from the evidence that certain facts exist, must embrace all the facts and conditions necessary to such a verdict,[16] and an instruction which directs a ver-

[9] St. Louis S. W. Ry. Co. of Texas v. Byers (Tex. Civ. App.) 70 S. W. 558.

[10] **Colo.** Stoltz v. People, 148 P. 865, 59 Colo. 342.

Pa. Hood v. Hood, 2 Grant. Cas. 229.

Tex. Hannes v. Raube (Civ. App.) 210 S. W. 985; Texas & N. O. R. Co. v. Harrington (Civ. App.) 209 S. W. 685; Southern Kansas Ry. Co. of Texas v. Wallace (Com. App.) 206 S. W. 505, reversing judgment (Civ. App.) 152 S. W. 873; Texas & P. Ry. Co. v. Johnson, 118 S. W. 1117, 55 Tex. Civ. App. 495; St. Louis, B. & M. Ry. Co. v. Droddy (Civ. App.) 114 S. W. 902.

Wis. McDonell v. Dodge, 10 Wis. 106.

[11] Jackson v. Southern Pac. Co., 103 P. 1098, 11 Cal. App. 101.

[12] **Ga.** Jackson v. State, 88 Ga. 784, 15 S. E. 677; Willis v. Willis, 18 Ga. 13.

Minn. Chandler v. De Graff, 25 Minn. 88.

Mo. Wise v. Wabash R. Co., 115 S. W. 452, 135 Mo. App. 230; Bradford v. Pearson, 12 Mo. 71.

N. C. State v. Collins, 30 N. C. 407.

[13] Oliver v. State, 39 Miss. 526; Murphy's Hotel v. Cuddy's Adm'r, 97 S. E. 794, 124 Va. 207; Life Ins. Co. of Virginia v. Hairston, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989.

[14] Maltby v. Northwestern Virginia R. Co., 16 Md. 422.

[15] Ante, §§ 58–62.

[16] **Ala.** Alabama Great Southern R. Co. v. Loveman Compress Co., 72 So. 311, 196 Ala. 683; Louisville & N. R. Co. v. Rice, 101 Ala. 676, 14 So. 639; Pritchett v. Munroe, 22 Ala. 501; Dill v. Camp, 22 Ala. 249; Rowland v. Ladiga's Heirs, 21 Ala. 9.

Cal. Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114.

Colo. Kent v. Treworgy, 125 P. 128, 22 Colo. App. 441.

Ga. Towns v. Kellett, 11 Ga. 286;

Idaho. Johnson v. Fraser, 2 Idaho (Hasb.) 404, 18 P. 48; Deasey v. Thurman, 1 Idaho, 775.

Ill. Dowdey v. Palmer, 122 N. E. 102, 287 Ill. 42; Illinois Cent. R. Co. v. Warriner, 82 N. E. 246, 229 Ill. 91, affirming judgment 132 Ill. App. 301; Chicago Consol. Traction Co. v. Schritter, 78 N. E. 820, 222 Ill. 364, affirming judgment 124 Ill. App. 578; Bradley v. Vandalia R. Co., 207 Ill. App. 592; Conrad v. St. Louis, S. & P. R. Co., 201 Ill. App. 276; Richards v. Illinois Cent. R. Co., 197 Ill. App. 282; Reynolds v. Alton, Granite City & St. Louis Traction Co., 183 Ill. App. 538; Schultz v. Burnwell Coal Co., 180 Ill. App. 693; Carroll v. Chicago City Ry. Co., 180 Ill. App. 309; Fisch-

dict if the jury finds that the case as laid in the declaration is

er v. Chicago & W. I. R. Co., 171 Ill. App. 347; Pfohman v. Chicago & A. R. Co., 164 Ill. App. 190; Hennigh v. Cleveland, C., C. & St. L. Ry. Co., 143 Ill. App. 283; Gould v. Aurora, E. & C. Ry. Co., 141 Ill. App. 344; Harding v. Thuet, 124 Ill. App. 437; New Ohio Washed Coal Co. v. Hindman, 119 Ill. App. 287; Alton Light & Traction Co. v. Oller, 119 Ill. App. 181, judgment affirmed Same v. Oliver, 75 N. E. 419, 217 Ill. 15, 4 L. R. A. (N. S.) 399; Chicago City Ry. Co. v. O'Donnell, 114 Ill. App. 359; West Chicago St. Ry. Co. v. Winters, 107 Ill. App. 221; Dauchy Iron Works v. Toles, 107 Ill. App. 216; Chicago City Ry. Co. v. Mauger, 105 Ill. App. 579; McNulta v. Jenkins, 91 Ill. App. 309; Chicago Athletic Ass'n v. Eddy Electric Mfg. Co., 77 Ill. App. 204; Lake Shore & M. S. Ry. Co. v. Beam, 11 Ill. App. 215.

Ind. City of Decatur v. Eady, 115 N. E. 577, 186 Ind. 205, L. R. A. 1917E, 242; Chicago, I. & L. Ry. Co. v. Lake County Savings & Trust Co., 114 N. E. 454, 186 Ind. 358; Neeley v. Louisville & S. I. Traction Co., 102 N. E. 455, 53 Ind. App. 659; Bragg v. Eagan, 98 N. E. 835, 51 Ind. App. 513, Wyman v. Turner, 14 Ind. App. 118, 42 N. E. 652; Larue v. Russell, 26 Ind. 386.

Iowa. McNamara v. Dratt, 40 Iowa, 413.

Md. Carrington v. Graves, 89 A. 237, 121 Md. 567; Maryland & D. R. Co. v. Porter, 19 Md. 458; Peterson's Ex'rs v. Ellicott, 9 Md. 52; Beall v. Beall, 7 Gill, 233.

Miss. Dean v. Tucker, 58 Miss. 487; Meyer v. Blakemore, 54 Miss. 570.

Mo. Clayton Lumber Co. v. Seever (App.) 223 S. W. 442; Shortridge v. Raiffeisen, 222 S. W. 1031, 204 Mo. App. 106; Albritton v. Kansas City, 183 S. W. 239, 192 Mo. App. 574; Rissmiller v. St. Louis & H. Ry. Co. (App.) 187 S. W. 573; Birtwhistle v. Woodward, 95 Mo. 113, 7 S. W. 465; Boothe v. Loy, 83 Mo. App. 601; Thomas v. Babb, 45 Mo. 384; Chappell v. Allen, 38 Mo. 213.

Neb. Standard Distilling & Distributing Co. v. Harris, 106 N. W. 582, 75 Neb. 480; Levy v. Cunningham, 76 N. W. 882, 56 Neb. 348; Consaul v. Sheldon, 35 Neb. 247, 52 N. W. 1104.

Okl. Murphy v. Hood & Lumley, 73 P. 261, 12 Okl. 593.

Tex. Bering Mfg. Co. v. Femelat, 79 S. W. 869, 35 Tex. Civ. App. 36; Willoughby v. Townsend, 45 S. W. 861, 18 Tex. Civ. App. 724.

Va. Winn Bros. & Baker v. Lipscombe, 103 S. E. 623, 127 Va. 554; Carpenter v. Smithey, 88 S. E. 321, 118 Va. 533; Jones' Adm'r v. City of Richmond, 88 S. E. 82, 118 Va. 612; Hawkins & Buford v. Edwards, 84 S. E. 654, 117 Va. 311; Pocahontas Consol. Collieries Co. v. Hairston, 83 S. E. 1041, 117 Va. 118; Hughes v. Kelly, 30 S. E. 387.

W. Va. Penix v. Grafton, 103 S. E. 106, 86 W. Va. 278; Stuck v. Kanawha & M. Ry. Co., 89 S. E. 280, 78 W. Va. 490; Petry v. Cabin Creek Consol. Coal Co., 88 S. E. 105, 77 W. Va. 654; McVey v. St. Clair Co., 38 S. E. 648, 49 W. Va. 412; Ward v. Ward, 35 S. E. 873, 47 W. Va. 766; Claiborne v. Chesapeake & O. Ry. Co., 33 S. E. 262, 46 W. Va. 363; Price v. Chesapeake & O. R. Co., 33 S. E. 255, 46 W. Va. 538; McCreery's Adm'x v. Ohio River R. Co., 27 S. E. 327, 43 W. Va. 110; Wooddell v. West Virginia Imp. Co., 38 W. Va. 23, 17 S. E. 386; Thompson v. Douglass, 35 W. Va. 337, 13 S. E. 1015.

It is proper to refuse an instruction predicated on a partial and imperfect state of facts as shown by the testimony. City of Atchison v. King, 9 Kan. 550; Himes v. McKinney, 3 Mo. 382.

Instructions erroneous within rule. In a passenger's action against a carrier for failure to permit her to alight at her destination, a charge that before a verdict could be rendered for plaintiff the jury must be reasonably satisfied that the station was not called in a distinct and audible tone in the car in which plaintiff was riding held properly refused, as

proved should not be given where the declaration does not con-

failing to hypothesize that the name of the station was called a reasonable time before plaintiff was to get off. Central of Georgia Ry. Co. v. Barnitz, 84 So. 474, 17 Ala. App. 201. In prosecution for grand larceny by stealing sawlogs, instruction that if the jury found the defendant took the logs but claimed ownership and manifested ownership by words and acts at the time, then this would rebut any felonious taking under the law, and defendant was not guilty, was properly refused, since it disregarded the element of good faith in the claim of ownership. Bridgeman v. State (Ark.) 225 S. W. 1. Where an interest in a logging contract has been sold under representations amounting to a warranty, and it appears that vendee is entitled to an abatement from the purchase money because of damages occasioned by the breach of the warranty, it is error to give a binding instruction which ignores the evidence of the breach of the warranty. Myers v. Cook (W. Va.) 104 S. E. 593. While negligence may be predicated as a matter of law on the fact that an automobile is being driven in the nighttime at such a rate of speed that it cannot be stopped within a radius illuminated by its lights, it was erroneous for the court to lay down the general rule of law that it is negligence per se to drive an automobile at night at a rate of speed which will not permit stopping within such distance; such instruction not taking into account the degree of darkness of the night or known conditions of the road. Ham v. Los Angeles County (Cal. App.) 189 P. 462. Where, under the evidence, part of the damages to plaintiff's lands might have been the result of an ordinary flood, in connection with defendant's filling in the lowlands on one side of the stream, though part of it might have been the result of an extraordinary flood, an instruction requesting a verdict for defendant on the finding of there having been an extraordinary flood was properly refused, as based on a part of the evidence only. Sloss-Sheffield Steel & Iron Co. v. Mitchell, 52 So. 69, 167 Ala. 226.

Instructions not improper within rule. In an action against a railroad company, an instruction that if the jury believed from the evidence that the engine was derailed, and that the derailment, if any, was caused by the condition they found the track to have been in, yet, if they believed from the evidence, that the defendant was not negligent in having and permitting the track to be in the condition it was in, or if they believed from the evidence that plaintiff was not injured, or if they believed that the track was not in a safe condition, and that such condition was occasioned solely by unusual rainfall, which could not have been foreseen, they should return a verdict for defendant, was not objectionable as stating all the terms and conditions upon which defendant was entitled to a verdict, and as affirmatively excluding all other matters. Galveston, H. & S. A. Ry. Co. v. Roberts (Tex. Civ. App.) 91 S. W. 375. In an action against a railroad company, an instruction that if the jury believed from the evidence that the railroad track at the place where the engine was derailed was in a defective condition, and that defendant was negligent, and such negligence, if any, was the direct cause of plaintiff's injuries, if any, they should find for plaintiff, was not objectionable as undertaking to submit all the issues and excluding the principal defense, that the action was due to a hidden defect in the embankment which could not have been discovered. Galveston, H. & S. A. Ry. Co. v. Roberts (Tex. Civ. App.) 91 S. W. 375.

Charge on particular phase of case. If an instruction in an action for breach of contract directs a verdict for either party or amounts to such a direction in case the jury shall find certain facts, it must necessarily contain all the facts which will authorize the verdict directed, and it is immaterial that it does not undertake to instruct the jury as to the

tain all the averments necessary to entitle the plaintiff to recover.[17]

Prayers for instruction which conclude with a direction to find a verdict for the party offering them must include every fact and circumstance in evidence that might justify an adverse conclusion, and make it clear that, on the evidence thus presented, the adverse party has no right to a verdict in his favor.[18] If an instruction directing a verdict on the finding of facts so grouped omits an essential fact, the omission cannot be supplied by another instruction.[19]

In criminal cases an instruction purporting to state hypothetically the facts which, if believed by the jury, will warrant a conviction, is erroneous if it omits an element necessary to such conviction,[20] and where an accused asks for instructions embodying the principle of law entitling him to an acquittal, all the elements required to establish such principle must be stated among the facts.[21]

If such an instruction, however, embraces all the ultimate or essential facts, its omission to recite circumstances not controlling will not render it erroneous,[22] and the omission of a material element will constitute harmless error, where the record shows that

whole case but only as to particular parts of the contract. Farmers' League & Community Telephone Ass'n v. Ohio & Mississippi Valley Telephone Co., 194 Ill. App. 166.

Charge on one of two theories of case. In the absence of a motion to make more definite and certain a petition so drawn as to permit a recovery by plaintiff for noncompliance with a condition precedent in a sale or for breach of warranty, the court is not in error in charging on either theory, but a charge on either theory must include all the essential elements of a recovery on such theory. Henry Gaus & Sons' Mfg. Co. v. Magee, Lattimore & La Berge Mfg. Co., 42 Mo. App. 307.

[17] Peters v. Howard, 206 Ill. App. 610; Hoxsey v. St. Louis & S. Ry. Co., 171 Ill. App. 109; Latham v. Cleveland, C., C. & St. L. Ry. Co., 164 Ill. App. 559.

[18] United States v. Metropolitan Club of City of Washington, 11 App. D. C. 180.

[19] Gage v. City of Vienna, 196 Ill. App. 585; American Sheet & Tin Plate Co. v. Bucy, 87 N. E. 1051, 43 Ind. App. 501.

[20] Gregg v. People, 98 Ill. App. 170; Rahke v. State, 81 N. E. 584, 168 Ind. 615; Davidson v. State, 34 N. E. 972, 135 Ind. 254; Bode v. State, 113 N. W. 996, 80 Neb. 74.

Instructions improper within rule. In a prosecution for larceny of a yearling, where defendant claimed that he bought the animal from another and the whole defense was bottomed on that theory, a general instruction, purporting to cover all elements of the offense, which after charging on the burden of proof authorized conviction, if defendant converted to his own use the animal and it belonged to the prosecuting witness, was erroneous because it omitted the essential element of felonious or criminal intent. Johnson v. State, 219 S. W. 32, 142 Ark. 573.

[21] State v. Guidor, 37 So. 622, 113 La. 727.

[22] Farley v. Smith, 39 Ala. 38; Illinois Cent. R. Co. v. Byrne, 68 N. E. 720, 205 Ill. 9, affirming judgment 105 Ill. App. 96; Chicago & A. R. Co. v.

the negation of the element omitted was not relied on by the adverse party.[23]

Moreover, a party may ask for a charge on the facts as he sees them, and is not required to include facts upon which his adversary relies.[24] All that the law requires is that an instruction based upon some particular hypothesis warranted by the evidence, which undertakes to summarize the elements in the cause essential to a recovery upon that theory, must not omit any essential matter,[25] and it will be sufficient if all the essential facts are included, although only by inference.[26]

§ 287. Duty not to include more than essential facts

An instruction in which the court groups certain facts, and declares that if the jury find such facts to exist a party will be entitled to a certain verdict, is erroneous, if the party would be so entitled on the finding of any one of such facts.[27]

Harrington, 61 N. E. 622, 192 Ill. 9; affirming judgment 90 Ill. App. 638.

[23] St. Louis, A. & T. H. R. Co. v. Holman, 155 Ill. 21, 39 N. E. 573, affirming 53 Ill. App. 617.

[24] **Ill.** Kellyville Coal Co. v. Strine, 75 N. E. 375, 217 Ill. 516; O'Leary v. Zindt, 109 Ill. App. 309; Mt. Olive & S. Coal Co. v. Rademacher, 60 N. E. 888, 190 Ill. 538, affirming judgment 92 Ill. App. 442.

Md. Woodward v. Dudley A. Tyng & Co., 91 A. 166, 123 Md. 98; Williams v. Woods, 16 Md. 220; Day v. Day, 4 Md. 262.

Mo. Harrod v. Hammond Packing Co., 102 S. W. 637, 125 Mo. App. 357; Hester v. Jacob Dold Packing Co., 84 Mo. App. 451.

Right of plaintiff to exclude affirmative defense. Since want of probable cause is a part of the cause of action of the plaintiff in an action for malicious prosecution, an instruction in such an action, authorizing verdict for plaintiff on finding malice alone, and ignoring the element of want of probable cause, is erroneous; the rule that an instruction covering plaintiff's case need not include an affirmative defense, but may leave such defense to be covered by defendant's instructions, not applying. De Witt v. Syfon, 211 S. W. 716, 202 Mo. App. 469.

[25] Springfield Consol. Ry. Co. v. Hoeffner, 51 N. E. 884, 175 Ill. 634, affirming judgment 71 Ill. App. 162.

[26] Reno v. City of St. Joseph, 169 Mo. 642, 70 S. W. 123.

[27] Hightower v. State, 110 S. W. 750, 53 Tex. Cr. R. 486.

CHAPTER XXI

EXCLUSION OF EVIDENCE FROM CONSIDERATION OF JURY

§ 288. Evidence improperly admitted.
289. Evidence which has been excluded, withdrawn, or already stricken out.
290. Evidence on issues not submitted to jury.
291. Effect of erroneous refusal to instruct against considering certain evidence.
292. Necessity of request for instruction to disregard evidence.

§ 288. Evidence improperly admitted

Where evidence which is not material to the issues, or which is improper for any reason, has been admitted, the court may,[1] and should,[2] on request,[3] by its charge correct such error, by ex-

[1] **Ala.** Foxworth v. Brown, 24 So. 1, 120 Ala. 59.

Ga. Wyatt v. State, 88 S. E. 718, 18 Ga. App. 29; Cook v. J. I. Case Threshing Mach. Co., 87 S. E. 832, 17 Ga. App. 543; Williams v. State, 33 S. E. 648, 107 Ga. 721; Myers v. State, 25 S. E. 252, 97 Ga. 76.

Ind. Utter v. Vance, 7 Blackf. 514.

Ky. Chesapeake & O. Ry. Co. v. Stein, 134 S. W. 1169, 142 Ky. 515.

Mo. White v. Gray, 32 Mo. 447.

Tex. Stevens v. State (Cr. App.) 49 S. W. 105.

Wis. Campbell v. Moore, 3 Wis. 767.

Compare Hall v. Earnest, 36 Barb. (N. Y.) 585.

Statements by counsel. It is proper to instruct the jury to disregard statements by counsel, not sworn as witnesses, as to their personal knowledge of adverse witnesses, made to discredit them. Van Alstine v. Kaniecki, 109 Mich. 318, 67 N. W. 502.

[2] **Colo.** Rio Grande Southern R. Co. v. Campbell, 96 P. 986, 44 Colo. 1.

Ill. Pittman v. Gaty, 10 Ill. (5 Gilman) 186.

Ind. Gallivan v. Strickler, 118 N. E. 679, 118 Ind. 201.

Iowa. International Harvester Co. of America v. Chicago, M. & St. P. Ry. Co., 172 N. W. 471, 186 Iowa, 1207; Dilly v. Paynsville Land Co., 155 N. W. 971, 173 Iowa, 536.

Me. Harlow v. Perry, 96 A. 775, 114 Me. 460, Ann. Cas. 1918C, 37.

Mo. Smith v. Bailey, 209 S. W. 945, 200 Mo. App. 627; Gutzweiler's Adm'r v. Lackmann, 39 Mo. 91.

N. M. Price v. Wood, 54 P. 231, 9 N. M. 397.

Ohio. Geiger v. State, 71 N. E. 721, 70 Ohio St. 400; Henkle v. McClure, 32 Ohio St. 202.

Pa. Commonwealth v. Duffy, 49

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[3] **Ga.** Schmidt v. Mitchell, 43 S. E. 371, 117 Ga. 6.

Ill. Barr v. Wilmington Coal Min. & Mfg. Co., 5 Ill. App. (5 Bradw.) 442.

Ind. Eppert v. Hall, 133 Ind. 417, 31 N. E. 74, 32 N. E. 713.

Kan. Guthrie v. Merrill, 4 Kan. 187.

N. Y. Woolsey v. Trustees of Village of Ellenville, 50 N. E. 270, 155 N. Y. 573, affirming judgment, 32 N. Y. S. 546, 84 Hun, 236; O'Dell v. Bonta, 142 N. Y. S. 179, 157 App. Div. 349. Harrington v. City of Buffalo, 50 Hun, 601, 2 N. Y. Supp. 333, judgment reversed 121 N. Y. 147, 24 N. E. 186.

S. C. Fass v. Western Union Telegraph Co., 64 S. E. 235, 82 S. C. 461.

Tex. Ft. Worth & D. C. Ry. Co. v. Speer (Civ. App.) 212 S. W. 762; Occident Fire Ins. Co. v. Linn (Civ. App.) 179 S. W. 523; W. P. Carmichael Co. v. Miller (Civ. App.) 178 S. W. 976; Byrd Irr. Co. v. Smyth (Civ. App.) 157 S. W. 260.

cluding the consideration of such evidence from the jury, or directing them to disregard it. Under the above rule the jury may be instructed to disregard certain evidence if they find certain things to be true,[4] and counsel, objecting to a hypothetical question asked of an expert witness, on the ground that it assumes facts not proved, may have the court instruct the jury to disregard the testimony of the expert unless they are satisfied that all the matters assumed as facts in such question, and on which it is based, are true,[5] and where the direct testimony of a witness is entirely destroyed by his cross-examination, it is proper to tell the jury to disregard such direct testimony.[6]

Where the state seeks to introduce evidence as a link in the chain of circumstances against the defendant in a criminal case, its relevancy can only be determined after the judge has heard it, and, if irrelevant, he must instruct the jury to disregard it.[7] Where, however, incompetent evidence is brought out by a party in cross-examining the witnesses for the other side, he is not entitled to have the jury instructed to disregard such evidence.[8]

Pa. Super. Ct. 344; Commonwealth v. Lynch, Id., 370; Commonwealth v. Sweeney, Id.; Commonwealth v. Shobert, Id. 371; Commonwealth v. Debussey, Id.; Devling v. Williamson, 9 Watts, 311.

S. C. Massillon Sign & Poster Co. v. Buffalo Lick Springs Co., 61 S. E. 1098, 81 S. C. 114.

Tenn. Low v. State, 65 S. W. 401, 108 Tenn. 127.

Tex. Bartlesville Zinc Co. v. Campania Minera Ygnacio Rodriguez Ramos, S. A. (Civ. App.) 202 S. W. 1048; Scott v. State, 166 S. W. 729, 73 Tex. Cr. R. 622; Orner v. State, 143 S. W. 935, 65 Tex. Cr. R. 137. Bradley v. State, 132 S. W. 484, 60 Tex. Cr. R. 398; Hollins v. State (Cr. App.) 69 S. W. 594; Wilson v State, 51 S. W. 916, 41 Tex. Cr. R. 115.

Wash. Bentley v. Western Union Telegraph Co., 167 P. 1127, 98 Wash. 431, L. R. A. 1918B, 965.

W. Va. Patton v. Elk River Nav. Co., 13 W. Va. 259.

Evidence whose relevancy depends on introduction of other evidence. Evidence, the relevancy of which does not appear at the time, may nevertheless be competent, where it is proposed to connect it with the fact to be proved by other evidence; but, if it should not be so connected, the court should instruct the jury to disregard it. Bedell v. Janney, 9 Ill. (4 Gilman) 193.

[4] Dowdy v. Watson, 41 S. E. 266, 115 Ga. 42; Pittman v. Gaty, 10 Ill. (5 Gilman) 186.

[5] Hallawell v. Union Oil Co. of California, 173 P. 177, 36 Cal. App. 672.

[6] Niendorff v. Manhattan Ry. Co., 4 App. Div. 46, 38 N. Y. S. 690.

[7] State v. McKowen, 53 So. 353, 126 La. 1075.

[8] Smith v. State, 73 So. 188, 72 Fla. 263; Gray v. State, 178 S. W. 337, 77 Tex. Cr. R. 221.

Evidence brought out by accused on cross-examination of accomplice. Where, on the cross-examination of an accomplice, defendant made the witness his own, and brought out acts and declarations not inquired about by the state, made by the witness after the killing in defendant's absence, which tended to connect him with the crime, defendant was not entitled to an instruction eliminating such acts and declarations from the case. Benton v. State, 94 S. W. 688, 78 Ark. 284.

Any instruction which makes it plain to the jury that evidence improperly admitted is not to be included in their deliberations is sufficient for that purpose. Ordinarily an instruction that the jury are not to consider such evidence will constitute a sufficient withdrawal of it.[9] Such an instruction should clearly specify the evidence which is to be disregarded;[10] but where a ruling striking out certain evidence at the trial is plain, an instruction directing the jury not to consider the evidence so stricken in its presence is not objectionable for failure to identify the stricken matter.[11]

§ 289. Evidence which has been excluded, withdrawn, or already stricken out

There cannot be error in withdrawing from the jury by an instruction evidence which has already been stricken on motion;[12] but, as a general rule, where improper evidence has been ruled out, it is unnecessary to instruct the jury to disregard it,[13] particularly where the court has instructed the jury to disregard all evidence which has been ruled out.[14]

The court may refuse to instruct the jury that they must disregard evidence which has been withdrawn,[15] and where a particular issue has been withdrawn from the jury by an instruction, it

[9] Kahn v. Triest-Rosenberg Cap Co., 73 P. 164, 139 Cal. 340; Shephard v. Goben, 142 Ind. 318, 39 N. E. 506; Wright v. Gillespie, 43 Mo. App. 244.

Use of "may" instead of "must." In a trial for killing an officer who sought to arrest accused for an offense, on the district attorney withdrawing his contention that such offense was a felony, an instruction that the jury "may" disregard all evidence concerning such offense was not erroneous for using the word "may" instead of "must"; the objection not having been taken at the trial, and it appearing that the jury must have understood that they were required to disregard the evidence. Commonwealth v. Phelps, 95 N. E. 868, 209 Mass. 396, Ann. Cas. 1912B, 566.

[10] Bess v. Commonwealth, 77 S. W. 849, 116 Ky. 927, 25 Ky. Law Rep. 1091; Hall v. State, 66 S. W. 783, 43 Tex. Cr. R. 479.

[11] Considine v. City of Dubuque, 102 N. W. 102, 126 Iowa, 283.

[12] Central Indiana Ry. Co. v. Clark, 112 N. E. 892, 63 Ind. App. 49.

[13] **Cal.** People v. Pasqueria, 159 P. 173, 30 Cal. App. 625.

Ill. Yezner v. Roberts, Johnson & Rand Shoe Co., 140 Ill. App. 61.

Ind. City of La Porte v. Henry, 83 N. E. 655, 41 Ind. App. 197; Pfaffenback v. Lake Shore & M. S. Ry. Co., 142 Ind. 246, 41 N. E. 530; Grand Rapids & I. R. Co. v. Horn, 41 Ind. 479.

Iowa. State v. Foster, 114 N. W. 36, 136 Iowa, 527.

Mich. People v. Sharp, 127 N. W. 758, 163 Mich. 79.

Mo. Dobbs v. Cates' Estate, 60 Mo. App. 658.

W. Va. State v. Gebhart, 73 S. E. 964, 70 W. Va. 232.

[14] State v. Roupetz, 85 P. 778, 73 Kan. 663; State v. Tracy, 129 N. W. 1033, 21 N. D. 205.

[15] Russell v. Bush, 71 So. 397, 196 Ala. 309; Brown v. Matthews, 79 Ga. 1, 4 S. E. 13.

is not necessary to state further that the evidence on that subject is also withdrawn.[16] Where, however, after testimony given by a witness has been ruled out, he repeats it, the jury should be admonished not to consider his statements,[17] and where evidence erroneously admitted is subsequently excluded, it is held in some jurisdictions that the court should direct the jury not to consider such evidence for any purpose.[18] In other jurisdictions it is held that where improper evidence is admitted, and subsequently stricken out as soon as its inadmissibility develops, the failure of the court to instruct the jury on the matter is not error, in the absence of any request for such an instruction.[19] While, where the court during the trial has once told the jury to disregard evidence improperly admitted, it may be error for it to refuse a request to repeat such direction in its general charge,[20] it is not required of its own motion to so instruct a second time.[21]

§ 290. Evidence on issues not submitted to jury

It is error to instruct the jury to consider evidence on an issue not submitted to them.[22]

§ 291. Effect of erroneous refusal to instruct against considering certain evidence

Error in refusing to tell the jury to disregard certain evidence is not cause for reversal, where it is apparent that the jury did not consider it.[23]

§ 292. Necessity of request for instruction to disregard evidence

The failure of the trial court to instruct the jury to disregard incompetent or immaterial evidence, which has been admitted without objection,[24] or evidence which has been excluded or stricken out as inadmissible,[25] or evidence which, competent at the time of

[16] Kirsher v. Kirsher, 94 N. W. 846, 120 Iowa, 337.

[17] United States Health & Accident Ins. Co. v. Jolly (Ky.) 118 S. W. 281.

[18] Jones v. Bynum, 66 So. 639, 189 Ala. 677; Varnon v. Nabors, 66 So. 593, 189 Ala. 464.

[19] Pierson v. Illinois Cent. R. Co., 112 N. W. 923, 149 Mich. 167; Martin v. McCray, 171 Pa. 575, 33 A. 108.

[20] Jones v. United States Mut. Acc. Ass'n of City of New York, 92 Iowa, 652, 61 N. W. 485.

[21] Fink v. Ash, 99 Ga. 106, 24 S. E. 976.

[22] Hammer v. Chicago, R. I. & P. Ry. Co., 70 Iowa, 623, 25 N. W. 246.

[23] Frizelle v. Kaw Valley Paint & Oil Co., 24 Mo. App. 529.

[24] Co-operative Raw Fur Co. v. American Credit Indemnity Co. (C. C. A. Mich.) 240 F. 67, 153 C. C. A. 103; State v. Fortin, 76 A. 896, 106 Me. 382, 21 Ann. Cas. 454; Martin v. Coleman (Com. Pl.) 14 Misc. Rep. 505, 35 N. Y. Supp. 1069; McRae v. Malloy, 93 N. C. 154; Martin v. Seaboard Air Line Ry., 48 S. E. 616, 70 S. C. 8.

[25] **Iowa.** Croft v. Chicago, R. I. & P. Ry. Co., 109 N. W. 723, 134 Iowa, 411.

its admission, becomes subsequently incompetent or immaterial,[26] will as a general rule not constitute error, in the absence of a request for such an instruction.

Kan. Gulliford v. McQuillen, 89 P. 927, 75 Kan. 454.

Mich. Barnett v. Farmers' Mut. Fire Ins. Co., 73 N. W. 372, 115 Mich. 247.

N. Y. Gall v. Funkenstein, 21 N. E. 1119; Gall v. Gall, 114 N. Y. 109, 21 N. E. 106.

Tex. Russell v. Nall, 79 Tex. 664, 15 S. W. 635.

[26] McGee v. Kinsey, 1 Phila. (Pa.) 326; Aitkin's Heirs v. Young, 12 Pa. (2 Jones) 15, 51 Am. Dec. 608; Blum v. Jones (Tex. Civ. App.) 23 S. W. 844.

CHAPTER XXII

EXPLAINING PURPOSE FOR WHICH PARTICULAR EVIDENCE MAY BE CONSIDERED

§ 293. General rule as to propriety and necessity of instructions.
294. Specific applications of rule.
295. Evidence only proper as bearing on the credibility of a witness.
296. Evidence of other offenses.
297. Evidence competent only for or against one of two or more coparties.
298. Limitations of rule.
299. Effect of limiting scope of evidence at time of its admission.
300. Necessity of request for limiting instructions.

Stating purpose of evidence as invading province of jury, see ante, § 45.

§ 293. General rule as to propriety and necessity of instructions

Where certain evidence is of such a character as may naturally be misapprehended by the jury and accorded weight on questions to which it has no proper application, a cautionary instruction as to the effect of such evidence is entirely proper,[1] and the general rule is, both in civil[2] and in criminal cases,[3] that in such a case

[1] Hanley v. Fidelity & Casualty Co., 161 N. W. 114, 180 Iowa, 805; Same v. Travelers' Protective Ass'n, 161 N. W. 125.

[2] Adkins v. Brett, 193 P. 251; Cleveland, C., C. & St. L. Ry. Co. v. Gossett, 87 N. E. 723, 172 Ind. 525; In re Kah's Estate, 113 N. W. 563, 136 Iowa, 116; Tankersley v. Lincoln Traction Co., 163 N. W. 850, 101 Neb. 578.

Instructions proper within rule. In a case where incompetent testimony was admitted without objection on cross-examination showing that plaintiff had consulted two other attorneys who had declined to take his case, and where an attempt was made to show that plaintiff had learned from them why he had no cause of action, to the end that the credibility of his evidence might be affected, an instruction that it was immaterial how many lawyers plaintiff visited before bringing the action, but if as a result of any visit he afterwards told a different story, and which was not true, that could be taken into consideration, but that the lawyers' views of the matter had nothing to do with the case, was properly given to eliminate the effect of the testimony as to the lawyers' opinions as to the merits of the case, and to leave for the jury's consideration so much of the testimony as might tend to influence or color plaintiff's testimony. Pereira v. Star Sand Co., 94 P. 835, 51 Or. 477. Where one person testifies that he put a certain amount of money in a box, and sent it to another, and the latter testifies that no money was received in the box, error cannot be predicated of a charge that the amount of money which was deposited in the box and sent should be determined from the testimony of the former witness alone. Murray v. Norwood, 77 Wis. 405, 46 N. W. 499.

[3] **Cal.** People v. Botkin, 98 P. 861, 9 Cal. App. 244.

Ky. Ellis v. Commonwealth, 143 S. W. 425, 146 Ky. 715.

La. State v. Honore, 46 So. 655, 121 La. 573.

Mont. State v. Nielson, 100 P. 229, 38 Mont. 451.

Okl. Gray v. State, 111 P. 825, 4 Okl. Cr. 292, 32 L. R. A. (N. S.) 142.

it is proper for the court to tell the jury for what purpose evidence which has been admitted may be considered, and that, where evidence which is competent for one purpose, but not for another, is admitted, the court may,[4] and should,[5] upon request,[6] limit its

[4] **Ga.** Pratt Engineering & Machine Co. v. Trotti, 83 S. E. 107, 142 Ga. 401.

Ill. Erickson v. Fred Miller Brewing Co., 189 Ill. App. 394; Lowe v. Alton Baking & Catering Co., 158 Ill. App. 458.

Ky. Brents v. Louisville & N. R. Co., 104 S. W. 961, 31 Ky. Law Rep. 1216.

Mo. Andrew v. Linebaugh, 169 S. W. 135, 260 Mo. 623; Buckry-Ellis v. Missouri Pac. Ry. Co., 138 S. W. 912, 158 Mo. 499; Home Lumber Co. v. Hartman, 45 Mo. App. 647.

Neb. Raapke & Katz Co. v. Schmoeller & Mueller Piano Co., 118 N. W. 652, 82 Neb. 716.

Tex. Buchanan v. Houston & T. C. R. Co. (Civ. App.) 180 S. W. 625; Carl v. Wolcott (Civ. App.) 156 S. W. 334; Lehmann v. Medack (Civ. App.) 152 S. W. 438; Armstrong v. Burt, 138 S. W. 172; Southern Kansas Ry. Co. of Texas v. Morris (Civ. App.) 99 S. W. 433, judgment affirmed 102 S. W. 396, 100 Tex. 611, 123 Am. St. Rep. 834.

[5] **U. S.** (C. C. N. Y.) Hollenback v. Hand, 189 F. 929.

Conn. Barlow Bros. Co. v. Parsons, 49 A. 205, 73 Conn. 696; Smith v. Phipps, 65 Conn. 302, 32 A. 367.

Ill. Webster v. Enfield, 10 Ill. (5 Gilman) 298.

Iowa. Kircher v. Incorporated Town of Larchwood, 95 N. W. 184, 120 Iowa, 578.

Ky. Ditto v. Slaughter, 92 S. W. 2, 28 Ky. Law Rep. 1164.

Md. Haney v. Marshall, 9 Md. 194.

N. C. Croom v. Whitehead, 93 S. E. 854, 174 N. C. 305; Burton v. Wilmington & W. R. Co., 84 N. C. 192; Luther v. Skeen, 53 N. C. 356.

Okl. St. Louis & S. F. R. Co. v. Murray, 150 P. 884, 50 Okl. 64.

Or. Dorn v. Clarke-Woodward Drug Co., 133 P. 351, 65 Or. 516.

Tex. Commonwealth Bonding & Casualty Co. v. Hendricks, 168 S. W. 1007; Puryear v. State, 28 Tex. App. 73, 11 S. W. 929; Kelley v. State, 18 Tex. App. 262; Branch v. State, 15 Tex. App. 96; Weir v. McGee, 25 Tex. Supp. 20.

Utah. McKinney v. Carson, 99 P. 660, 35 Utah, 180.

Illustrations of cases in which such limiting instructions required. Where plaintiff sues for injuries sustained from an attack by defendant's dog, evidence of the general reputation of the dog for being vicious is competent only on the issue of defendant's knowledge of the dog's disposition, and it is reversible error to refuse an instruction so limiting the testimony. Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698. Where, in an action against an electric light company to recover the amount of a judgment against plaintiff for causing the death of a boy by defective insulation, plaintiff introduced in evidence the record in the original suit to show

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[6] **Ala.** Birmingham Trust & Savings Co. v. Currey, 57 So. 962, 175 Ala. 373, Ann. Cas. 1914D, 81.

Ga. Central of Georgia Ry. Co. v. Brown, 74 S. E. 839, 138 Ga. 107.

Ind. Pittsburgh, C., C. & St. L. Ry. Co. v. Parish, 62 N. E. 514, 28 Ind. App. 189, 91 Am. St. Rep. 120.

Mo. Ozark Orchard Co. v. Kansas City Southern Ry. Co., 158 S. W. 884, 173 Mo. App. 450; McMorrow v. Dowell, 90 S. W. 728, 116 Mo. App. 289.

N. Y. Franklin v. Hoadley, 111 N. Y. S. 300, 126 App. Div. 687; Harding v. Barney, 20 N. Y. Super. Ct. (7 Bosw.) 353.

Tex. Missouri, K. & T. Ry. Co. of Texas v. Cherry, 97 S. W. 712, 44 Tex. Civ. App. 232; Bell v. Missouri, K. & T. Ry. Co. of Texas, 82 S. W. 1073, 36 Tex. Civ. App. 569; Missouri, K. & T. Ry. Co. v. Collins, 39 S. W. 150, 15 Tex. Civ. App. 21.

Va. Cohen v. Bellenot, 32 S. E. 455.

W. Va. Welch v. King, 95 S. E. 844, 82 W. Va. 258.

application to the purpose for which it is competent; care being taken to observe the legal restrictions against charging on the weight of the evidence.[7]

the amount of damages it had sustained by reason of defendant's breach of contract, and which also showed that a verdict had been returned and judgment rendered against it and in favor of defendant who was a codefendant in such suit, it was held that it was prejudicial error to charge the jury that they might consider such record generally and give the facts therein shown such weight as they thought them entitled to. City of Owensboro, Ky., v. Westinghouse, Church, Kerr & Co. (C. C. A. Ky.) 165 F. 385, 91 C. C. A. 335. Where defendant is accused of obtaining money on a draft by false representations, and the certificate of a notary, stating that the draft had been protested, was admitted in evidence under a statute making it admissible in "evidence of the facts therein stated," it is error to refuse to charge that it cannot be considered for any other purpose than to show the fact of protest. May v. State, 15 Tex. App. 430. Where evidence is admitted of an independent assault by a third party, unknown to defendant, on deceased, by reason of which deceased was being taken home, and was killed on his way by defendant, the purpose of such evidence should be set out in an instruction limiting it in its operation to an explanation of the presence of the deceased at the place of the homicide. Bruner v. United States, 96 P. 597, 21 Okl. 410, 1 Okl. Cr. 205. Where plaintiff, suing on a policy, alleged the appointment by each party of a competent and disinterested appraiser, a letter received in evidence demanding a new appraisal and intimating that defendant's appraiser was incompetent and interested should have been limited to showing the demand, though it was set out in plaintiff's declaration, and no motion to strike it out was made. Messler v. Williamsburg City Fire Ins. Co., 108 A. 832, 42 R. I. 460. In a prosecution for murder, in which witnesses to defendant's good reputation were cross-examined by questions whether they had heard of his having been concerned in previous specific crimes, it was error for the court to omit to charge that such questions and their answers must be limited in their effect to the determination of the witness' knowledge of defendant's reputation, and could not be considered as showing that defendant had been guilty of such crimes, evidence of specific misconduct being inadmissible on the question of reputation. Commonwealth v. Colandro, 80 A. 571, 231 Pa. 343. Where, in an action against an alleged firm, the existence of which is in issue, evidence of the declarations of two of the alleged partners showing the existence of the partnership was admitted on the issue of fraud on the part of the two on the theory that their discharge in bankruptcy did not exempt them from liability for the debt created, it was error to refuse an instruction limiting the consideration of the evidence to such issue. Robinson v. First Nat. Bank, 82 S. W. 505, 98 Tex. 184, reversing judgment (Civ. App.) 79 S. W. 103. Where in personal injury action photographs were admissible on issue of contributory negligence, but not to show defect in street, court must limit the evidence to purpose for which admissible. Bullock v. Yakima Valley Transp. Co., 184 P. 641, 108 Wash. 413. Where, in an action for injuries sustained by plaintiff, while driving with others, owing to the alleged defect in a highway, the driver was asked, on cross-examination, if one of the persons was a married woman, and, on objection, counsel stated he proposed to show the character of the party, and desired to test the knowledge of the witness on that subject, as bearing on his credibility, and testimony was admitted that the plaintiff, at the time of the injury, was one of a party

[7] James v. State, 219 S. W. 202, 86 Tex. Cr. R. 598.

§ 294. Specific applications of rule

In an action by a husband or wife for the alienation of the affections of his or her spouse, an instruction may be necessary limiting the effect of declarations of the latter.[8] So, in an action for injuries sustained by a servant through coming in contact with an unguarded machine, the court should instruct, with respect to evidence that the machine in question was guarded after the accident, that it is only competent to show the practicability of a guard,[9] and where evidence has been heard by the jury bearing on an alleged offer of compromise by a party, the latter is entitled to an instruction that such offer should not be regarded as a recognition of liability.[10] The above rule applies to evidence which is admissible only in mitigation of damages,[11] or which is pertinent only to the question of exemplary damages,[12] and cautionary in-

of men and women who had been drinking, and were on their way to a place where they expected to get more liquor and have a high time, it was held that, in order to guard against prejudicial misuse of the evidence, plaintiff had a right to have the jury instructed that it could only be considered on the question of due care. Guertin v. Town of Hudson, 53 A. 736, 71 N. H. 505.

Instructions held sufficient within rule. An instruction that, if the property in question was not the property mentioned in the information and taken from prosecutor at the time and place alleged, such taking might be considered for the purpose of identification, but would not warrant a conviction, properly limited the effect of the evidence. People v. Castile, 86 P. 746, 3 Cal. App. 487. Where the court charged that, if B. inflicted the wounds which caused decedent's death, the jury should return a verdict of not guilty as to both defendants, and that in order to convict defendants, or either of them, the jury must be fully satisfied of the existence of each fact necessary to establish their guilt, one of which being that one of the defendants, and not B., inflicted the fatal wound, the court sufficiently charged the effect of evidence that deceased had not been cut by either of the defendants, but by B. State v. Bowman, 67 S. E. 1058, 152 N. C. 817. On trial for murder, where the evidence is circumstantial, and the state introduces an indictment against accused, charging him with another crime, for the purpose of proving the motive, an instruction that the fact that accused is charged with another crime is not proof of guilt of homicide sufficiently protects the right of accused. State v. McKowen, 53 So. 353, 126 La. 1075. By the judge carefully instructing the jury that the statement of defendant K. on being arrested, that whatever part he had in the killing was under compulsion of defendant B., was to be considered against K. alone, and not in the slightest against B. the rights of B. were protected. Commonwealth v. Borasky, 101 N. E. 377, 214 Mass. 313.

[8] Bourne v. Bourne (Cal. App.) 185 P. 489; Clark v. Clark, 118 N. E. 123, 187 Ind. 25; Miller v. Miller, 134 N. W. 1058, 154 Iowa, 344; Hardwick v. Hardwick, 106 N. W. 639, 130 Iowa, 230.

[9] Minea v. St. Louis Cooperage Co., 162 S. W. 741, 179 Mo. App. 705.

[10] St. Louis Southwestern Ry. Co. v. Mitchell, 171 S. W. 895, 115 Ark. 339, Ann. Cas. 1916E, 317; Chicago City Ry. Co. v. Schuler, 111 Ill. App. 470.

[11] Snyder v. Tribune Co., 143 N. W. 519, 161 Iowa, 671.

[12] Williams v. Hicks Printing Co., 150 N. W. 183, 159 Wis. 90.

structions may be required as to the purpose and effect of mortality tables.[13]

§ 295. Evidence only proper as bearing on the credibility of a witness

Where evidence is only admissible for the purpose of impeaching a witness, or to corroborate him, the court may, and should, both in civil[14] and in criminal cases,[15] so instruct, and that it is

[13] Scott v. Chicago, R. I. & P. Ry. Co., 141 N. W. 1065, 160 Iowa, 306; Stearns Coal & Lumber Co. v. Williams, 186 S. W. 931, 171 Ky. 46.

[14] **Colo.** Anson v. Evans, 19 Colo. 274, 35 P. 47.

Ind. Johnson v. Samuels, 114 N. E. 977, 186 Ind. 56.

Ky. Watson v. Kentucky & Indiana Bridge & R. Co., 126 S. W. 146, 137 Ky. 619, opinion modified 129 S. W. 341, 137 Ky. 619; Georgetown Water, Gas, Electric & Power Co. v. Neale, 125 S. W. 293, 137 Ky. 197; Illinois Cent. R. Co. v. Johnson, 115 S. W. 798.

N. J. Moloney v. Public Service Ry. Co., 106 A. 376, 92 N. J. Law, 539.

N. C. Sprague v. Bond, 113 N. C. 551, 18 S. E. 701; Henson v. King, 47 N. C. 385.

Tex. Texas & P. Ry. Co. v. Missouri Iron & Metal Co. (Civ. App.) 178 S. W. 597; Texas Loan & Trust Co. v. Angel, 86 S. W. 1056, 39 Tex. Civ. App. 166; Halsell v. Decatur Cotton Seed Oil Co. (Civ. App.) 36 S. W. 848.

[15] **Ga.** Griggs v. State, 86 S. E. 726, 17 Ga. App. 301; Hayes v. State, 54 S. E. 809, 126 Ga. 95.

Ill. Purdy v. People, 140 Ill. 46, 29 N. E. 700, following Ritter v. People, 130 Ill. 255, 22 N. E. 605.

Kan. State v. Wellington, 43 Kan. 121, 23 Pac. 156.

Mich. People v. Row, 98 N. W. 13, 135 Mich. 505.

Mo. State v. Weeden, 133 Mo. 70, 34 S. W. 473.

Tex. Rowan v. State, 124 S. W. 668, 57 Tex. Cr. R. 625, 136 Am. St. Rep. 1005; Dobbs v. State, 113 S. W. 921, 54 Tex. Cr. R. 579; Tabor v. State, 107 S. W. 1116, 52 Tex. Cr. R. 387; Joy v. State, 51 S. W. 933, 41 Tex. Cr. R. 46; Coker v. State, 35 Tex. Cr. R. 57, 31 S. W. 655; Shackelford v. State (Cr. App.) 27 S. W. 8; Engers v. State (Cr. App.) 26 S. W. 987; Drake v. State, 25 Tex. App. 293, 7 S. W. 868.

Vt. State v. Bolton, 102 A. 489, 92 Vt. 157.

Illustrations of sufficient instructions. Where defendant testifies in his own behalf, and there is evidence tending to impeach his character for truth, an instruction that such evidence shall be regarded by the jury only in determining the credit, if any, to be given defendant's testimony as a witness in his own behalf, sufficiently restricts the application of such evidence to defendant's character as a witness. State v. Rainsbarger, 79 Iowa, 745, 45 N. W. 302. Where, in a prosecution for patricide, accused's witness testified that the feelings between accused and decedent had always been kind, and on cross-examination she testified that she had never heard accused make any threat against his father, and she was then asked whether she did not have a conversation with a third person, in which, in response to inquiries as to how the trouble arose, she replied that accused made a certain threat, and she answered, "No," it was held that an instruction that the impeaching testimony was not admitted as going to accused's guilt, but solely as affecting the credibility of the witness, sufficiently guarded the admission. Connell v. State, 75 S. W. 512, 45 Tex. Cr. R. 142. Where, in cross-examining defendant as to credibility, it was disclosed that he had been indicted for murder, in jail twice, and paid fines for gambling, but had not been locked up, it was held that a charge that, if there was testimony tending to show that he had been legally charged with some

although introduced for a particular purpose,[35] is not within the scope of the above rule.

§ 299. Effect of limiting scope of evidence at time of its admission.

In criminal cases the rule is held to be that a statement made by the trial judge on the admission of evidence, not competent on the main issue, limiting its scope, does not relieve him from the necessity of afterwards instructing the jury as to the purpose for which it can be considered;[36] but in civil cases such a limitation by the court at the time of the admission of evidence will preclude urging as error the subsequent failure of the court to give an equivalent instruction,[37] unless the attention of the court is called to the matter by a request for instructions.[38] Even in civil cases, however, if the court, after having, at the time of the admission of evidence, so limited its scope, has occasion in its charge to refer to such evidence, it should be careful to again explain the purpose for which it can be considered.[39]

§ 300. Necessity of request for limiting instructions

The general rule, in civil proceedings, is that a party who fails to request such an instruction limiting the scope of certain evidence cannot complain of the failure to give it as a ground for reversal.[40] Thus, where evidence is admitted in mitigation of

ly assaulted for a like purpose by two persons, one of whom was positively identified as one of the defendants, and the other of whom resembled his codefendant, is not extraneous matter within the rule which requires that the jury shall be instructed to restrict their consideration of extraneous matter adduced in evidence to the specific purpose for which it was admitted. Leeper v. State, 29 Tex. App. 63, 14 S. W. 398.

[35] Bartley v. Comer (Tex. Civ. App.) 89 S. W. 82.

[36] Thompson v. State, 29 Tex. App. 208, 15 S. W. 206.

Rule in absence of request for instruction. In Massachusetts it has been held that, where two are jointly tried for an assault, and evidence of admissions by one of the fact that the other committed the assault, and that he was present at the time, is admitted, the court ruling at the time that such evidence is only admissible against the person making the admission, its failure to instruct, no request being made, that such evidence is not admissible against the other, is not ground for reversal. Commonwealth v. Keating, 133 Mass. 572.

[37] **Ark.** McCarty v. Nelson, 195 S. W. 689, 129 Ark. 280.

Conn. Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149.

Iowa. Purcell v. Tibbles, 69 N. W. 1120, 101 Iowa, 24.

Mo. Atkinson v. American School of Osteopathy, 202 S. W. 452, 199 Mo. App. 251.

N. H. Lee v. Lamprey, 43 N. H. 13.

Tex. D'Arrigo v. Texas Produce Co., 44 S. W. 531, 18 Tex. Civ. App. 41.

Wis. Hacker v. Heiney, 87 N. W. 249, 111 Wis. 313.

[38] Liles v. Fosburg Lumber Co., 54 S. E. 795, 142 N. C. 39.

[39] Westfeldt v. Adams, 47 S. E. 816, 135 N. C. 591.

[40] **U. S.** (C. C. A. Ohio) Young v. Corrigan, 210 F. 442, 127 C. C. A. 174.

Ala. Postal Telegraph-Cable Co. v.

damages only, it is plaintiff's duty to request an instruction lim-

Minderhout, 71 So. 89, 14 Ala. App. 392, certiorari denied 71 So. 91, 195 Ala. 420; Big Sandy Iron & Steel Co. v. Williams, 63 So. 1011, 184 Ala. 184; Sloss-Sheffield Steel & Iron Co. v. Mitchell, 61 So. 934, 938, 181 Ala. 576, 671; Birmingham Ry., Light & Power Co. v. Long, 59 So. 382, 5 Ala. App. 510; United States Cast Iron Pipe & Foundry Co. v. Driver, 50 So. 118, 162 Ala. 580; First Nat. Bank v. Alexander, 50 So. 45, 161 Ala. 580; Long Distance Telephone & Telegraph Co. v. Schmidt, 47 So. 731, 157 Ala. 391; Scruggs v. Bibb, 33 Ala. 481.

Ark. Lisko v. Uhren, 196 S. W. 816, 130 Ark. 111; C. H. Smith Tie & Timber Co. v. Weatherford, 121 S. W. 943, 92 Ark. 6; Bodcaw Lumber Co. v. Ford, 102 S. W. 896, 82 Ark. 555.

Cal. Liebrandt v. Sorg, 65 P. 1098, 133 Cal. 571.

Colo. Melcher v. Beeler, 110 P. 181, 48 Colo. 233, 139 Am. St. Rep. 273.

D. C. Washington Times Co. v. Downey, 26 App. D. C. 258, 6 Ann. Cas. 765.

Ga. Gordon v. Gilmer, 80 S. E. 1007, 141 Ga. 347; Stallins v. Southern Ry. Co., 78 S. E. 421, 140 Ga. 55; Central of Georgia Ry. Co. v. Brown, 74 S. E. 839, 138 Ga. 107; A. G. Garbutt Lumber Co. v. Camp, 73 S. E. 841, 137 Ga. 592; McCommons v. Williams, 62 S. E. 230, 131 Ga. 313.

Ill. Bird v. Bird, 75 N. E. 760, 218 Ill. 158; Foley v. Everett, 142 Ill. App. 250.

Ind. Chesapeake & O. Ry. Co. v. Perry (App.) 125 N. E. 414; Irvine v. Baxter Stove Co. (App.) 123 N. E. 185; International Harvester Co. of America v. Haueisen, 118 N. E. 320, 66 Ind. App. 355; Clark v. Clark, 118 N. E. 123, 187 Ind. 25; Cleveland, C., C. & St. L. Ry. Co. v. Clark, 97 N. E. 822, 51 Ind. App. 392; Coddington v. Canaday, 61 N. E. 567, 157 Ind. 243; Benjamin v. McElwaine-Richards Co., 37 N. E. 362, 10 Ind. App. 76.

Iowa. Hall v. City of Shenandoah, 149 N. W. 831, 167 Iowa, 735; Greenlee v. Ealy, 124 N. W. 166, 145 Iowa, 394; Hanson v. Kline, 136 Iowa, 101, 113 N. W. 504; Kircher v. Incorporated Town of Larchwood, 95 N. W. 184, 120 Iowa, 578; Puth v. Zimbleman, 68 N. W. 895, 99 Iowa, 641.

Kan. Cooper v. Harvey, 94 P. 213, 77 Kan. 854.

Ky. Chicago Veneer Co. v. Jones, 135 S. W. 430, 143 Ky. 21.

Me. Reid v. Eastern S. S. Co., 90 A. 609, 112 Me. 34.

Md. Pegg v. Warford, 7 Md. 582.

Mass. Wagman v. Ziskind, 125 N. E. 633, 234 Mass. 509; Leavitt v. Maynes, 117 N. E. 343, 228 Mass. 350; Wachtel-Pickert Co. v. Leonard, 105 N. E. 354, 217 Mass. 417; Commonwealth v. Fenno, 134 Mass. 217; Penn. Mut. Life Ins. Co. v. Crane, 134 Mass. 56, 45 Am. Rep. 282; Commonwealth v. Keating, 133 Mass. 572; Potter v. Baldwin, 133 Mass. 427; Chapin v. Haley, 133 Mass. 127; Commonwealth v. Wunsch, 129 Mass. 477; Same v. Sargent, 129 Mass. 115.

Minn. Nininger v. Knox, 8 Minn. 140 (Gil. 110).

Mo. Robinson v. City of Springfield, 191 S. W. 1094; Hitt v. Hitt, 131 S. W. 369, 150 Mo. App. 631; Kirby v. St. Louis & S. F. R. Co., 130 S. W. 69, 146 Mo. App. 304; Stoebier v. St. Louis Transit Co., 102 S. W. 651, 203 Mo. 702; Rosier v. Metropolitan St. Ry. Co., 101 S. W. 1111, 125 Mo. App. 159; E. O. Stanard Milling Co. v. White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704; Garesche v. President, Directors, and Faculty of St. Vincent's College, 76 Mo. 332.

Neb. Fullerton v. Fullerton, 136 N. W. 847, 91 Neb. 649; Chicago, R. I. & P. Ry. Co. v. Holmes, 94 N. W. 1007, 68 Neb. 826.

N. H. Lord v. Manchester St. Ry., 67 A. 639, 74 N. H. 295; Dow v. Merrill, 65 N. H. 107, 18 A. 317.

N. J. Perry v. Levy, 94 A. 569, 87 N. J. Law, 670.

N. Y. Devine v. Brooklyn Heights R. Co., 115 N. Y. S. 263, 131 App. Div. 142; Pritchard v. Edison Electric Illuminating Co., 87 N. Y. S. 225, 92 App. Div. 178, judgment affirmed 72 N. E. 243, 179 N. Y. 364.

N. C. Muse v. Ford Motor Co., 95 S. E. 900, 175 N. C. 466; Tise v. Town of Thomasville, 65 S. E. 1007, 65 S.

iting its effect, if one is desired,[41] and where evidence is introduced that a master, after an accident which resulted in the death of a servant, took certain precautions to prevent the recurrence of such accident, and the master does not request a charge that such evidence is no proof of negligence on his part, it is not error to omit giving the instruction.[42] It has been held in a civil case that, if a party at the time of the reception of evidence does not ask that its effect be limited, it will not be error to subsequently refuse his request for an instruction qualifying the scope of such evidence.[43]

E. 281; Stewart v. Raleigh & A. Air Line R. Co., 53 S. E. 877, 141 N. C. 253.

Okl. Brownell v. Moorehead, 165 P. 408; Atchison, T. & S. F. Ry. Co. v. Baker, 130 P. 577, 37 Okl. 48.

Or. State v. Finnigan, 160 P. 370, 81 Or. 538.

Pa. Frank v. American Bond & Mortg. Co., 70 Pa. Super. Ct. 478.

Tex. Kampmann v. Cross (Civ. App.) 194 S. W. 437; Southwestern Portland Cement Co. v. Presbitero (Civ. App.) 190 S. W. 776; Vaughn v. Morris (Civ. App.) 180 S. W. 954; Carver v. Power State Bank (Civ. App.) 164 S. W. 892; Payne v. Snyder (Civ. App.) 160 S. W. 1153; Wichita Falls Compress Co. v. W. I. Moody & Co. (Civ. App.) 154 S. W. 1032; Posener v. Harvey (Civ. App.) 125 S. W. 356; Fordtran v. Stowers, 113 S. W. 631, 52 Tex. Civ. App. 226; Eastland v. Maney, 81 S. W. 574, 36 Tex. Civ. App. 147; San Antonio & A. P. Ry. Co. v. Morgan, 58 S. W. 544, 24 Tex. Civ. App. 58; Mutual Life Ins. Co. of New York v. Baker, 10 Tex. Civ. App. 515, 31 S. W. 1072; Roos v. Lewyn, 5 Tex. Civ. App. 593, 24 S. W. 538; Shumard v. Johnson, 66 Tex. 70, 17 S. W. 398; Walker v. Brown, 66 Tex. 556, 1 S. W. 797.

Utah. Jensen v. Davis and Weber Counties Canal Co., 137 P. 635, 44 Utah, 10; McKinney v. Carson, 99 P. 660, 35 Utah, 180; State v. Greene, 94 P. 987, 33 Utah, 497.

Wash. Blystone v. Walla Walla Valley Ry. Co., 165 P. 1049, 97 Wash. 46; Burger v. Taxicab Motor Co., 120 P. 519, 66 Wash. 676; Sproul v. City of Seattle, 49 P. 489, 17 Wash. 256.

Wis. Vielleese v. City of Green Bay, 85 N. W. 665, 110 Wis. 160.

Illustrations of omissions to instruct held not error within rule. Evidence that, after an accident caused by a washout of a bridge whose bents were laid on stone without being bolted down, defendant, in rebuilding the bridge, bolted the bents down into the rock, was admissible to rebut the testimony of a witness for defendant that the bents of the washed-out bridge had not been so fastened because the character of the rock would not permit it; and an objection that it was likely to be considered by the jury as showing negligence in the construction of the old bridge was waived, unless made by a request for an instruction as to the purposes for which the evidence was admissible. St. Louis & S. F. Ry. Co. v. George, 85 Tex. 150, 19 S. W. 1036. Where, in an action against a telegraph company for negligence and wantonness in the transmission of the telegram, evidence is received as to the wealth of the company, it is not reversible error, where a nonsuit is granted as to the cause of action for wantonness, to fail to instruct not to consider such evidence on the cause of action for negligence, in the absence of a request therefor. Smith v. Western Union Telegraph Co., 58 S. E. 6, 77 S. C. 378, 12 Ann. Cas. 654.

[41] Young v. Corrigan (D. C. Ohio) 208 F. 431.

[42] Lind v. Uniform Stave & Package Co., 120 N. W. 839, 140 Wis. 183.

[43] Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co., 120 S. W. 1146.

Time of making request.

The above rule is also generally applied in criminal cases,[44] as where evidence admitted is competent only for the purpose of affecting the credibility of a witness,[45] or where it is desired to

Where, after reading a deposition, taken on notice to one of the two defendants, the court adjourned for the day, a request by the other defendant's counsel the first thing the next morning, to the effect that the deposition could not be considered as evidence against the latter defendant, was made in ample time. Millspaugh v. Missouri Pac. Ry. Co., 119 S. W. 993, 138 Mo. App. 31.

In New York, however, it has been held that the fact that when evidence of a statement by defendant's superintendent, admissible for a particular purpose only, was received, defendant did not insist that the jury be then informed as to the limited purpose for which it could properly be considered, did not result in a waiver of defendant's right to have the jury subsequently charged to that effect. Walsh v. Carter-Crume Co., 110 N. Y. S. 523, 126 App. Div. 229.

[44] **U. S.** (C. C. A. Mo.) Moffatt v. United States, 232 F. 522, 146 C. C. A. 480; (C. C. A. Or.) Hallowell v. United States, 253 F. 865, 165 C. C. A. 345, certiorari denied 249 U. S. 615, 39 S. Ct. 390, 63 L. Ed. 803, judgment affirmed on rehearing 258 F. 237, 169 C. C. A. 303.

Ala. Houston v. State, 82 So. 503, 203 Ala. 261.

Ark. Oakes v. State, 205 S. W. 305, 135 Ark. 221; Williams v. State, 198 S. W. 699, 131 Ark. 264.

Cal. People v. Escalera, 171 P. 975, 36 Cal. App. 212; People v. Monroe, 70 P. 1072, 138 Cal. 97.

Fla. Andrew v. State, 56 So. 681, 62 Fla. 10.

Ga. Cantrell v. State, 80 S. E. 649, 141 Ga. 98.

Iowa. State v. Pelser, 163 N. W. 600, 182 Iowa, 1; State v. Glaze, 159 N. W. 260, 177 Iowa, 457.

Mo. State v. Douglas, 167 S. W. 552, 258 Mo. 281; State v. Rasco, 144 S. W. 449, 239 Mo. 535.

N. J. State v. Brand, 72 A. 131, 77 N. J. Law, 486, affirming judgment 69 A. 1092, 76 N. J. Law, 267.

N. Y. People v. Weinseimer, 83 N. E. 1129, 190 N. Y. 537, affirming judgment 102 N. Y. S. 579, 117 App. Div. 603.

N. C. State v. Stancill, 100 S. E. 241, 178 N. C. 683; State v. English, 80 S. E. 72, 164 N. C. 497.

Okl. Gray v. State, 111 P. 825, 4 Okl. Cr. 292, 32 L. R. A. (N. S.) 142.

Tex. Hensley v. State, 211 S. W. 590, 85 Tex. Cr. R. 260; Thompson v. State, 178 S. W. 1192, 77 Tex. Cr. R. 417; Johns v. State, 174 S. W. 610, 76 Tex. Cr. R. 303; Montgomery v. State, 151 S. W. 813, 68 Tex. Cr. R. 78; Harris v. State, 150 S. W. 796, 68 Tex. Cr. R. 208.

Wash. State v. Douette, 71 P. 556, 31 Wash. 6.

W. Va. State v. Baker, 99 S. E. 252, 84 W. Va. 151.

Excuses for failure to make request. Where certain evidence for the state was admitted against the objection of defendant, and the court stated that it would properly limit the evidence by its instructions, and failed to give such an instruction, but no suggestion was made to the court in respect to such evidence, except as stated, defendant could not assign error for the court's failure to limit the effect of the evidence. State v. Simas, 62 P. 242, 25 Nev. 432.

[45] **U. S.** (C. C. A. Alaska) Ball v. United States, 147 F. 32, 78 C. C. A. 126.

Ala. Morris v. State, 41 So. 274, 146 Ala. 66.

Cal. People v. Peck, 185 P. 881; People v. Haydon, 123 P. 1102, 18 Cal. App. 543, rehearing denied 123 P. 1114, 18 Cal. App. 543.

Ga. Fitzpatrick v. State, 99 S. E. 128, 149 Ga. 75.

Ky. Bennett v. Commonwealth, 194 S. W. 797, 175 Ky. 540; Day v. Commonwealth, 191 S. W. 105, 173 Ky. 269; Haywood v. Commonwealth, 170 S. W. 624, 161 Ky. 338.

Mo. State v. Gatlin, 70 S. W. 885, 170 Mo. 354.

Tex. Watts v. State, 171 S. W. 202, 75 Tex. Cr. R. 330.

limit, as against one defendant, the effect of evidence admissible as against his codefendant,[46] or where the defendant wishes the effect of evidence of other offenses to be limited,[47] although in some criminal cases the duty of the court in this regard seems to be more strictly enforced than in civil cases,[48] and in criminal cases the rule has been laid down that whenever extraneous matter admitted in evidence for a specific purpose incidental to the proof of the main issue is not admissible directly to prove such issue, and may tend to exercise a strong, undue, or improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of the defendant, it is the duty of the court, without any request, to so limit and restrict such evidence as that such unwarranted results cannot ensue.[49]

[46] **U. S.** (C. C. A. Ohio) Foster v. United States, 178 F. 165, 101 C. C. A. 485; (C. C. A. Tex.) Bryant v. United States, 257 F. 378, 168 C. C. A. 418.

Ill. People v. Darr, 104 N. E. 389, 262 Ill. 202, affirming judgment 179 Ill. App. 130.

Ind. Thompson v. State, 125 N. E. 641.

Minn. State v. Newman, 149 N. W. 945, 127 Minn. 445.

N. J. State v. Unger, 107 A. 270, 93 N. J. Law, 50; State v. Stanford. 101 A. 53, 90 N. J. Law, 724.

N. C. State v. Fain, 97 S. E. 716, 177 N. C. 120.

Utah. State v. Gillies, 123 P. 93, 40 Utah, 541, 43 L. R. A. (N. S.) 776.

See, also, ante, § 297, note 29.

[47] People v. Ciulla, 187 P. 46; People v. Germino, 175 P. 489, 38 Cal. App. 100; People v. Moran, 144 P. 152, 25 Cal. App. 472; People v. Bransfield, 124 N. E. 365, 289 Ill. 72; Glover v. People, 68 N. E. 464, 204 Ill. 170.

[48] State v. Lavin, 46 N. W. 553, 80 Iowa, 555; State v. Collins, 28 S. E. 520, 121 N. C. 667; Paris v. State, 35 Tex. Cr. R. 82, 31 S. W. 855; Oliver v. Same, 33 Tex. Cr. R. 541, 28 S. W. 202; Sexton v. State, 33 Tex. Cr. R. 416, 26 S. W. 833.

Where defendant has objected to the admission of certain evidence and taken the position that it is wholly incompetent for any purpose, he cannot be expected to request the court to charge the jury as to the purpose for which the evidence should be regarded or considered. Porter v. State, 91 N. E. 340, 173 Ind. 694.

Rule in misdemeanor cases. In Texas, in a prosecution for a misdemeanor, the court, unless requested, need not instruct the jury to consider evidence, only admissible to corroborate the testimony of the prosecutrix, for that purpose alone. Duke v. State, 35 Tex. Cr. R. 283, 33 S. W. 349.

[49] Wilson v. State, 39 S. W. 373, 37 Tex. Cr. R. 373; Maines v. State, 23 Tex. App. 576, 5 S. W. 123.

CHAPTER XXIII

NECESSITY, PROPRIETY, AND SUFFICIENCY OF INSTRUCTIONS WHERE CASE IS SUBMITTED TO JURY FOR SPECIAL FINDINGS

§ 301. In general.
302. Effect of special findings.
303. Consistency between general verdict and special findings or between special findings.

§ 301. In general

Where the case is submitted to the jury for a special verdict, they should only be instructed upon the questions which they are to answer,[1] and general instructions on any subject involved should not be given,[2] save so far as is necessary to assist in answering each interrogatory propounded,[3] as they are apt to have a tendency to confuse the jury,[4] and it is proper to refuse instructions general in their application to all the issues of the case, or

[1] **Mass.** Tarbell v. Forbes, 58 N. E. 873, 177 Mass. 238.

N. C. Earnhardt v. Clement, 49 S. E. 49, 137 N. C. 91.

N. D. Morrison v. Lee, 102 N. W. 223, 13 N. D. 591.

Wis. McHatton v. McDonnell's Estate, 165 N. W. 468, 166 Wis. 323; Meyer v. Home Ins. Co., 106 N. W. 1087. 127 Wis. 293; Van De Bogart v. Marinette & Menominee Paper Co., 106 N. W. 805, 127 Wis. 104; Lyon v. City of Grand Rapids, 99 N. W. 311, 121 Wis. 609; Schrunk v. Town of St. Joseph, 97 N. W. 946. 120 Wis. 223; Gutzman v. Clancy, 90 N. W. 1081, 114 Wis. 589, 58 L. R. A. 744; Patnode v. Westenhaver, 90 N. W. 467, 114 Wis. 460; Cullen v. Hanisch, 89 N. W. 900, 114 Wis. 24; Gerrard v. La Crosse City Ry. Co., 89 N. W. 125, 113 Wis. 258, 57 L. R. A. 465; Byington v. City of Merrill, 88 N. W. 26, 112 Wis. 211; Missinskie v. McMurdo. 83 N. W. 753, 107 Wis. 578; New Home Sewing-Mach. Co. v. Simon. 80 N. W. 71, 104 Wis. 120.

[2] **Ind.** Boyce v. Schroeder, 51 N. E. 376, 21 Ind. App. 28.

Tex. International & G. N. Ry. Co. v. Reek, 179 S. W. 699.

Wis. Howard v. Beldenville Lumber Co., 108 N. W. 48, 129 Wis. 98; Mauch v. City of Hartford, 87 N. W. 816, 112 Wis. 40; Rhyner v. City of Menasha, 83 N. W. 303, 107 Wis. 201; Goesel v. Davis, 76 N. W. 768, 100 Wis. 678.

Definitions. The court cannot, by general instructions, define the meaning of terms used in questions submitted to the jury for a special verdict, as such a practice would result in a verdict special in part and general in part. Louisville & N. R. Co. v. Cambron, 8 Ky. Law Rep. (abstract) 615.

Harmless error. Where, in an action for negligence, the case was submitted on special interrogatories, and for a special verdict only, the fact that the court instructed generally on the law as though a general verdict was to be returned, while such action was improper, is not error, where the instructions did not indicate how the jury should find upon any given question of fact. Reed v. City of Madison, 85 Wis. 667, 56 N. W. 182.

[3] Lathrop v. Fargo-Moorhead St. Ry. Co., 136 N. W. 88, 23 N. D. 246; Dallas Hotel Co. v. Fox (Tex. Civ. App.) 196 S. W. 647.

[4] Southwestern Telegraph & Telephone Co. v. Andrews (Tex. Civ. App.) 169 S. W. 218.

suitable only to a case submitted for a general verdict.[5] It is only proper, where a special verdict is requested, to give such instructions as are necessary to inform the jury as to the issues, the rules for weighing evidence, who has the burden of proof, and whatever else may be necessary to enable the jury clearly to understand their duties.[6]

As is indicated by the foregoing discussion, a demand for a special verdict does not deprive the court of the right, or relieve it of the duty, to instruct the jury as to the nature of the action and the issues, as to the form of the special verdict, and the general duties of the jury.[7] Instructions which will assist the jury in returning pertinent and intelligent answers to special interrogatories propounded may be given,[8] and the court should explain to the jury distinctly what facts are material to be found within the issues,[9] and so instruct them as to enable the jury to answer each question intelligently and to find and settle the facts.[10]

[5] **Kan.** Warden v. Reser, 38 Kan. 86, 16 P. 60.

Tex. Southwestern Portland Cement Co. v. Challen (Civ. App.) 200 S. W. 213: Moore v. Pierson (Civ. App.) 93 S. W. 1007.

Wis. Collins v. Mineral Point & N. Ry. Co., 117 N. W. 1014, 136 Wis. 421; Kohler v. West Side R. Co., 74 N. W. 568, 99 Wis. 33; Klatt v. N. C. Foster Lumber Co., 73 N. W. 563, 97 Wis. 641.

Discretion of court. In Georgia it is held that where, in an equity case, a special verdict is demanded by the parties, and questions covering the issues of fact are submitted to the jury, the judge may, in his discretion, limit his instructions to such matters as are involved in the questions submitted, and omit general instructions covering the law of the whole case. Livingston v. Taylor, 63 S. E. 694, 132 Ga. 1.

[6] Udell v. Citizens' St. R. Co., 52 N. E. 799, 152 Ind. 507, 71 Am. St. Rep. 336; Roller v. King, 49 N. E. 948, 150 Ind. 159; Louisville, N. A. & C. Ry. Co. v. Frawley, 9 N. E. 594, 110 Ind. 18.

Damages. In Texas, under a statute, where a case is submitted to the jury on special issues, it is not necessary for the court to charge on the measure of damages. St. Louis, S. F. & T. Ry. Co. v. Wall (Civ. App.) 165 S. W. 527.

[7] **U. S.** (C. C. A. Neb.) Ward v. Cochran, 71 Fed. 127, 18 C. C. A. 1.

Ind. Sprinkle v. Taylor, 27 N. E. 122, 1 Ind. App. 74; Louisville, N. A. & C. Ry. Co. v. Hart, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549; Johnson v. Culver, 116 Ind. 278, 19 N. E. 129; Woollen v. Wire, 110 Ind. 251, 11 N. E. 236; Toler v. Keiher, 81 Ind. 383.

Tex. Cole v. Crawford, 69 Tex. 124, 5 S. W. 646.

[8] Kalteyer v. Mitchell (Civ. App.) 110 S. W. 462.

[9] Louisville, N. A. & C. Ry. Co. v. Buck, 19 N. E. 453, 116 Ind. 566, 2 L. R. A. 520, 9 Am. St. Rep. 883.

[10] Wawrzyniakowski v. Hoffman & Billings Mfg. Co., 131 N. W. 429, 146 Wis. 153; Baxter v. Chicago & N. W. Ry. Co., 80 N. W. 644, 104 Wis. 307.

Instructions held proper within rule. In an action to recover for services in furnishing plans for a building, it being in issue whether plaintiff's compensation was contingent upon the building costing not over a certain sum, and defendant having referred the special question to the jury, "Was the agreement conditional on the cost of the building?" an instruction submitted, in connection therewith by the trial court, that

If any instructions are given as to where the burden of proof rests, the jury should be so informed that they will understand the subject as to each material fact in issue,[11] and the giving to the jury of general rules of law appropriate to the particular interrogatories in connection with which such rules are given is proper.[12] An instruction requested to be given in connection with special findings should expressly designate the particular interrogatory to which it is directed,[13] and all parts of the charge bearing on a special interrogatory, whether given by the court of its own motion or on request should be given together in connection with a submission of such question.[14]

§ 302. Effect of special findings

While, in one jurisdiction there is no restraint upon the trial court giving an instruction as to the effect of special findings made by them upon the ultimate rights and liabilities of the parties,[15] in the majority of jurisdictions the rule is that instructions explaining to the jury the effect of an answer to a special interrogatory or of special findings as a whole upon such ultimate rights or liabilities should not be given,[16] and such an instruction is prop-

if before he began to build defendant knew, or should have known, that the building would cost more, and then used plaintiff's plans, an answer of "no" to the question would be justified, was not erroneous, as telling the jury what answer to make thereto; the instruction being proper in order to secure an answer decisive of the issue. Bennett v. Greenwood, 114 N. W. 1019, 151 Mich. 274.

[11] Siebrecht v. Hogan, 75 N. W. 71, 99 Wis. 437.

[12] Sanger v. First Nat. Bank of Amarillo (Tex. Civ. App.) 170 S. W. 1087; Banderob v. Wisconsin Cent. Ry. Co., 113 N. W. 738, 133 Wis. 249.

[13] Banderob v. Wisconsin Cent. Ry. Co., 113 N. W. 738, 133 Wis. 249.

[14] Banderob v. Wisconsin Cent. Ry. Co., 113 N. W. 738, 133 Wis. 249.

[15] Smith v. Rhode Island Co., 98 A. 1, 39 R. I. 146.

[16] **Mich.** Taylor v. Davarn, 157 N. W. 572, 191 Mich. 243.

N. D. Morrison v. Lee, 102 N. W. 223, 13 N. D. 591.

Tex. Laybourn v. Bray & Shifflet (Civ. App.) 214 S. W. 630; Hovey v. See (Civ. App.) 191 S. W. 606.

Wis. Christl v. Hauert, 160 N. W. 1061, 164 Wis. 624; Banderob v. Wisconsin Cent. Ry. Co., 113 N. W. 738, 133 Wis. 249; Musbach v. Wisconsin Chair Co., 84 N. W. 36, 108 Wis. 57; Baxter v. Chicago & N. W. Ry. Co., 80 N. W. 644, 104 Wis. 307; Coats v. Town of Stanton, 90 Wis. 130, 62 N. W. 619. See Lyttle v. Goldberg, 111 N. W. 718, 131 Wis. 613.

In Texas the decisions are conflicting; it being held in one case that to assume that to inform the jury that under a certain state of facts the plaintiff can recover, and that under another state of facts he cannot, will influence them to find the facts requiring a judgment in favor of the plaintiff, is an impeachment of the system of trial by jury as being fundamentally unreliable. J. M. Guffey Petroleum Co. v. Dinwiddie (Tex. Civ. App.) 182 S. W. 444; Texarkana & Ft. S. Ry. Co. v. Casey (Tex. Civ. App.) 172 S. W. 729.

Instructions held improper within rule. Where the first special interrogatory embodied the claim of the defense that plaintiff was paid $50 in full for a release of dower,

erly refused.[17] Such rule does not preclude the court from relieving the jury of the labor of determining a subsidiary question submitted after reaching a conclusion on a primary question necessarily terminating the controversy, as the jury must see,[18] and a charge is not erroneous merely because an intelligent juror may be able to infer therefrom the effect on the final result of his answers to the special interrogatories,[19] and an instruction which informs the jury that an affirmative answer to such an interrogatory will be in favor of a party, but which does not go so far as to tell the jury the effect of such answer upon the ultimate right of ei-

and the second embodied the claim of the plaintiff that she was to have the balance of all proceeds of real estate and personal property after the payment of debts and broker's commission as a consideration for the release, but plaintiff's testimony did not fully support the contention that she was to have the proceeds of personal property, it is error for the court to instruct that, if the jury answered the first question, "No," they must, in his opinion, answer the second question, "Yes." Lyttle v. Goldberg, 111 N. W. 718, 131 Wis. 613.

Instructions held not objectionable within rule. An instruction in an action by an employé for injuries caused by being caught by an unguarded shafting, that the law requires the employer to securely guard shaftings so located as to be dangerous to employés, and, if the shafting was so located as to be dangerous to the employé at the time of the injury, the jury should find that the place furnished by the employer to the employé in which to do his work was not reasonably safe, was not objectionable, as stating to the jury the effect of their answer. Walker v. Simmons Mfg. Co., 111 N. W. 694, 131 Wis. 542. On an issue as to plaintiff's contributory negligence, an instruction that the court must be informed by a special verdict whether plaintiff contributed to the accident by a slight want of ordinary care, which would be negligence on her part, was not objectionable, as informing the jury of the effect of their answer on plaintiff's right of recovery. Brunette v. Town of Gagen, 82 N. W. 564, 106 Wis. 618. Where, in an action for injuries to a minor servant, the court instructed, in respect to a question to the jury as to whether plaintiff exercised ordinary care, that if plaintiff knew that there was a revolving knife, and that his hand was liable to come in contact therewith in cleaning out a certain hopper, he must be held to have assumed the risk, although he was attempting to do the work by the express direction of defendant, and that the true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he comprehended the danger, but whether he ought to have known of it, and that defendant had a right to assume that plaintiff was a person of ordinary common sense for one of his years, and that he would exercise such care to avoid dangers which were visible, or which he knew or ought to have known existed, as might be reasonably expected of one of his years and capacity, it was held that the instructions were not violative of the rule that the court should not advise the jury as to the effect of their answers. Horn v. La Crosse Box Co., 111 N. W. 522, 131 Wis. 384.

[17] Crawford v. Texas Improvement Co. (Tex. Civ. App.) 196 S. W. 195; Moore v. Coleman (Tex. Civ. App.) 195 S. W. 212.

[18] Sicard v. Albenberg Co., 118 N. W. 179, 136 Wis. 622.

[19] Banderob v. Wisconsin Cent. Ry. Co., 113 N. W. 738, 133 Wis. 249.

ther party to recover does not call for a reversal.[20] As a corollary of the above rule the jury may be properly instructed that they have nothing to do with the legal consequences of the facts found by them.[21]

§ 303. Consistency between general verdict and special findings or between special findings

It is error to charge that the special findings of the jury must conform to their general verdict;[22] the object of a special verdict being to get the unbiased decision of the jury on some material question of fact, without any reference in their minds as to how the finding will affect their general verdict,[23] and to ascertain whether the jury have, in making up their general verdict, properly applied the law, as given by the court, to the facts in the case.[24]

In one jurisdiction, however, it is held that, while it is not good practice, it is not error to tell the jury that it is important that their special findings agree with their general verdict,[25] and in another jurisdiction instructions cautioning the jury to be careful that their general verdict harmonize with their special findings, or tending to impress them with the necessity of consistency between such findings and the general verdict, are not erroneous.[26]

The jury may be admonished to make their answers to the several questions submitted for a special verdict consistent with each other.[27]

[20] Wankowski v. Crivitz Pulp & Paper Co., 118 N. W. 643, 137 Wis. 123.

[21] Neanow v. Uttech, 46 Wis. 581, 1 N. W. 221.

[22] **Kan.** Coffeyville Vitrified Brick Co. v. Zimmerman, 60 P. 1064, 61 Kan. 750; Kilpatrick-Koch Dry Goods Co. v. Kahn, 53 Kan. 274, 36 Pac. 327.

Mich. Mechanics' Bank v. Barnes, 86 Mich. 632, 49 N. W. 475; People v. Murray, 17 N. W. 843, 52 Mich. 288; Cole v. Boyd, 47 Mich. 98, 10 N. W. 124.

Ohio. Cleveland, C., C. & St. L. Ry. v. Sivey, 27 Ohio Cir. Ct. R. 248.

[23] Ryan v. Rockford Ins. Co., 77 Wis. 611, 46 N. W. 885.

[24] Beecher v. Galvin, 71 Mich. 391, 39 N. W. 469.

[25] Germaine v. City of Muskegon, 105 Mich. 213, 63 N. W. 78.

[26] Capital City Bank v. Wakefield, 83 Iowa, 46, 48 N. W. 1059; Des Moines & D. Land & Tree Co. v. Polk County Homestead & Trust Co., 82 Iowa, 663, 45 N. W. 773.

[27] Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 357, 21 N. W. 227.

Contra, St. Louis & S. F. R. Co. v. Burrows, 61 P. 439, 62 Kan. 89.

CHAPTER XXIV

INSTRUCTIONS IN EQUITY CAUSES

§ 304. Necessity of instructions.
305. Propriety of instructions.

§ 304. Necessity of instructions

When, in an equitable proceeding, a jury is called simply for advisory purposes, the court need give only such instructions as it sees fit, and may properly refuse all requests for instructions.[1] But, where an equity case is submitted to a jury and tried as an action at law, it will be treated as if it were an action at law, and the parties may request special instructions,[2] and, in jurisdictions, where a jury is a necessary part of the chancery system, the court should be careful, on the submission of an issue of fact in an equitable action to a jury, to instruct them as to the nature of the issue and the application of the evidence produced before them,[3] and it is not only the province, but the duty, of the court, when requested so to do, to instruct the jury what portions of the answer of defendant are responsive to the allegations of the bill.[4] Such an instruction is not upon a question of fact, but relates to the admissibility of evidence.[5]

§ 305. Propriety of instructions

Where questions of fact are submitted to the jury in an equity case, the instructions should not be general, as in a suit at law, but should only relate to the determination of the questions of fact submitted.[6] Instructions merely pertinent to other questions in the case should not be given.[7]

[1] **Cal.** Dominguez v. Dominguez, 7 Cal. 424.

Colo. Royce v. Latshaw, 62 P. 627, 15 Colo. App. 420; Danielson v. Gude, 17 P. 283, 11 Colo. 87.

Ill. Worthing v. Hall, 153 Ill. App. 587.

Mo. Baker v. Payne (Mo. App.) 198 S. W. 75; Blood v. Sovereign Camp Woodmen of the World, 120 S. W. 700, 140 Mo. App. 526.

[2] Van Vleet v. Olin, 4 Nev. 95, 97 Am. Dec. 513.

[3] Ely v. Early, 94 N. C. 1.

[4] Webb v. Robinson, 14 Ga. 216; Beall v. Beall, 10 Ga. 342.

Where the court charges that the answer of the defendant responsive to the bill is evidence, and there is, in fact, matter in the answer not responsive which is material, the court should further charge that such nonresponsive matter is only pleading, and not evidence. Neal v. Patten, 40 Ga. 363.

[5] Adkins v. Hutchings, 79 Ga. 260, 4 S. E. 887; Shiels v. Stark, 14 Ga. 429.

[6] Farmers' Bank v. Butterfield, 100 Ind. 229; Stickel v. Bender, 15 P. 580, 37 Kan. 457.

[7] Carlisle v. Foster, 10 Ohio St. 198; Perry v. Clift (Tenn. Ch. App.) 54 S. W. 121.

CHAPTER XXV

INSTRUCTIONS ON PARTICULAR MATTERS IN CRIMINAL CASES

A. In General

§ 306. Proof of corpus delicti.
307. Intent of defendant.
308. Evidence of intent.
309. Motive or lack of motive.
310. Place of offense.
311. Time of offense.
312. Instructions necessary or proper where two or more persons are jointly indicted or jointly tried.

B. Principals and Accessories

313. Necessity and propriety of instructions.
314. Sufficiency of instructions.

C. Grade or Degree of Offense

315. Necessity and propriety in general.
316. Pleadings and evidence to sustain.
317. Sufficiency of instructions.

Form of verdict in criminal cases, see post, § 388.
Instructions on admissions and confessions in criminal cases, see ante, §§ 215–221.
Instructions on character of accused, see ante, §§ 236–244.
Instructions on circumstantial evidence, see ante, §§ 226–235.
Instructions on presumptions in criminal cases, see ante, §§ 188–196, 198, 200–202.
Instructions on reasonable doubt, see ante, §§ 257–278.
Punishment in criminal cases, see post, §§ 354–356.

A. In General

§ 306. Proof of corpus delicti

The court may be required to charge that the jury should acquit the defendant if they find that the corpus delicti has not been proved,[1] unless no issue is raised with respect to the commission of an offense.[2] It may be the duty of the court to charge as to what is proper evidence of the corpus delicti,[3] and though it has been held that it is not necessary, where no improper evidence has been introduced, for the judge to point out to the jury what circumstances tend to prove the corpus delicti, and what ones tend

[1] Territory v. Monroe, 6 P. 478, 2 Ariz. 1; Williams v. State (Tex. Cr. App.) 65 S. W. 1059.

Instructions as to necessity of corroboration of confession by proof of corpus delicti, see ante, § 218.

[2] (Tex. Cr. App.) Hopkins v. State, 53 S. W. 619.

[3] Francis v. State, 7 Tex. App. 501.

to prove defendant's connection with the crime alleged,[4] it is also held that, where circumstances are introduced in evidence having no tendency to prove the corpus delicti, but having some tendency to show the guilt of the defendant, if a crime has been committed, the court should charge on request that the corpus delicti cannot be proven by such circumstances.[5]

It is improper to refer to the jury the determination of the meaning of the words "corpus delicti."[6]

§ 307. Intent of defendant

Where the guilt or innocence of the defendant depends upon the question of intent, and instructions are properly requested on that subject, they should be given,[7] and an omission to instruct on intent as an element of the offense charged may constitute reversible error, although no request is made therefor;[8] but where the statute on which an indictment is predicated does not couple with the prohibited act any specific intent, it is not necessary that an instruction, including all the essential elements of the offense, specifically mention the intent.[9]

§ 308. Evidence of intent

It is proper to instruct that the intent with which the accused did the act alleged as an offense may be inferred from all the facts and circumstances under which the act complained of was committed as disclosed by the evidence,[10] and an instruction to the contrary is properly refused.[11]

[4] State v. Roberts, 63 Vt. 139, 21 A. 424.

[5] State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312.

[6] Burgess v. State, 42 So. 681, 148 Ala. 654.

[7] Shaeffer v. State, 61 Ark. 241, 32 S. W. 679; State v. Essex, 175 N. W. 795, 170 Wis. 512.

[8] State v. Green, 89 P. 322, 15 Mont. 424.

[9] McClure v. People, 61 P. 612, 27 Colo. 358; State v. Conley, 217 S. W. 29, 280 Mo. 21.

[10] State v. Woodward, 84 Iowa, 172, 50 N. W. 885; State v. Williams, 66 Iowa, 573, 24 N. W. 52.

Instructions on intent held proper. A charge that there must be a union or joint operation of act and intent or criminal negligence, followed by an explanation that it was not possible to look into the mind of a man, and see what its workings are, or to bring a photograph of the mind of the man and exhibit it to the jury, so as to determine clearly and absolutely what the workings of a human being's mind are, and that from necessity the law required the jury to gather the intention with which the act was done from all the surrounding circumstances, was not objectionable as being argumentative, misleading, or suggestive. People v. McRoberts, 81 P. 734, 1 Cal. App. 25.

[11] Cross v. State, 55 Wis. 261, 12 N. W. 425.

§ 309. Motive or lack of motive

In jurisdictions where the court is allowed to comment on the evidence, it is not improper to instruct that the establishment of a motive on the part of the defendant to commit the alleged crime makes it "more likely that he committed it than a man who had no motive."[12] An instruction calculated to authorize the jury to imagine a motive without proof is erroneous.[13] Within this rule an instruction that no one can lay bare the secrets of the mind and that there may have been a concealed motive, although it is impossible to prove any, may be ground for reversal.[14] The general rule is that it is proper to instruct, in connection with an instruction that the failure of the state to show a motive for the offense charged is a circumstance in favor of the accused,[15] that it is not essential to a conviction that a motive be proven,[16] and instructions which may mislead the jury into believing that the state is required to prove a motive on the part of the defendant are properly refused.[17]

Where the attention of the jury has been directed to the motive of accused in committing a crime by an instruction that a motive is not a necessary element of guilt, it is error to refuse an instruction that the absence of a probable motive is a circumstance in favor of the accused,[18] and in some jurisdictions it is held without qualification that such an instruction should be given,[19] on request,[20] where the evidence does not disclose a motive. In other jurisdictions the rule is that the court need not instruct on the effect of the absence of an apparent motive for the alleged crime because of the mere fact of such absence,[21] and where the intent to commit the act charged to constitute the offense has been shown or where defendant's own testimony shows a motive, the defendant is not entitled to an instruction on the effect of the absence of motive.[22] In some jurisdictions an instruction that the

[12] Commonwealth v. Keegan, 70 Pa. Super. Ct. 436.

[13] People v. Enwright, 66 P. 726, 134 Cal. 527.

[14] People v. Enwright, 66 P. 726, 134 Cal. 527.

[15] Lanckton v. United States, 18 App. D. C. 348; State v. Barrington, 95 S. W. 235, 198 Mo. 23.

[16] Lanckton v. United States, 18 App. D. C. 348; Wheeler v. State, 63 N. E. 975, 158 Ind. 687; State v. David, 33 S. W. 28, 131 Mo. 380.

[17] Ward v. State, 45 So. 221, 153 Ala. 9; People v. Enright, 99 N. E. 936, 256 Ill. 221, Ann. Cas. 1913E, 318.

[18] State v. Santino (Mo.) 186 S. W. 976; State v. Foley, 46 S. W. 733, 144 Mo. 600.

[19] State v. Johnson, 72 So. 370, 139 La. 829.

[20] Vaughan v. Commonwealth, 85 Va. 671, 8 S. E. 584.

[21] State v. Cox, 175 S. W. 50, 264 Mo. 408; State v. Brown, 68 S. W. 568, 168 Mo. 449.

[22] State v. Santino, 186 S. W. 976; State v. Feeley, 92 S. W. 663, 194 Mo. 300, 3 L. R. A. (N. S.) 351, 112 Am. St. Rep. 511; State v. Lynn, 70 S. W. 127, 169 Mo. 664.

absence of evidence to show a motive for the crime alleged is a circumstance in favor of defendant is considered misleading.[23]

§ 310. Place of offense

As a general rule the failure of the court in a criminal prosecution to instruct on the question of venue is erroneous only where there is a question as to the proof of venue or when there is no proof of venue.[24] An instruction authorizing the jury to convict the defendant if they should find that he committed the acts charged in the indictment or information is not objectionable because it fails to require them to find that such acts were committed at the place named in such pleading,[25] and where an instruction has been given requiring the state to prove that the crime alleged was committed in the county in which the indictment was found, it is not error for the court to omit to add such direction to an instruction that the people are not bound to prove the exact time alleged in the indictment;[26] but where, on the trial of a person charged as an accessory before the fact, the evidence tends to prove the commission of the crime in two or more counties, the court should in plain terms charge that there should be an acquittal, if no accessorial act was committed in the county in which the information was filed.[27] Where the question of venue is a serious one, and is fought out as an issue before the jury, it will be reversible error to fail to submit it to them,[28] and the court should declare the necessity of proving the venue beyond a reasonable doubt.[29]

§ 311. Time of offense

The instructions need not specify the date of the offense, when the allegations and the proof show that it occurred on a certain day,[30] and ordinarily, in a criminal prosecution, it is proper for

[23] Carwile v. State, 39 So. 220, 148 Ala. 576; Jackson v. State, 34 So. 188, 136 Ala. 22.

[24] Ragsdale v. State, 32 So. 674, 134 Ala. 24; Cook v. State, 35 So. 665, 46 Fla. 20.

[25] Thain v. State, 106 N. E. 690, 182 Ind. 345; Dyer v. State, 74 Ind. 594; Walker v. State, 151 S. W. 318, 68 Tex. Cr. R. 315.

Instructions sufficiently specific as to place of offense. An instruction that defendant was guilty, if he obtained possession of the mules in B. county and did "then and there" fraudulently convert same, sufficiently informed the jury that, to warrant conviction, the conversion must have taken place in B. county. Pech v. State, 154 S. W. 998, 69 Tex. Cr. R. 490.

[26] Cook v. People, 52 N. E. 273, 177 Ill. 146.

[27] Burlingim v. State, 85 N. W. 76, 61 Neb. 276.

[28] McKnight v. State, 156 S. W. 1188, 70 Tex. Cr. R. 470.

[29] Territory v. Caldwell, 98 P. 167, 14 N. M. 535.

[30] State v. Gould, 170 S. W. 868, 261 Mo. 694, Ann. Cas. 1916E, 855.

the court to charge, with reference to the time of the alleged offense, that if the jury find that it was committed on or about the date specified in the indictment or information, or at any date within the period of limitation, they will be warranted in convicting the defendant,[31] where only one offense is testified to and the evidence indicates no uncertainty as to the occasion referred to.[32]

Even where the evidence of the state shows the commission by the defendant of several offenses of the kind charged within the time covered by the indictment, and no election has been made or requested, the court may properly refuse to charge that to entitle the state to a conviction, and at the same time protect the defendant from a probable future prosecution, the evidence must show that the defendant committed the offense charged at a particular time and upon a particular occasion.[33] Where, however, although the evidence shows the commission by the defendant of several distinct acts, similar to the one of which he is accused, at different times, it also fixes the exact date of the offense charged against him, it is error for the court to instruct that the time of the offense is not material,[34] and in such case the defendant is entitled to an instruction that in order to convict the jury must find that he committed the offense on the date selected for prosecution.[35] The court may also be required to give instructions as to the date of the offense with a view of defining the duties of the jury with respect to the matter of punishment.[36]

An instruction that the jury may convict on finding the commission of an offense at any time prior to the date of the indictment and within the period fixed by the statute of limitations should specify the time covered by such statute,[37] and such an instruction should confine the jury to a date anterior to the filing of the indictment or information, and should not permit conviction of an offense committed at any time before the trial.[38]

Where the evidence raises an issue as to the date of the com-

[31] People v. Reynolds, 192 P. 343; People v. Sykes, 101 P. 20, 10 Cal. App. 67; Imboden v. People, 90 P. 608, 40 Colo. 142; Ferguson v. State, 72 N. W. 590, 52 Neb. 432, 66 Am. St. Rep. 512; State v. Perkins, 47 A. 268, 70 N. H. 330.

[32] Robinson v. State, 126 N. W. 750, 143 Wis. 205.

[33] Long v. State, 56 Ind. 182, 26 Am. Rep. 19.

[34] State v. Moss, 131 P. 1132, 73 Wash. 430.

[35] People v. Nichols, 124 N. W. 25, 159 Mich. 355. See State v. Clark, 146 P. 1107, 27 Idaho, 48.

[36] Clary v. Commonwealth, 173 S. W. 171, 163 Ky. 48.

[37] People v. Davidson, 88 N. E. 565, 240 Ill. 191.

[38] Taylor v. State, 114 P. 628, 5 Okl. Cr. 183; Mitchell v. State, 101 P. 1100, 2 Okl. Cr. 442; Banks v. State, 101 P. 610, 2 Okl. Cr. 339.

mission of the offense, and is not inconsistent with the possibility that limitations have intervened between such commission and the indictment, the court should charge,[39] on request,[40] that unless the offense be shown to have been committed within the statutory limitation a conviction cannot be had.

§ 312. Instructions necessary or proper where two or more persons are jointly indicted or jointly tried

Where two persons jointly indicted are separately tried, the court should charge, on request, that the conviction of one defendant creates no presumption of the guilt of the other.[41] Where two persons are separately indicted for the same offense, but tried jointly, the court should charge the law separately as to each case,[42] and where two or more persons are jointly tried for a crime the court should charge that the jury are at liberty to find one or more of the defendants guilty and the others not guilty,[43] and instructions which may lead the jury to believe that a conviction of one defendant, tried jointly with others, will require the conviction of the others, are erroneous.[44] The failure, however, of the court to

[39] State v. Kunhi, 93 N. W. 342, 119 Iowa, 461.

[40] Thorp v. State, 129 S. W. 607, 59 Tex. Cr. R. 517, 29 L. R. A. (N. S.) 421.

[41] Mixon v. State, 51 S. E. 580, 123 Ga. 581, 107 Am. St. Rep. 149.

[42] Mayzone v. State (Tex. Cr. App.) 225 S. W. 55.

[43] **Conn.** Hayden v. Nott, 9 Conn. 367.

Ga. Abrams v. State, 48 S. E. 965, 121 Ga. 170.

La. State v. Daniels, 38 So. 894, 115 La. 59.

Mo. State v. James, 115 S. W. 994, 216 Mo. 394; State v. Vaughan, 98 S. W. 2, 200 Mo. 1.

Tex. Hampton v. State, 45 Tex. 154.

[44] **Ga.** Lofton v. State, 48 S. E. 908, 121 Ga. 172.

Iowa. State v. Harvey, 106 N. W. 938, 130 Iowa, 394.

Miss. Davis v. State, 23 So. 770, 941, 75 Miss. 637.

N. Y. People v. McGrath, 5 N. Y. Cr. R. 4.

Tex. Maloney v. State, 125 S. W. 36, 57 Tex. Cr. R. 435; Holmes v. State, 9 Tex. App. 313.

Instructions objectionable within rule. On a trial of two persons on the charge of homicide, an instruction that, if the jury are satisfied that "defendants or either of them is guilty of murder, but have a reasonable doubt whether it was committed upon express or implied malice," they must give the defendants the benefit of the doubt, and not find him or them guilty of a higher degree than murder in the second degree, is subject to the criticism that the court combined the cases of both persons and made the guilt of one dependent on that of the other. Abbata v. State, 102 S. W. 1125, 51 Tex. Cr. R. 510.

Instructions not improper within rule. Direction that the jury could find any one or any two or all three of the defendants guilty, or that they might return a verdict of not guilty as to all of them. State v. Ford, 95 S. E. 154, 175 N. C. 797. Where, on a trial for homicide, the court charged that the law presumed that the defendants were innocent until their guilt had been proved beyond a reasonable doubt, and that if on the whole case the jury had a reasonable doubt of the guilt of the defendants, or either of them, they should find them not guilty, or such one of them not guilty as to whom they

charge that the jury may find one or both of the defendants guilty or acquit one or both as they may find the facts to be from the evidence,[45] or to instruct that the jury may find one defendant guilty and disagree as to the other,[46] is not error, if no such instruction is asked. So, where the evidence is practically the same as to each defendant so tried, and neither asks for a severance, or for a charge as to the circumstances under which the jury may make a separate finding as to either one of the defendants, the failure of the court to so charge is not error.[47]

B. Principals and Accessories

§ 313. Necessity and propriety of instructions

Where the evidence tends to show that the accused and others acted together in the commission of the offense charged, the court may,[48] and should,[49] except in a prosecution for a misdemeanor,[50]

might entertain such doubt, an instruction that if they believed that defendants, or either of them, conspired to kill decedent, and pursuant thereto killed him, they should find them guilty of murder, was not open to the objection that, if the jury believed any of the defendants to be guilty, they were required to find them all guilty. Bull v. Commonwealth, 96 S. W. 817, 29 Ky. Law Rep. 949. Instructions authorizing conviction of assault with intent to murder if defendants committed certain acts were not erroneous as requiring a joint conviction or joint acquittal, where other instructions authorized separate or joint conviction or acquittal. Sellers v. State, 134 S. W. 348, 61 Tex. Cr. R. 140.

[45] People v. Darr, 179 Ill. App. 130, judgment affirmed 104 N. E. 389, 262 Ill. 202; State v. James, 115 S. W. 994, 216 Mo. 394; State v. Barnett, 102 S. W. 506, 203 Mo. 640.

[46] Morgan v. State, 19 N. E. 154, 117 Ind. 569.

[47] Welborn v. State, 42 S. E. 773, 116 Ga. 522.

[48] **Ala.** Bailey v. State, 53 So. 296, 390, 168 Ala. 4.

Cal. People v. Haney (App.) 189 P. 338; People v. Wong Hing, 169 P. 357, 176 Cal. 699; People v. Llera, 149 P. 1004, 27 Cal. App. 346.

Colo. Reagan v. People, 112 P. 785, 49 Colo. 316; Van Wyk v. People, 99 P. 1009, 45 Colo. 1.

Conn. State v. Kritchman, 79 A. 75, 84 Conn. 152.

Ga. Short v. State, 80 S. E. 8, 140 Ga. 780; Morman v. State, 65 S. E. 146, 133 Ga. 76; Goodin v. State, 55 S. E. 503, 126 Ga. 560.

Ky. Ratliff v. Commonwealth, 206 S. W. 497, 182 Ky. 246.

Miss. Spight v. State, 83 So. 84, 120 Miss. 752.

Neb. Kirk v. State, 172 N. W. 527, 103 Neb. 484.

Okl. Collins v. State, 175 P. 124, 15 Okl. Cr. 96.

Or. State v. Chin Borkey, 176 P. 195, 91 Or. 606.

Tex. Middleton v. State, 217 S. W. 1046, 86 Tex. Cr. R. 307; Gribble v. State, 210 S. W. 215, 85 Tex. Cr. R. 52, 3 A. L. R. 1096; Hoecker v. State, 183 S. W. 141, 79 Tex. Cr. R. 78; Lewis v. State, 162 S. W. 866, 72 Tex. Cr. R. 377; Coggins v. State, 151 S. W. 311, 68 Tex. Cr. R. 266; Cortez v. State, 83 S. W. 812, 47 Tex. Cr. R. 10; McMahon v. State, 81 S. W. 296, 46 Tex. Cr. R. 540; Wingo v. State (Cr. App.) 75 S. W. 29; Grimsinger v. State, 69 S. W. 583, 44 Tex. Cr. R. 1; Houston v. State (Cr. App.) 47 S. W. 468.

[49] Lake v. State, 184 S. W. 213, 79

[50] Lott v. State, 127 S. W. 191, 58 Tex. Cr. R. 604.

charge on the law of principals. In a prosecution as principal of one who did not actually commit the crime charged, the court should instruct that at the time of the commission of the offense the parties must have been acting together, each doing some part

Tex. Cr. R. 234; McKnight v. State, 156 S. W. 1188, 70 Tex. Cr. R. 470.

Evidence justifying or requiring instructions as to principal and accessory. Where, in a prosecution for robbery, it appeared that defendant did not personally take the property from complainant's person, but stood by holding a revolver, an instruction as to an accessory was properly given. People v. Deluce, 86 N. E. 1080, 237 Ill. 541. Where there is evidence that defendant, who was charged with unlawfully branding cattle not his own, caused the cattle to be branded by another, an instruction that the jury could find defendant guilty, if he branded or caused the cattle to be branded, without instructing as to who were principals in the offense, is erroneous. Arismendis v. State, 54 S. W. 601, 41 Tex. Cr. R. 378. In a prosecution against two for burglary, where the prosecuting witnesses saw only one person in their house, but there was evidence another participated, an instruction on accessories is warranted. People v. Hohimer, 111 N. E. 599, 271 Ill. 515. In a prosecution for burglary, evidence that at the time of the burglary defendant's codefendant was in the house, and defendant was standing on the outside and ran away as the officers approached, was sufficient to authorize a charge defining a principal. Tally v. State, 90 S. W. 1113, 49 Tex. Cr. R. 91. Evidence that a witness testified that on approaching the burglarized house he heard a whistle, which he thought came from defendant, who was standing near by, and witness thought he saw another person in the house. Young v. State, 44 S. W. 835. Where defendants were jointly indicted for burglary as principals in the first degree, and there was evidence that defendants were the actual perpetrators of the offense, and other evidence from which the jury might have found that they watched while the burglary was committed, it warranted an instruction on the subject of principals in the second degree. Lofton v. State, 48 S. E. 908, 121 Ga. 172. In a prosecution for burglary of a saloon, where defendant testified that he was called into the place to have a drink by parties engaged in committing the crime, and that he left as soon as he understood the true condition of affairs, he had the right to have presented to the jury the law, applicable to his defense, that he was not guilty as a principal, unless he aided in the commission of the crime. McPherson v. State, 182 S. W. 1114, 79 Tex. Cr. R. 93. Where the state's evidence tended to show that one defendant held the deceased while the other defendant shot him, it is proper to charge the law of principals as to the first defendant. Bell v. State, 190 S. W. 732, 80 Tex. Cr. R. 475. Where the only evidence as to defendant's connection with the offense of unlawfully killing a hog was circumstantial, and the evidence for the state tended to show a conspiracy on the part of defendant and others to kill hogs belonging to a certain person, it was error to refuse to instruct that defendant was not chargeable with anything which any other one named in the indictment may have done, unless he advised, aided, or abetted others in the commission of the offense, intending at the time to aid or encourage the commission of the offense. Howser v. State, 23 So. 681, 117 Ala. 176. Where the evidence tended to show that defendant might have been guilty of homicide upon the theory that he personally delivered the fatal blow, or that there was a conspiracy between him and others, in pursuance of which one of his associates delivered the fatal blow, or that though there was no such conspiracy and though defendant did not deliver the fatal blow, yet he was present, aiding and abetting, it was error to refuse an instruction that, if the jury

in the execution of the common purpose.[51] Where there is evidence showing that the defendant was guilty only as an accomplice, the jury should be affirmatively instructed that if the defendant was not a principal he cannot be convicted under an indictment charging him as principal,[52] and where the defendant has admitted subsequent knowledge of the crime charged against him he is entitled to an instruction that such confession is not evidence of actual participation in the crime, but goes only to show that he was an accessory after the fact, and that it is no basis for his conviction as principal or active participant.[53]

In a prosecution of one as an accomplice, the jury should be charged in some jurisdictions that the state must prove, first, the commission of the crime by the alleged principal, and, second, that defendant was an accomplice as charged, and that the testimony of the alleged principal is not sufficient to prove either of these facts, but must be corroborated,[54] and, in some jurisdictions, where one is charged as accomplice in a crime the court should distinctly instruct that in order to convict the jury must believe that the defendant was not present at the commission of the crime, and that it was committed by a person or persons who were advised, commanded, or encouraged by the defendant to commit it,[55] although it is held that, where the evidence conclusively shows the guilt of the principal defendant, it is not necessary to instruct that the jury must believe him to be guilty before they can convict the accessory.[56]

found that defendant and his associates acted illegally and maliciously in what they did, yet unless they were satisfied beyond a reasonable doubt, and to a moral certainty, that their acts were done pursuant to a mutual agreement, they should not convict defendant unless they believed beyond a reasonable doubt, and to a moral certainty, that defendant inflicted the fatal wound, or aided and abetted whoever did inflict it. Liner v. State, 27 So. 438, 124 Ala. 1. Evidence in a prosecution for obstructing a railroad track, showing that defendant and another passed the place of the obstruction and were seen about there calls for an instruction on principals. Clay v. State, 146 S. W. 166, 65 Tex. Cr. R. 590.

[51] Middleton v. State, 217 S. W. 1046, 86 Tex. Cr. R. 307.

[52] Silvas v. State, 159 S. W. 223, 71 Tex. Cr. R. 213.

Harmless error. Where the court had charged that, before the jury could convict defendant, they must find beyond a reasonable doubt that she was a principal, a failure to charge that, if she were an accomplice or an accessory, they must acquit her, was without prejudice where the evidence shows that, if guilty at all, she was guilty as a principal. Harris v. State, 37 Tex. Cr. R. 441, 36 S. W. 88.

[53] State v. Payne, 6 Wash. 563, 34 Pac. 317.

[54] Cone v. State, 216 S. W. 190, 86 Tex. Cr. R. 291.

[55] Cone v. State, 216 S. W. 190, 86 Tex. Cr. R. 291; Leeper v. State, 29 Tex. App. 154, 15 S. W. 411; Dugger v. State, 27 Tex. App. 95, 10 S. W. 763.

[56] Gullatt v. State, 80 S. E. 340, 14 Ga. App. 53.

It is unnecessary to charge as to accessories, where the court defines a principal, tells the jury they can only convict if they believe the defendant to be a principal as defined, and then charges that if they have a reasonable doubt as to whether the defendant is guilty as a principal as defined to them he is entitled to the benefit of the doubt and should be acquitted.[57] Where all the defendants are principal offenders, the court may so charge.[58]

§ 314. Sufficiency of instructions

An instruction which follows the language of the statute in defining a principal or an accessory will ordinarily be sufficient,[59] and usually it is better to do so.[60] In a proper case the court may call the attention of the jury to a provision of the statute that an accessory may be prosecuted and punished as though he were the principal offender.[61] In an instruction defining who are principals, the court should only quote that part of the statute relating to principals, omitting the part not applicable to principals.[62]

In some jurisdictions an instruction defining accomplices as all persons who participate in an offense as principals, and principals as "all persons acting together in the commission of an offense," is sufficient.[63] An instruction calculated to give the jury the im-

[57] Spradling v. State (Tex. Cr. App.) 42 S. W. 294.

[58] Gavinia v. State, 145 S. W. 594, 65 Tex. Cr. R. 572; Hernandez v. State (Tex. Cr. App.) 145 S. W. 596.

[59] Burnett v. State, 96 S. W. 1007, 80 Ark. 225; State v. Bland, 76 P. 780, 9 Idaho, 796; People v. Everett, 90 N. E. 226, 242 Ill. 628; People v. Lee, 86 N. E. 573, 237 Ill. 272; Grimsinger v. State, 69 S. W. 583, 44 Tex. Cr. R. 1.

[60] Clerget v. State, 103 S. W. 381, 83 Ark. 227; State v. Allen, 87 P. 177, 34 Mont. 403; State v. Geddes, 55 P. 919, 22 Mont. 68.

[61] State v. Carey, 56 A. 632, 76 Conn. 342.

[62] Sapp v. State, 190 S. W. 489, 80 Tex. Cr. R. 363.

[63] Hilton v. State, 53 S. W. 113, 41 Tex. Cr. R. 190.

Other instructions on principal and accessory held proper. An instruction in giving general definition of a principal which quoted the statute, to the effect that any person who advises or agrees to the commission of an offense and is present when it is committed, whether or not he aids in the illegal act, is a principal, was not error. Ferguson v. State, 187 S. W. 476, 79 Tex. Cr. R. 641. A charge that all persons are "principals" who are guilty of acting together in the commission of an offense, and that the criterion is did the parties act together, was the act done in pursuance of a common intent and previously formed design in which the minds of all united; if so, they are alike guilty, providing the offense was actually committed during the existence and in the execution of the common design and intent, whether all were actually bodily present when the offense was actually committed or not—sufficiently submitted the law on the subject of principals. Lott v. State, 127 S. W. 191, 58 Tex. Cr. R. 604. An instruction that all persons are principals who acted together in the commission of an offense, and that where an offense is committed by one or more persons, and others are present, and, knowing the unlawful intent, aid those actually engaged in the unlawful act, such persons are principals, who may be prosecuted as such, fol-

pression that mere knowledge by one defendant, that the crime charged was in contemplation by the person or persons who actually committed it would constitute an aiding or abetting is erlowed by an instruction that, before defendant could be convicted, it must be found beyond a reasonable doubt that he was present "knowing the unlawful intent and aided the persons committing the offense," aptly presents the issue as to intent. Dowling v. State, 140 S. W. 224, 63 Tex. Cr. R. 366. An instruction that if a man assist, or encourage another by his presence consciously, knowingly, purposely, knowing that the other person understands that he is there as an encourager, he is an accomplice though he does not lift a hand is a reasonably correct exposition of the law on the subject. Eaton v. State, 63 So. 41, 8 Ala. App. 136. Where, in a prosecution for drowning accused's infant child, there was no evidence that any one could have been connected therewith except accused and its mother, and the evidence strongly rebutted the theory that she did the act, a charge that if the jury believed beyond a reasonable doubt that the child was drowned, but believed that accused was not present at the time and did not drown it, or had a reasonable doubt thereof, they should acquit, sufficiently presented the question of liability of accused as an accomplice. Gossett v. State, 123 S. W. 428, 57 Tex. Cr. R. 43. On a prosecution for assault with intent to kill, where there is evidence that defendant was an accessory, an instruction that one is guilty as principal of an offense committed solely by another, when he conspired with the other to commit it, and that the conspiracy need not be shown by positive, but may be shown by circumstantial, evidence, is proper. Elmore v. State, 110 Ala. 63, 20 So. 323. An instruction that if one of the defendants made the felonious assault, and if the others were present, aiding, and abetting, or ready, if necessary, to aid and abet therein, they are equally guilty with him, is not erroneous, since the word "ready" means prepared in mind, and disposed to so aid and abet. State v. Gooch, 105 Mo. 392, 16 S. W. 892. An instruction that the jury would be warranted in finding defendants guilty if they believed that "the defendants, or either of them, the other being present and abetting," did willfully, etc., shoot deceased, is not ground for reversal, as requiring a conviction of both defendants if a conviction of one was had. State v. Taylor, 134 Mo. 109, 35 S. W. 92. In a trial for murder, an instruction that if defendant was present for the purpose of actual assistance as the circumstances might demand, and the principal was encouraged to take the life of the deceased by the presence of defendant, then defendant aided and abetted in the killing of the deceased, is properly given. Singleton v. State, 106 Ala. 49, 17 So. 327. Where, on a prosecution for larceny, there is evidence that others were present when the crime was committed, who might have acted in concert with defendant, it is proper to instruct the jury to convict if they find that the offense was committed, and the opportunity was such as to point to the defendant, as the sole perpetrator, or the perpetrator with others, with whom she acted in concert. Territory v. De Gutman, 8 N. M. 92, 42 P. 68. The charge, in a prosecution for larceny, that any participation in a general felonious plan, if there is such a plan and there be actual or constructive presence, will make one a principal, is not error, when joined with a charge that, to be convicted of larceny as a principal, one must be actually or constructively present, and that previous consent or procurement of the taking and carrying away, or subsequent reception, of the thing stolen, will not make one a principal. Baldwin v. State, 35 So. 220, 46 Fla. 115. Where, on a prosecution for theft of hogs, the defense was that defendant was not connected with the original theft of the property, a charge by the court, after defining "principals," that defendant must be acquitted unless the evidence satisfied the jury that defendant took the hogs, or that some other person

roneous.[64] In some jurisdictions an instruction which authorizes the jury to convict the defendant as a principal if he acted with others in the commission of the offense charged, and the act was done in pursuance of a common intent, whether the defendant was in fact actually present, is erroneous, as authorizing a conviction as a principal on facts which make the defendant guilty only as an accomplice.[65]

The acts necessary to constitute one an aider and abettor of an offense cannot well be embodied in an instruction without misleading the jury, and accordingly it is the better practice simply to instruct the jury that a party aiding and abetting the commission of an offense is guilty.[66]

C. Grade or Degree of Offense

§ 315. Necessity and propriety in general

Where the offense charged is one that admits of degrees, and the evidence justifies it, an instruction looking to the conviction of defendant of a lower grade of offense than that charged in the indictment, but necessarily included in it, is proper,[67] and should be

took the hogs, and that defendant was so connected with such taking as would make him a "principal," as before defined, is sufficient. Tucker v. State (Tex. Cr. App.) 23 S. W. 682.

Instructions on principal and accessory held improper. In a prosecution for hog theft, where it appeared that the hogs were taken from their accustomed range, so that whoever took them, by driving them or reducing them to actual possession, was guilty as an original taker, and any one who had connection with the hogs subsequent to such taking was not a principal, but there was no evidence showing how the hogs disappeared from the range, or who took them, and it was sought by circumstantial evidence to connect accused and another with the possession of the hogs, though they were never seen in accused's possession, a charge that all persons are principals who are guilty of acting together in the commission of an offense, and that if the jury believed that one or more of the hogs in question were fraudulently taken as charged, and that accused, with one or more others, acted together in such taking, accused would be a principal, and that by acting together was meant that accused was present, and that the persons acted in concert towards the accomplishment of a common purpose, one performing one part and another another part in aid of its accomplishment at the time of its perpetration, was erroneous, as permitting accused to be convicted as principal, whether he participated in the original taking or not. McClure v. State, 128 S. W. 386, 59 Tex. Cr. R. 287.

[64] Clem v. State, 33 Ind. 418; State v. Bartlett, 105 N. W. 59, 128 Iowa, 518; True v. Commonwealth, 90 Ky. 651, 14 S. W. 684; State v. Cox, 65 Mo. 29.

[65] Silvas v. State, 159 S. W. 223, 71 Tex. Cr. R. 213.

[66] Smith v. Commonwealth, 4 Ky. Law Rep. (abstract) 353.

[67] **Ark.** Pickett v. State, 121 S. W. 732, 91 Ark. 570.

Mo. State v. Schieller, 130 Mo. 510, 32 S. W. 976; State v. Musick, 101 Mo. 260, 14 S. W. 212.

Neb. McConnell v. State, 110 N. W. 666, 77 Neb. 773.

given[68] on request.[69] The above rule applies where the trial court has a reasonable doubt about the propriety of such an in-

Utah. People v. Thiede, 11 Utah, 241, 39 Pac. 837.

Wyo. Nicholson v. State, 106 P. 929, 18 Wyo. 298.

[68] **Ariz.** Stokes v. Territory, 127 P. 742, 14 Ariz. 242.

Cal. People v. Wilson, 156 P. 377, 29 Cal. App. 563.

Ga. Weldon v. State, 94 S. E. 326, 21 Ga. App. 330; Griffin v. State, 89 S. E. 537, 18 Ga. App. 462; Tanner v. State, 88 S. E. 554, 145 Ga. 71; McGuffie v. State, 17 Ga. 497.

Iowa. State v. Thompson, 103 N. W. 377, 127 Iowa, 440; State v. Desmond, 80 N. W. 214, 109 Iowa, 72.

Kan. State v. Bloom, 136 P. 951, 91 Kan. 156; State v. Franklin, 77 P. 588, 69 Kan. 798.

La. State v. Wright, 28 So. 909, 104 La. 44.

Minn. State v. Brinkman, 175 N. W. 1006, 145 Minn. 18.

Mo. State v. Barham, 82 Mo. 67; State v. Tate, 12 Mo. App. 327; State v. Robinson, 73 Mo. 306; State v. Bryant, 55 Mo. 75; State v. Wyatt, 50 Mo. 309.

N. M. Territory v. Nichols, 3 N. M. 76, 2 P. 78.

N. Y. People v. Young, 88 N. Y. S. 1063, 96 App. Div. 33; Fitzgerrold v. People, 37 N. Y. 413.

N. C. State v. Merrick, 88 S. E. 501, 171 N. C. 788.

Ohio. Hagan v. State, 10 Ohio St. 459.

Okl. Newby v. State (Okl. Cr. App.) 188 P. 124: Kent v. State, 126 P. 1040, 8 Okl. Cr. 188.

Or. State v. Cody, 18 Or. 506, 23 P. 891, 24 P. 895.

Tenn. Jones v. State, 161 S. W. 1016, 128 Tenn. 493; Nelson v. State, 2 Swan, 237.

Tex. Jones v. State, 216 S. W. 884, 86 Tex. Cr. R. 371; Wood v. State, 150 S. W. 780, 68 Tex. Cr. R. 58; Joy v. State, 123 S. W. 584, 57 Tex. Cr. R. 93; Cockerell v. State, 32 Tex. Cr. R. 585, 25 S. W. 421; McPhail v. State, 10 Tex. App. 128; Gatlin v. State, 5 Tex. App. 531; Taliaferro v. State, 40 Tex. 523; Pefferling v. State, 40 Tex. 486; Marshall v. State, 40 Tex. 200; Hudson v. State, 40 Tex. 12.

Wis. Weisenbach v. State, 119 N. W. 843, 138 Wis. 152.

Instructions held necessary under rule. On trial of an indictment for burglary and larceny, under a statute providing that, where a person committing burglary also commits a larceny, he may be prosecuted for both in the same indictment, and, if convicted, shall be imprisoned in the penitentiary, in addition to the punishment prescribed for burglary, not less than two nor more than five years for the larceny, the court should instruct the jury that they might convict of burglary and acquit of larceny or acquit of the former and convict of the latter, or convict or acquit of both. State v. Brinkley, 47 S. W. 793, 146 Mo. 37.

Conviction of first and second offenses as misdemeanors. In a prosecution for a felony under a statute which also defines first and second offenses as misdemeanors with different penalties attached, defendant may be acquitted of felony but convicted for a first or second offense, and instructions should be given thereon, especially when evidence as to former offense is more doubtful than as to principal offense charged. Wozniak v. State, 174 N. W. 298, 103 Neb. 749.

Joint trial of two defendants. In a joint trial for murder, it is the duty of the judge, if convinced that either prisoner is guilty of a less offense than that charged, to so instruct the jury, without regard to its effect

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[69] **Ark.** Roberson v. State, 160 S. W. 214, 109 Ark. 420; Collins v. State, 143 S. W. 1075, 102 Ark. 180.

Kan. State v. McAnarney, 79 P. 137, 70 Kan. 679.

N. Y. Foster v. People, 50 N. Y. 598.

Okl. Ex parte Wills, 148 P. 1069, 12 Okl. Cr. 596; Moody v. State, 148 P. 1055, 11 Okl. Cr. 471.

Tex. Hemanus v. State, 7 Tex. App. 372.

struction,[70] and slight evidence that the offense committed may have been of a lower degree than the one charged will make it proper or necessary for the court to charge the law of such inferior offense.[71] The unsupported evidence of the accused will be sufficient for that purpose.[72] Such an instruction should be given, unless the evidence positively excludes any inference that an inferior degree of the crime charged was committed, and to require such submission the defendant need not show facts justifying the conclusion that the lesser crime was committed.[73] It is only where the court may hold as a matter of law that the offense, if any, of which the defendant is guilty is the highest possible degree of the offense charged, that included offenses need not be submitted,[74] and an instruction that withdraws from the jury the consideration of elements in the case tending to reduce the degree of the crime charged is reversible error.[75] Instructions permitting the jury to bring in a verdict of guilty of the particular grade of offense for which the defendant is on trial, on finding him guilty of a higher grade, are erroneous.[76]

In most jurisdictions in the absence of a request so to do, the general rule is that it is not error for the court to fail to instruct as to the various degrees of the crime charged and as to the conditions of proof under which they may convict of a lesser degree.[77]

upon the other prisoner. State v. Pratt, 88 N. C. 639.

Instructions held improper under rule. In a prosecution for assault with intent to murder, where, under the information and evidence, the defendant could have been convicted of an assault likely to produce great bodily injury, it was error to charge that he could only be convicted of assault with intent to commit murder, or of a simple assault. People v. Watson, 57 P. 1071, 125 Cal. 342.

[70] State v. McGowan, 93 P. 552, 36 Mont. 422.

[71] State v. Clark, 77 P. 287, 69 Kan. 576; State v. Patterson, 52 Kan. 335, 34 P. 784.

[72] State v. Clark, 77 P. 287, 69 Kan. 576.

[73] State v. Gottstein, 191 P. 766, 111 Wash. 600.

[74] State v. Dimmitt, 169 N. W. 137, 184 Iowa, 870.

[75] Dolan v. State, 44 Neb. 643. 62 N. W. 1090.

[76] Lomax v. State, 43 S. W. 92, 38 Tex. Cr. R. 318; Parker v. State, 3 S. W. 100, 22 Tex. App. 105.

[77] **Ark.** Adcock v. State, 83 S. W. 318, 73 Ark. 625, 626; Hamilton v. State, 36 S. W. 1054, 62 Ark. 543.

Ariz. Ward v. Territory, 64 P. 441, 7 Ariz. 241, 3 Ann. Cas. 137.

Cal. People v. Modina, 79 P. 842, 146 Cal. 142; People v. Clark, 79 P. 434, 145 Cal. 727; People v. Bailey, 76 P. 49, 142 Cal. 434; People v. Arnold, 48 P. 803, 116 Cal. 682; People v. Barney, 47 P. 41, 114 Cal. 554; People v. McNutt, 93 Cal. 658, 29 P. 243.

Colo. Ray v. People, 167 P. 954, 63 Colo. 376; Miller v. People, 46 P. 111, 23 Colo. 95.

Fla. Cross v. State, 74 So. 593, 73 Fla. 530; Lindsey v. State, 43 So. 87, 53 Fla. 56; Copeland v. State, 26 So. 319, 41 Fla. 320. Compare Johnson v. State, 43 So. 779, 53 Fla. 45.

Ga. Tyson v. State, 97 S. E. 458, 23 Ga. App. 20; Green v. State, 97 S. E. 201, 22 Ga. App. 793.

Idaho. State v. White, 61 P. 517, 7 Idaho, 150.

In some jurisdictions, however, the duty of the court to so instruct exists, irrespective of whether the defendant requests such an instruction or not.[78] In Missouri, under a recent statute requiring the court to instruct upon all questions of law necessary for the information of the jury, the court should, whether so requested or not, in a proper case, instruct upon minor offenses.[79] In Georgia it is held that while, if the issue of included offenses is presented merely by the statement of the defendant, it will not be error to fail to charge thereon in the absence of a request,[80] the rule is otherwise where the issue is presented by the evidence.[81]

Ill. People v. Rozanski, 109 N. E. 711. 268 Ill. 607.

Ind. Barnett v. State, 100 Ind. 171; McClary v. State, 75 Ind. 200.

Ind. T. Roper v. United States, 104 S. W. 584, 7 Ind. T. 185, rehearing denied 97 P. 1022, 1 Okl. Cr. 712.

Kan. State v. Ewing, 173 P. 927, 103 Kan. 399; State v. Truskett. 118 P. 1047, 85 Kan. 804; State v. Newton, 87 P. 757, 74 Kan. 561.

La. State v. Marqueze, 45 La. Ann. 41, 12 So. 128.

Mich. People v. Ezzo, 104 Mich. 341. 62 N. W. 407.

Minn. State v. Gaularpp, 174 N. W. 445, 144 Minn. 86.

Neb. Curtis v. State, 150 N. W. 264. 97 Neb. 397; Krause v. State, 129 N. W. 1020, 88 Neb. 473, Ann. Cas. 1912B, 736; McConnell v. State, 110 N. W. 666, 77 Neb. 773; Barr v. State, 63 N. W. 856, 45 Neb. 458; Thurman v. State, 32 Neb. 224, 49 N. W. 338.

N. Y. People v. Jordan, 109 N. Y. S. 840, 125 App. Div. 522; McKee v. People, 34 How. Prac. 230.

Ohio. State v. McCoy, 103 N. E. 136, 88 Ohio St. 447.

Or. State v. Reyner, 91 P. 301, 50 Or. 224.

S. C. State v. Malloy, 78 S. E. 995, 95 S. C. 441, Ann. Cas. 1915C, 1053, judgment affirmed Malloy v. State of South Carolina, 35 S. Ct. 507, 237 U. S. 180, 59 L. Ed. 905.

S. D. State v. Frazer, 121 N. W. 790, 23 S. D. 304; State v. Sutterfield, 119 N. W. 548, 22 S. D. 584; State v. Horn, 111 N. W. 552, 21 S. D. 237.

Tex. Patten v. State, 209 S. W. 664, 84 Tex. Cr. R. 584.

Vt. State v. Hanlon, 62 Vt. 334. 19 A. 773.

Wash. State v. Parsons, 87 P. 349, 44 Wash. 299, 7 L. R. A. (N. S.) 566, 120 Am. St. Rep. 1003, 12 Ann. Cas. 61.

Wis. Weisenbach v. State, 119 N. W. 843, 138 Wis. 152; Cupps v. State, 97 N. W. 210, 120 Wis. 504, 102 Am. St. Rep. 996, rehearing denied 98 N, W. 546, 120 Wis. 504, 102 Am. St. Rep. 996.

[78] **N. M.** Territory v. Nichols, 3 N. M. 76, 2 P. 78.

N. C. State v. Merrick, 88 S. E. 501. 171 N. C. 788.

Okl. Steeley v. State (Cr. App.) 187 P. 821; Palmer v. State (Cr. App.) 187 P. 502; Kent v. State, 126 P. 1040, 8 Okl. Cr. 188; Atchison v. State, 105 P. 387, 3 Okl. Cr. 295; Cannon v. Territory, 99 P. 622, 1 Okl. Cr. 600.

Contra, State v. Davidson, 90 S. E. 688, 172 N. C. 944.

[79] State v. Hoag, 134 S. W. 509, 232 Mo. 308; State v. Turlington, 102 Mo. 642, 15 S. W. 141.

[80] Hightower v. State, 101 S. E. 918, 24 Ga. App. 701; Mulling v. State, 89 S. E. 221, 18 Ga. App. 205, conforming to answer to certified questions 88 S. E. 575, 145 Ga. 36; Pollard v. State, 86 S. E. 1096, 144 Ga. 229; Roberts v. State, 84 S. E. 122, 143 Ga. 71; Harris v. State, 83 S. E. 514, 142 Ga. 627; Hawkins v. State, 80 S. E. 711, 141 Ga. 212; McLaughlin v. State, 80 S. E. 631, 141 Ga. 132; Helms v. State, 72 S. E. 246, 136 Ga. 799; Cargile v. State, 70 S. E. 873, 136 Ga. 55; Richards v. State, 70 S. E. 868, 136 Ga. 67; Johnson v. State, 60 S. E. 813, 4 Ga. App. 59; Baker v. State, 36 S. E. 607, 111 Ga. 141.

[81] Tanner v. State, 88 S. E. 554, 145

In some jurisdictions it is held that, while it is ordinarily true that a mere failure to instruct on a lesser included offense constitutes simply a nondirection, and is not ground for reversal, in the absence of a request for such an instruction, an exception to this rule exists in prosecutions for murder, and in such jurisdictions, in a murder case the court should, on its own motion, instruct on included offenses.[82]

§ 316. Pleadings and evidence to sustain

Instructions upon the different degrees or grades of an offense involved in a criminal proceeding should be based upon the indictment, and, if a nolle prosequi has been entered upon a count therein charging a particular grade of the offense, it is error to give an instruction upon such grade.[83]

While the law of each degree of the crime charged which the evidence tends to prove should be given to the jury, if the evidence only tends to prove the higher degree, or does not tend to prove an offense included in that charged, the court is not required to instruct on a lower degree, or on included offenses,[84] and if a

Ga. 71; Kimball v. State, 37 S. E. 886, 112 Ga. 541.

[82] State v. O'Connor, 44 So. 265, 119 La. 464; State v. Thomas, 23 So. 250, 50 La. Ann. 148; Kraus v. State, 169 N. W. 3, 102 Neb. 690.

[83] Serio v. State, 22 Tex. App. 633, 3 S. W. 784.

[84] **Ark.** Carlton v. State, 161 S. W. 145, 109 Ark. 516.

Cal. People v. Wright, 93 Cal. 564, 29 P. 240; People v. Turley, 50 Cal. 469.

Colo. Sevilla v. People, 177 P. 135, 65 Colo. 437.

Ga. Livingston v. State, 97 S. E. 854, 148 Ga. 686; Lindsey v. State, 88 S. E. 202, 145 Ga. 9; Wade v. State, 75 S. E. 494, 11 Ga. App. 411; Gibson v. State, 72 S. E. 944, 10 Ga. App. 117; Robinson v. State, 84 Ga. 674, 11 S. E. 544; Boyd v. State, 17 Ga. 194.

Ill. People v. Moore, 114 N. E. 906, 276 Ill. 392.

Iowa. State v. Newcomber, 174 N. W. 255; State v. Leete, 174 N. W. 253, 187 Iowa, 305; State v. Luther, 129 N. W. 801, 150 Iowa, 158; State v. Dean, 126 N. W. 692, 148 Iowa, 566; State v. Atkins, 97 N. W. 996, 122 Iowa, 161; State v. Sherman, 77 N. W. 461, 106 Iowa, 684; State v. Tippet, 94 Iowa, 646, 63 N. W. 445.

Kan. State v. Sparks, 99 P. 1130, 79 Kan. 548; State v. Mowry, 37 Kan. 369, 15 P. 282.

Ky. Wattles v. Commonwealth, 215 S. W. 291, 185 Ky. 486; Klette v. Commonwealth, 177 S. W. 258, 165 Ky. 430.

La. State v. Kemp, 45 So. 283, 120 La. 378; State v. Fruge, 31 So. 323, 106 La. 694.

Mich. People v. De Meaux, 160 N. W. 634, 194 Mich. 18; People v. Ezzo, 104 Mich. 341, 62 N. W. 407; People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865; People v. Repke, 103 Mich. 459, 61 N. W. 861.

Minn. State v. Damuth, 160 N. W. 196, 135 Minn. 76.

Miss. Skates v. State, 64 Miss. 644, 1 So. 843, 60 Am. Rep. 70; Virgil v. State, 63 Miss. 317.

Mo. State v. Dipley, 147 S. W. 111, 242 Mo. 461; State v. Colvin, 126 S. W. 448, 226 Mo. 446; State v. McCaffery, 125 S. W. 468, 225 Mo. 617; State v. Nieuhaus, 117 S. W. 73, 217 Mo. 332; State v. Johnson, 129 Mo. 26, 31 S. W. 339; State v. Woods, 124 Mo. 412, 27 S. W. 1114; State v. Maloney, 118 Mo. 112, 23 S. W. 1084;

minor offense is not necessarily included within the terms of the greater offense as set forth in the indictment, the court may properly refuse to give in charge to the jury the law applicable to the minor offense.[85] Where the evidence shows that the defendant is either guilty of the offense charged or innocent the court may so instruct,[86] and is not required to instruct on lower grades of the offense, or on included offenses.[87]

State v. Wilson, 88 Mo. 13; State v. Stoeckli, 71 Mo. 559; State v. Kilgore, 70 Mo. 546; State v. Lane, 64 Mo. 319.

Mont. State v. Karri, 149 P. 956, 51 Mont. 157, L. R. A. 1916F, 90.

Neb. Thompson v. State, 122 N. W. 986, 85 Neb. 244; Strong v. State, 88 N. W. 772, 63 Neb. 440.

Nev. State v. Enkhouse, 160 P. 28, 40 Nev. 1.

N. Y. People v. Travis, 157 N. Y. S. 577, 172 App. Div. 959.

Okl. Nail v. State (Cr. App.) 192 P. 592; Rhoades v. State, 184 P. 913, 16 Okl. Cr. 446; Inklebarger v. State, 127 P. 707, 8 Okl. Cr. 316; Fooshee v. State, 108 P. 554, 3 Okl. Cr. 666; Territory v. Gatliff, 37 P. 809, 2 Okl. 523.

Or. State v. Megorden, 88 P. 306, 49 Or. 259, 14 Ann. Cas. 130.

Tenn. Good v. State, 1 Lea, 293; Ray v. State, 3 Heisk. 379.

Tex. Hooper v. State, 160 S. W. 1187, 72 Tex. Cr. R. 82; Irby v. State, 155 S. W. 543, 69 Tex. Cr. R. 619; Hardin v. State, 103 S. W. 401, 51 Tex. Cr. R. 559; Hartley v. State, 71 S. W. 603; Stiener v. State, 33 Tex. Cr. R. 291, 26 S. W. 214; Hodge v. State (Cr. App.) 26 S. W. 69; Neyland v. State, 13 Tex. App. 536; Winn v. State, 5 Tex. App. 621; Gatlin v. State, 5 Tex. App. 531; Sims v. State, 4 Tex. App. 144.

Wash. State v. Murphy, 172 P. 544, 101 Wash. 425; State v. Reynolds, 162 P. 358, 94 Wash. 270; State v. Copeland, 119 P. 607, 66 Wash. 243; State v. Kruger, 111 P. 769, 60 Wash. 542; State v. McPhail, 81 P. 683, 39 Wash. 199.

Wis. Dillon v. State, 119 N. W. 352, 137 Wis. 655, 16 Ann. Cas. 913.

Offense not divided into degrees. Where, under a statute, there are degrees of crime, and the jury are charged with the duty of finding the degree, it is proper for the court to instruct in respect to the acts necessary to constitute the crime in each degree; but, where the offense charged is not divided into degrees, the court is not required to charge as to an offense that might be included in the charge made, but which the evidence would not warrant. State v. Kapelino, 108 N. W. 335, 20 S. D. 591.

[85] Lindsey v. State, 43 So. 87, 53 Fla. 56.

[86] Wilder v. State, 96 S. E. 325, 148 Ga. 270; State v. Nelson, 97 N. W. 652, 91 Minn. 143; State v. Moynihan, 106 A. 817, 93 N. J. Law, 253; State v. Cox, 110 N. C. 503, 14 S. E. 688; State v. Sanders, 103 N. W. 419, 14 N. D. 203.

[87] **Ala.** Miller v. State, 40 So. 47, 145 Ala. 677; Braham v. State, 38 So. 919, 143 Ala. 28.

Ark. Rogers v. State, 206 S. W. 152, 136 Ark. 161.

Cal. People v. Tugwell, 163 P. 508, 32 Cal. App. 520; People v. Rogers, 126 P. 143, 163 Cal. 476.

Ga. Todd v. State, 97 S. E. 668, 148 Ga. 634; Brookins v. State, 28 S. E. 77, 100 Ga. 321.

Iowa. State v. Ralston, 116 N. W. 1058, 139 Iowa, 44; State v. Akin, 94 Iowa, 50, 62 N. W. 667; State v. Jordan, 87 Iowa, 86, 54 N. W. 63.

Mo. State v. Stenzel, 220 S. W. 882.

Mont. State v. McDonald, 149 P. 279, 51 Mont. 1.

N. Y. People v. Chapman, 121 N. E. 381, 224 N. Y. 463.

Okl. Leseney v. State, 163 P. 956, 13 Okl. Cr. 247.

Tex. Marshbanks v. State, 192 S. W. 246, 80 Tex. Cr. R. 507; Greer v. State (Tex. Cr. App.) 65 S. W. 1075;

§ 317. Sufficiency of instructions

The mode and extent of submitting to the jury the several degrees of crime included in the indictment must, like other duties of the court, rest largely in its discretion.[88] An instruction that the jury may convict of either of two degrees of the crime charged, defining them,[89] or requiring them to specify in their verdict the degree of the offense,[90] sufficiently states the power and duty of the jury to ascertain such degree, in the absence of a request for further instructions. Instructions on this head should be so framed as not to give the jury the impression that they must convict the defendant of the lower degree, although they may believe he is not guilty of any offense.[91]

Darlington v. State, 50 S. W. 375, 40 Tex. Cr. R. 333.

Wash. State v. Palmer, 176 P. 547, 104 Wash. 396.

Wyo. Ross v. State, 93 P. 299, 16 Wyo. 285, rehearing denied 94 P. 217, 16 Wyo. 285.

[88] State v. Conley, 39 Me. 78.

[89] State v. Broadbent, 48 P. 775, 19 Mont. 467.

[90] Commonwealth v. Sheets, 46 A. 753, 197 Pa. 69.

Duty on convicting of minor degree of offense charged, to acquit of higher degree, see post, § 389.

[91] Smith v. Commonwealth, 55 S. W. 718, 108 Ky. 53, 21 Ky. Law Rep. 1470; Beaudien v. State, 8 Ohio St. 634; Greta v. State, 9 Tex. App. 429.

Instructions held not objectionable under rule. Where, after charging that there was a presumption of innocence in favor of defendant as to each and every element of the offense, and that the jury must acquit unless the state established by the evidence the existence of each and every element of the offense, and defendant's guilt thereof beyond all reasonable doubt, the court charged that, in passing on the question as to what degree of homicide defendant was guilty of, if they had a reasonable doubt as to whether it should be a higher or lower grade they should give him the benefit of the doubt, and return a verdict of guilty of the lower offense rather than the higher, provided they had a reasonable doubt, and immediately after it was charged that they could not convict of any degree of homicide if they had a reasonable doubt of defendant's guilt; and then, at defendant's request, it was charged that it was their duty to either acquit defendant, or find him guilty of the lowest degree of homicide submitted with which you can reasonably reconcile the facts admitted or established, it was held that the charge did not tend to mislead the jury to believe that, if they had a reasonable doubt as to the existence of either of two grades of offense, they should convict of the lesser. Ryan v. State, 92 N. W. 271, 115 Wis. 488. Where the court correctly instructs the jury as to murder in the first and second degrees, and then proceeds to instruct them as to manslaughter and self-defense, and says, "if you believe beyond a reasonable doubt" that defendant killed deceased under the circumstances constituting manslaughter, "you will find him guilty of that crime," the charge is not open to the objection that it requires the jury to find beyond a reasonable doubt that defendant is guilty of manslaughter, as between the crimes of murder and manslaughter, but the evident meaning of the charge is that manslaughter must be proved beyond a reasonable doubt, or defendant acquitted on the ground of self-defense. Pitts v. State, 29 Tex. App. 374, 16 S. W. 189.

CHAPTER XXVI

INSTRUCTIONS ON DEFENSES IN CRIMINAL CASES

A. Defenses in General

§ 318. Necessity of instructions.
319. Disparagement of defense.
320. Application of doctrine of reasonable doubt to defenses.

B. Insanity as Defense to Criminal Accusation

321. Necessity of instructions.
322. Propriety and sufficiency of instructions in general.
323. Inability to distinguish between right and wrong.
324. Inability to refrain from criminal act.
325. Insanity from use of liquor or drugs.
326. Partial insanity.
327. Emotional insanity.
328. Presumption as to sanity and burden of proof or sufficiency of evidence to support defense.
329. Presumption of continuance of insanity.

C. Effect of Intoxication of Accused as Bearing on Guilt or Punishment

330. Necessity and propriety of instructions in general.
331. Drunkenness as excuse for crime.

D. Instructions on Alibi

332. Necessity of instructions.
333. Rule where issue of alibi not raised.
334. Sufficiency of evidence to authorize or require instructions on alibi.
335. Propriety and sufficiency of instructions on alibi.
336. Propriety of instructions on burden of proof.
337. Propriety and sufficiency of instructions as to time.
338. Propriety and sufficiency of instructions as to place.
339. Disparagement of defense of alibi.
340. Effect of failure to prove alibi.

A. Defenses in General

§ 318. Necessity of instructions

Where there is evidence in a criminal case reasonably raising a defensive issue, the defendant is entitled to instructions affirmatively presenting such issue.[1] Such rule applies to evidence tend-

[1] **Tex.** Key v. State, 161 S. W. 130, 72 Tex. Cr. R. 129; Jones v. State, 153 S. W. 310, 69 Tex. Cr. R. 216; Swinger v. State, 102 S. W. 114, 51 Tex. Cr. R. 397; Tankersley v. State, 101 S. W. 997, 51 Tex. Cr. R. 224; Stanton v. State (Cr. App.) 29 S. W. 476.

Wis. Koscak v. State, 152 N. W. 181, 160 Wis. 255.

Failure to charge affirmatively on one of two defenses. Where circumstantial evidence alone was relied on to show that accused killed decedent, and accused proved an alibi, and showed that a third person com-

ing to extenuate, mitigate, or excuse the crime charged,[2] and if there is some evidence tending to support a defense set up, an instruction thereon should be given on request, although such evidence may be of slight weight,[3] and the defendant may be entitled to an instruction on a theory of a defense developed by evidence inconsistent with his own testimony.[4]

§ 319. Disparagement of defense

It is improper for the judge to make statements calculated to cast suspicion upon any defense which is recognized by the law as legitimate, and which the defendant is apparently making in good faith.[5]

§ 320. Application of doctrine of reasonable doubt to defenses

Rule as to defense of insanity, see post, § 328.
Rule as to defense of alibi, see post, § 336.

In most jurisdictions a defendant in a criminal case, who admits the act charged against him as a crime, but sets up some defense thereto, is entitled to an acquittal if the proof offered by him in support of such defense, when taken in connection with all the other evidence in the case, is sufficient to raise a reasonable doubt of his guilt, in the minds of the jury, and the court should so charge,[6] and it is error to charge that, where the state has made out a prima facie case, the defendant must prove facts relied upon by him as a defense by a preponderance of the evidence,[7] or to the reasonable satisfaction of the jury,[8] or beyond a reasonable

mitted the offense, the failure to charge affirmatively that if another committed the offense, or if there was reasonable doubt thereof, the jury should acquit, was erroneous, though the court charged on reasonable doubt, alibi, and circumstantial evidence. Wheeler v. State, 121 S. W. 166, 56 Tex. Cr. R. 547.

[2] Kelley v. State, 185 S. W. 874, 79 Tex. Cr. R. 402.

[3] Ladwig v. State, 51 S. W. 390, 40 Tex. Cr. R. 585; State v. Manns, 48 W. Va. 480, 37 S. E. 613.

[4] State v. Baker, 172 S. W. 350, 262 Mo. 689, following State v. Bidstrup, 140 S. W. 904, 237 Mo. 273.

[5] Aszman v. State, 24 N. E. 123, 123 Ind. 347, 8 L. R. A. 33.

[6] People v. Bushton, 80 Cal. 160, 22 P. 127; State v. Rogers, 163 P. 912, 30 Idaho, 259; State v. Crean, 43 Mont. 47, 114 P. 603; Frazier v. State, 100 S. W. 94, 117 Tenn. 430.

Contrary rule. An instruction that if, on consideration of all the evidence, there remained a reasonable doubt as to whether the killing was in self-defense, the jury should acquit, was properly refused, since under the plea of self-defense the burden of proof was on defendant, and unless the jury was satisfied from the evidence that the plea was sustained, the defense failed; a reasonable doubt being insufficient. Lawson v. State, 46 So. 259, 155 Ala. 44.

[7] Howell v. State, 85 N. W. 289, 61 Neb. 391; Beal v. State, 152 P. 808, 12 Okl. Cr. 157; Cowherd v. State, 120 P. 1021, 7 Okl. Cr. 1; Mitchell v. State, 117 P. 650, 6 Okl. Cr. 622; See People v. Perini, 94 Cal. 573, 29 P. 1027.

[8] Dent v. State, 105 Ala. 14, 17 So. 94; Boykin v. People, 22 Colo. 496, 45 P. 419; Appleton v. State, 171 Ill. 473, 49 N. E. 708; Davis v. State, 113 P. 220, 4 Okl. Cr. 508.

In Missouri such an instruction is

doubt,[9] it being enough to sustain a defense if by any evidence a reasonable doubt is raised in the minds of the jury of any essential element of the charge against the defendant,[10] and where the court submits the issue of self-defense the court should in some jurisdictions, instruct, on request, that the burden is on the state to show beyond a reasonable doubt that the defendant was not acting in self-defense.[11] It is not improper, however, in some jurisdictions, to charge in a homicide case that the burden is on the defendant to establish his plea of self-defense, if the court also charges that, to convict, the state must, on the whole case, show the guilt of the accused beyond a reasonable doubt.[12]

B. Insanity as Defense to Criminal Accusation

§ 321. Necessity of instructions

In a criminal prosecution, in which there is some evidence to support such a plea, it is the duty of the court to instruct on the

proper. where the usual instruction as to reasonable doubt upon the whole case is given. State v. Jones, 78 Mo. 278. See State v. Hill, 69 Mo. 451.

[9] **Cal.** People v. Miller, 154 P. 468, 171 Cal. 649.

Ind. Clark v. State. 64 N. E. 589, 159 Ind. 60.

Ky. Biggs v. Commonwealth, 169 S. W. 525. 159 Ky. 836.

Okl. Brown v. State, 167 P. 762, 14 Okl. Cr. 115; Smith v. State, 159 P. 668, 12 Okl. Cr. 489; McGill v. State, 129 P. 75, 8 Okl. Cr. 500.

Tenn. Hamilton v. State, 37 S. W. 194. 97 Tenn. 452.

Tex. Davis v. State, 175 S. W. 1073, 76 Tex. Cr. R. 502; Jacobs v. State, 115 S. W. 581, 55 Tex. Cr. R. 149; Steel v. State, 113 S. W. 15, 54 Tex. Cr. R. 388.

Instructions not improper within rule. An instruction, in a prosecution for murder, that if the jury found that a third person had killed deceased they should acquit defendant, was not erroneous as requiring an affirmative finding instead of a reasonable doubt whether a third person killed defendant, when it was given in connection with a charge that, if the jury had a reasonable doubt whether defendant cut deceased, they should acquit. Adams v. State, 93 S. W. 116, 48 Tex. Cr. R. 452. An instruction, on a trial for theft of a horse, that if the jury believe that defendant thought it was his, or if they have a reasonable doubt on the point, they should acquit, does not require proof of such defense beyond a reasonable doubt. McGowan v. State (Tex. Cr. App.) 37 S. W. 750. A charge, in a prosecution for horse theft, that if the jury found "from the evidence, beyond a reasonable doubt, that the horse mentioned in the indictment had been stolen, * * * and that recently thereafter the defendant was found in possession of said horse," etc., was not objectionable, as requiring accused to prove the account he gave of his possession beyond a reasonable doubt. Landreth v. State, 70 S. W. 758, 44 Tex. Cr. R. 239.

[10] Zipperian v. People, 79 P. 1018, 33 Colo. 134; Lane v. State, 44 Fla. 105, 32 So. 896; State v. Lundhigh, 164 P. 690, 30 Idaho, 365; Vann v. State, 77 S. W. 813, 45 Tex. Cr. R. 434. 108 Am. St. Rep. 961.

[11] State v. Williams, 97 N. W. 992, 122 Iowa, 115.

[12] State v. Jones, 60 A. 396, 71 N. J. Law, 543; State v. Stockman, 64 S. E. 595, 82 S. C. 388, 129 Am. St. Rep. 888.

subject of insanity as a defense.[13] Such a charge should be given, where there is conflicting evidence as to the mental unsoundness of the accused at the time of the crime alleged, not caused by voluntary intoxication, and which is not merely "moral insanity," or an "irresistible impulse."[14]

The issue of the defendant's mental unsoundness at the time of the commission of the crime alleged should be submitted to the jury, although the evidence tending to show his mental incapacity to commit a criminal act is weak as compared with the evidence tending to show his sanity;[15] but, where there is no evidence tending to show the insanity of the accused, instructions assuming that his mental condition is an issue in the case are properly refused.[16] The mere fact that defendant frequently

[13] **Fla.** Cochran v. State, 61 So. 187, 65 Fla. 91.

Ga. Carter v. State, 58 S. E. 532, 2 Ga. App. 254.

Ill. People v. Penman, 110 N. E. 894, 271 Ill. 82.

Ky. Maulding v. Commonwealth. 189 S. W. 251, 172 Ky. 370.

Mich. People v. Muste. 100 N. W. 455, 137 Mich. 216.

Okl. Snodgrass v. State, 175 P. 129, 15 Okl. Cr. 117; Litchfield v. State, 126 P. 707, 8 Okl. Cr. 164, 45 L. R. A. (N. S.) 153.

Tex. Holland v. State, 192 S. W. 1070, 80 Tex. Cr. R. 637; Berry v. State, 125 S. W. 580, 58 Tex. Cr. R. 291.

W. Va. State v. Alie, 96 S. E. 1011, 82 W. Va. 601.

Mental incapacity caused by drug. Where a witness testifies that he gave defendant a certain amount of morphine, which failed to put him to sleep, shortly before the homicide was committed, and two physicians testify that the amount given was an overdose, whose effect would be to produce wildness and insanity until sleep should intervene, it is error to refuse to charge that the jury should acquit if they believe that defendant, at the time of the homicide, was in a state of mind that rendered him incapable of comprehending the real character of his act, and that this incapacity was the result of an overdose of a drug he had taken. State v. Rippy, 104 N. C. 752, 10 S. E. 259.

[14] Cochran v. State, 61 So. 187, 65 Fla. 91.

[15] State v. Newman, 47 P. 881, 57 Kan. 705..

[16] **Ala.** Johnson v. State, 53 So. 769, 169 Ala. 10.

Ark. Duncan v. State, 162 S. W. 573, 110 Ark. 523.

Conn. State v. Buonomo, 87 A. 977, 87 Conn. 285.

Ga. Adams v. State, 63 S. E. 703, 117 Ga. 302.

Ill. Doyle v. People, 147 Ill. 394, 35 N. E. 372.

Ind. T. Binyon v. United States, 76 S. W. 265, 4 Ind. T. 642.

Ky. Bast v. Commonwealth, 99 S. W. 978, 124 Ky. 747; Bishop v. Commonwealth, 109 Ky. 558, 60 S. W. 190; Buckhannon v. Commonwealth, 86 Ky. 110, 5 S. W. 358.

Mo. State v. Brown, 79 S. W. 1111, 181 Mo. 192.

Mont. State v. Kuum, 178 P. 288, 55 Mont. 436.

Nev. State v. Hartley, 22 Nev. 342, 40 P. 372, 28 L. R. A. 33.

Tex. Cook v. State, 160 S. W. 465, 71 Tex. Cr. R. 532; Coffey v. State, 131 S. W. 216, 60 Tex. Cr. R. 73.

Evidence not calling for instructions on issue of insanity. In a prosecution for burglary, where the only witness as to defendant's insanity testified that he had examined and treated defendant after he had been brought back from the penitentiary, that he was acquainted with defendant's mother and family, that he would not say defendant was insane, but that he was never mentally very bright, that he was a degenerate mentally and morally, that many

became intoxicated is not sufficient to warrant an instruction submitting the question of his insanity.[17] So an instruction on permanent insanity is properly refused where the evidence only tends to show temporary insanity from the use of liquor or drugs,[18] and where the evidence as to insanity is such as to warrant the jury in not giving it much consideration failure to instruct thereon is not error, in the absence of a request.[19]

§ 322. Propriety and sufficiency of instructions in general

The trial court should not disparage or ridicule the defense of insanity,[20] and it is not proper, in some jurisdictions, to caution the jury that the evidence in support of such a defense should be carefully scrutinized and considered, to the end that parties charged with crime may not make use of the plea of insanity to defeat the attainment of justice.[21] In other jurisdictions an instruction that the jury must examine the defense of insanity with great

criminals were known as degenerates who were held accountable and able to distinguish right from wrong, that he did not think defendant so mentally incapacitated or of such unsound mind that he would be able to plan and accomplish the burglarizing of a store and think it was not wrong, and that he thought defendant could distinguish right from wrong, refusal to give a special charge submitting the issue of insanity was not error. Mitchell v. State, 106 S. W. 124, 52 Tex. Cr. R. 37. Upon a trial for murder, evidence of conduct of the accused towards his wife, which might be readily accounted for as the result of rage and excitement produced by knowledge of his wife's infidelity and by the free use of intoxicants, does not call for a charge on the law of insanity. McConnell v. State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647.

Merest shadow of evidence of insanity. A requested instruction as to the insanity of the accused is properly refused where there is only the merest shadow of evidence that such accused was not of sound mind, and the judge has instructed the jury that the burden of proof is on the government to prove sanity beyond a reasonable doubt, and told the jury to consider all the evidence, including the bearing of the prisoner and the manner of his own testimony, and stated the evidence relied upon by him. Battle v. United States, 28 S. Ct. 422, 209 U. S. 36, 52 L. Ed. 670, affirming judgment United States v. Battle (C. C. Ga.) 154 F. 540.

Epileptic fits. Evidence that defendant was subject to epileptic fits will not justify an instruction that, if the jury believe her faculties were so impaired that she could not recognize the deceased, a police officer in uniform, they should acquit. State v. Hayes, 16 Mo. App. 560.

[17] State v. Brown, 79 S. W. 1111, 181 Mo. 192.

[18] Kinslow v. State, 109 S. W. 524, 85 Ark. 514.

[19] Cate v. State, 114 N. W. 942, 80 Neb. 611.

[20] People v. Holmes, 69 N. W. 501, 111 Mich. 364; State v. Crowe, 102 P. 579, 39 Mont. 174, 18 Ann. Cas. 643; State v. Barry, 92 N. W. 809, 11 N. D. 428; Sharkey v. State, 2 O. C. D. 443, 4 Ohio Cir. Ct. R. 101; Commonwealth v. Tompkins, 108 A. 350, 265 Pa. 97.

[21] State v. Shuff, 72 P. 664, 9 Idaho, 115; Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33, disapproving Sawyer v. State, 35 Ind. 80.

In Indiana earlier cases (Sawyer v. State, 35 Ind. 80; Sanders v. State, 94 Ind. 147) not in harmony with the rule of the text have been disapproved.

care lest an ingenious counterfeit of mental disease shall furnish immunity to the guilty has been sustained,[22] or at least held not reversible error.[23] Whether a plea of insanity is consistent with a plea of self-defense in a homicide case is a question for the jury, and the court should not tell them that they are not inconsistent.[24]

The propriety of instructions on what is the legal test of accountability for the act charged as a criminal offense depends upon the rule prevailing in the particular jurisdiction.[25] Instructions on insanity should be as brief and simple as it is possible to make them. Even if it were possible to do so, the court should not instruct on every phase or manifestation of insanity.[26]

Care should be observed to state the rule governing accountability to the law rather than to attempt to define insanity, or any of the recognized forms of mental disease, and the instructions should be framed in plain and comprehensive terms, consistent with approved scientific determinations,[27] and in some jurisdictions instructions on insanity as a defense should be restricted to a definition of insanity as any weakness or defect of the mind rendering it incapable of entertaining, in the particular instance, the criminal intent, supplemented by the comment that criminal responsibility is to be determined solely by the capacity of the defendant to conceive and entertain the intent to commit the particular crime charged.[28]

The presence of intelligence is not an absolute test of sanity, and an instruction is erroneous which sets up the power to deliberate, premeditate, and design as such a test.[29] In some jurisdictions the rule is that it is purely a question of fact whether there is a mental disease of a character that will excuse the commission of the act alleged as an offense, and that no legal rules or tests should be declared by the court as a guide to the jury in determining whether or not the defense of insanity in any given case shall avail the accused.[30]

[22] Braham v. State, 38 So. 919, 143 Ala. 28; People v. Bundy, 145 P. 537, 168 Cal. 777; People v. Donlan, 67 P. 761, 135 Cal. 489; People v. Allender, 48 P. 1014, 117 Cal. 81. See United States v. Chisolm (C. C. Ala.) 149 F. 284.

[23] People v. Stein, 137 P. 271, 23 Cal. App. 108; People v. Nihell, 77 P. 916, 144 Cal. 200.

[24] Yarbrough v. State, 162 P. 678, 13 Okl. Cr. 140.

Contra, State v. Wade, 61 S. W. 800, 161 Mo. 441.

[25] People v. Barthleman, 52 P. 112, 120 Cal. 7; State v. Saxon, 86 A. 590. 87 Conn. 5; Starke v. State, 37 So. 850, 49 Fla. 41; State v. Porter, 111 S. W. 529, 213 Mo. 43, 127 Am. St. Rep. 589.

[26] State v. Keerl, 75 P. 362, 29 Mont. 508, 101 Am. St. Rep. 579.

[27] Oldham v. People, 158 P. 148, 61 Colo. 413.

[28] State v. Keerl, 75 P. 362, 29 Mont. 508, 101 Am. St. Rep. 579.

[29] Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26.

[30] State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533.

Where the statutory definition of "insane persons" contains some words of indefinite significance, it is proper for the court to refuse to submit such definition to the jury as being likely to confuse them.[31]

§ 323. Inability to distinguish between right and wrong

In most jurisdictions it is proper and sufficient to charge that to establish the defense of insanity it must be proved that at the time of committing the act in question the defendant was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know it was wrong.[32] In these jurisdictions it is proper to

[31] Goodwin v. State, 96 Ind. 550.

[32] Davis v. State, 32 So. 822, 44 Fla. 32; State v. Murray, 11 Or. 413, 5 P. 55; Tubb v. State, 117 S. W. 858, 55 Tex. Cr. R. 606; Giebel v. State, 28 Tex. App. 151, 12 S. W. 591.

Illustrations of sufficient instructions on such defense. A charge that, if one have indulged his passions or blunted his moral sense so that he can commit crime without remorse, and fails to see its heinousness as persons of purer morals and more restrained passions see it, this does not make him insane. If he have sufficient capacity to discern right and wrong as to the particular act in question, if he has knowledge and consciousness that the act he is doing is wrong, and would deserve punishment, he is of sound mind and memory, so as to be subject to punishment. Loyd v. State, 45 Ga. 57. An instruction that a person in possession of a sound mind who commits an act under the impulse of passion or revenge, which may temporarily dethrone reason, or for the time being control his will, cannot be shielded from the consequences of his act, was not error for failure to assume that a person might become instantly insane so as to be unable to distinguish the character of his act, or right from wrong. State v. Fleming, 106 P. 305, 17 Idaho, 471. Upon a trial for murder, that insanity is "such a perverted and deranged condition of the mental and moral faculties as to render one incapable of distinguishing between right and wrong, making him unconscious, at times, of the act he is about to commit." State v. Redemeier, 8 Mo. App. 1. On a trial for malicious shooting, where the defense was insanity, after correct instructions on the law of insanity, an instruction that "the law requires something more than occasional oddity or hypochondria to exempt the perpetrator of an offense from its punishment" is not erroneous. Hawe v. State, 11 Neb. 537, 10 N. W. 452, 38 Am. Rep. 375. An instruction that, if at the time defendant killed his wife, he was insane, laboring under such a defect of reason and derangement of mind as not to know and comprehend the nature, quality, and consequences of the act he was doing, and unable to distinguish between right and wrong, he must be acquitted, and the insanity must be proved, beyond a reasonable doubt, to be such that at the time he labored under a diseased state of mind, so excessive as to overwhelm his reason, conscience, and judgment, is sufficient, where there is evidence of insanity as the result of delirium tremens. State v. Zorn, 22 Or. 591, 30 P. 317.

Illustrations of defective instructions on this defense. An instruction to the effect that, if the jury find that the defendant was insane at the time of committing a crime, they should find him not guilty, without regard to the degree of insanity. People v. Best, 39 Cal. 690. A charge that, "if you find that the defendant is subject to fits of insanity, he may not inaptly be called an insane man." Fogarty v. State, 80 Ga. 450, 5 S. E. 782. A charge that, "though a total

instruct that, if at the time of committing the alleged criminal act the defendant was capable of judging whether the act was right or wrong, he is responsible for it, but that, if he was unable to distinguish between right and wrong with respect to such act, he should be acquitted.[33] So a correct statement of the law on this defense in some jurisdictions is contained in an instruction that insanity is such a perverted condition of the mental and moral faculties as renders a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing.[34]

§ 324. Inability to refrain from criminal act

In some jurisdictions it is proper to instruct that, to excuse defendant on the ground of insanity, the jury must find that at the time of the commission of the alleged offense he was without sufficient reason to know what he was doing, or had not sufficient reason to know right from wrong, or that, as a result of mental unsoundness he had not then sufficient will power to govern his actions by reason of an insane impulse, which he could not resist or control,[35] and, in some jurisdictions, where the evidence

want of responsibility on account of insanity be not shown, yet if the prisoner's mind was so far affected as to render him incapable of a deliberate, premeditated assault with intent to murder, he cannot be convicted." Fogarty v. State, 80 Ga. 450, 5 S. E. 782. An instruction that the fact that ancestors of a person had been insane did not of itself prove him insane, and that, in the absence of preponderating evidence of insanity at the time of the killing, it could not be justified on that plea. State v. Simms, 68 Mo. 305. An instruction that if the jury believed that at the time of the killing defendant was capable of knowing that, if he shot deceased not in self-defense, he was committing an offense against the law of the land, it will not matter what the jury believe was the moral conception of defendant of the act at the time, is erroneous, as declaring that one not having the capacity to distinguish between right and wrong is criminally responsible. Kearney v. State, 68 Miss. 233, 8 So. 292. An instruction asked by defendant that "there are but two classes of persons under the law, * * * those of sound and unsound mind, and a person of unsound mind cannot be held responsible for crime; * * * the law makes no distinction in degrees of unsoundness of mind," without any explanation of what constitutes insanity, is misleading, and properly refused. Grubb v. State, 117 Ind. 277, 20 N. E. 725. It was proper, in a murder case, to refuse to charge that "if, in consequence of some disease, the defendant had not sufficient use of his reason to control the passions which prompted the act," the jury must acquit, since the request excluded the question as to capacity to distinguish between right and wrong. People v. Mills, 98 N. Y. 176.

[33] Bothwell v. State, 99 N. W. 669, 71 Neb. 747; Hart v. State, 14 Neb. 572, 16 N. W. 905; Territory v. Catton, 5 Utah, 451, 16 P. 902.

[34] Brown v. State. (Ga. App.) 107 S. E. 173; Oborn v. State, 126 N. W. 737, 143 Wis. 249.

[35] Thompson v. Commonwealth, 159 S. W. 829, 155 Ky. 333.

Requirement that inability to distinguish between right and wrong and inability to refrain from doing criminal act should exist concurrently. In a criminal

tends to show partial insanity or paranoia, instructions on this subject which fail to include the element of insane inability to resist wrong are defective;[36] and where the only rational inference from the evidence is that the defendant, at the time of the commission of the alleged criminal act, was suffering from mental disease which was the efficient cause of the act, the court should charge, on request, in addition to an instruction that if one has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed he is criminally responsible, the exception to such general rule that one must have intelligence enough to form the criminal intent, and that if his mental faculties are so deficient that he has no will, no conscience or controlling mental power, or if through the overwhelming power of mental disease the intellectual power is for the time obliterated, and such mental disease is the efficient cause of the act alleged to constitute the criminal offense, he is not to be held legally responsible.[37]

In some jurisdictions, an instruction which submits to the jury both the right and wrong test, and the test of irresistible impulse, is not objectionable, because it does not submit the question whether the accused had sufficient mental capacity to know right from wrong with reference to the specific offense charged.[38] A charge on irresistible impulse is not required where the only evidence of such impulse is the testimony of the defendant, which shows that his act must have been the result of unconsciousness or delirium, since the doctrine of irresistible impulse implies knowledge of right and wrong in some degree.[39]

In jurisdictions where the doctrine of irresistible impulse obtains, an instruction that, if defendant was in consequence of his insanity brought up to such a "frenzy" as rendered him incapable

prosecution, where there was a question as to the sanity of accused at the time he committed the act, and the instructions were on the theory that a person may be unable to refrain from committing an act though knowing it to be wrong, an instruction to acquit if the jury found that, at the time he committed the act, defendant was not able to distinguish right from wrong, and had no understanding of the character and consequences of his act and power of will to abstain from it, was erroneous because requiring the three mental conditions to concurrently exist, when under the theory of the instructions defendant was entitled to acquittal if any one of such conditions existed. State v. Kelley, 52 A. 434, 74 Vt. 278.

[36] Hankins v. State, 201 S. W. 832, 133 Ark. 38, L. R. A. 1913D, 784; Bell v. State, 180 S. W. 186, 120 Ark. 530; People v. Lowhone, 126 N. E. 620, 292 Ill. 32.

[37] Wilson v. State, 70 S. E. 1128, 9 Ga. App. 274.

Compare Fogarty v. State, 80 Ga. 450, 5 S. E. 782.

[38] Thompson v. Commonwealth, 159 S. W. 829, 155 Ky. 333.

[39] State v. Peel, 59 P. 169, 23 Mont. 358, 75 Am. St. Rep. 529.

and unable to control his movements, he would not be legally responsible for his acts, has been held misleading, since there are conditions of insanity depriving the will of its normal governing power which do not amount to "frenzy" in the ordinary acceptation of the term.[40]

On the other hand, an instruction which omits as an essential condition to irresponsibility because of inability to refrain from doing a criminal act the fact that such inability has resulted solely from mental disease is defective,[41] and it is proper to call the attention of the jury to the distinction between an act committed by reason of insanity which has destroyed will power and an act committed as a result of uncontrolled passion not resulting from disease,[42] and to refuse instructions which do not distinguish between irresistible impulse arising from insanity and from passion or revenge.[43]

In many jurisdictions the doctrine of inability to refrain from committing a particular act, although recognizing its criminality, as a test of insanity, is not accepted, and in such jurisdictions it is, of course, proper to refuse an instruction embodying such test.[44]

§ 325. Insanity from use of liquor or drugs

The decisions recognize a distinction between temporary insanity from the recent voluntary use of intoxicants, drunkenness produced from that source, and delirium tremens, or the settled

[40] Territory v. Kennedy, 110 P. 854, 15 N. M. 556.

Contra, Williams v. State, 50 Ark. 511, 9 S. W. 5.

[41] Smith v. State, 62 So. 184, 182 Ala. 38.

[42] Commonwealth v. Van Horn, 41 A. 469, 188 Pa. 143; Flanders v. State, 156 P. 39, 24 Wyo. 81, rehearing denied 156 P. 1121, 24 Wyo. 81.

Instructions on irresistible impulse held proper. An instruction that "mental unsoundness must be the result of a disease, and not the result of his having allowed his passions to run until they have become uncontrollable." People v. Durfee, 62 Mich. 487, 29 N. W. 109. A charge that, for insanity to excuse homicide, defendant should have been unable to distinguish, in respect of the crime, between right and wrong, or that, if conscious of the act and its consequences, he must have been, by reason of insanity, wrought up to a frenzy, rendering him incapable of controlling his actions, and that, if reason was dethroned temporarily by passion, defendant could not thereby be shielded from the consequences of his crime. Williams v. State, 50 Ark. 511, 9 S. W. 5. Accused cannot complain of a charge that "frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity." Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[43] Bolling v. State, 54 Ark. 588, 16 S. W. 658; State v. Hassing, 118 P. 195, 60 Or. 81; Commonwealth v. Eckerd, 34 A. 305, 174 Pa. 137.

[44] People v. Barthleman, 52 P. 112, 120 Cal. 7; State v. Mowry, 37 Kan. 369, 15 P. 282; State v. Knight, 50 A. 276, 95 Me. 467, 55 L. R. A. 373; Walker v. People, 26 Hun (N. Y.) 67. See Walker v. People, 88 N. Y. 81; Snodgrass v. State, 175 P. 129, 15 Okl. Cr. 117.

insanity which is the result of long-continued use of such intoxicants, the latter phase of insanity being a complete defense to an accusation of crime, and when the evidence in the case tends to show such a fixed or settled insanity the court should specially charge thereon; a charge on insanity in the usual form not being sufficient.[45]

Where the statute allows temporary insanity induced by the recent voluntary use of intoxicating liquor to be shown in mitigation of the penalty for the offense charged, it is the imperative duty of the court, where the evidence furnishes a sufficient predicate, so to instruct;[46] and where the evidence presents the issue, the court should instruct on insanity from the use of narcotics, although an instruction on intoxication produced by ardent spirits,[47] or a charge on the general issue of insanity,[48] has been given.

§ 326. Partial insanity

In some jurisdictions it is held that while the trial court may, if it sees fit, recognize monomania, or so-called partial insanity, as distinguished from general insanity, when instructing the jury in a criminal case involving that form of mental derangement as a defense, it is not imperative that it should do so, and that if the proper tests of criminal responsibility are stated the substantial rights of the accused are sufficiently protected.[49] In other jurisdictions the rule is that, where evidence is introduced tending to support the defense of partial insanity, the charge should specifically treat thereof, and not stop with merely submitting the usual test of ability to distinguish between right and wrong.[50] It is proper to charge with respect to such a defense that, when partial insanity or insane delusion or hallucination is relied on to avert

[45] Duke v. State, 134 S. W. 705, 61 Tex. Cr. R. 441; Erwin v. State, 10 Tex. App. 700.

Instructions held properly given. A charge that mental incapacity produced by voluntary intoxication, temporarily existing when the offense was committed, is no excuse for crime, but where the habit of intoxication, though voluntary, has so affected defendant's mind that he was incapable at the time of acting from motive, or distinguishing right from wrong, he will not be held accountable for an act committed while in such condition, was properly given where there was evidence that, though defendant was sober when the offense was committed, his mind was affected by habits of intoxication. Wagner v. State, 116 Ind. 181, 18 N. E. 833.

[46] Lawrence v. State, 157 S. W. 480, 70 Tex. Cr. R. 506; Id., 143 S. W. 636, 65 Tex. Cr. R. 93; Miller v. State, 105 S. W. 502, 52 Tex. Cr. R. 72; Hierholzer v. State, 83 S. W. 836, 47 Tex. Cr. R. 199; Edwards v. State (Tex. Cr. App.) 54 S. W. 589.

[47] Otto v. State, 80 S. W. 525, 47 Tex. Cr. R. 128, 122 Am. St. Rep. 682.

[48] Burton v. State, 81 S. W. 742, 46 Tex. Cr. R. 493.

[49] State v. Moore, 102 P. 475, 80 Kan. 232.

[50] Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646.

criminal responsibility, it must be made to appear that the crime charged was the offspring of such insanity, and not the result of sane reasoning and natural motives.[51]

§ 327. Emotional insanity

It is proper to charge that the law rejects the doctrine of emotional insanity, which begins on the eve of the criminal act and leaves off when it is committed,[52] and a refusal to charge the jury on emotional insanity is not error, where the insanity, if any ex-

[51] People v. Griffith, 80 P. 68, 146 Cal. 339.

Instructions on partial insanity held proper. An instruction, in a trial for murder, that if the prisoner, though he labored under partial insanity or delusion, understood the nature of his act, and knew it was wrong, and had mental power sufficient to apply that knowledge to his own case, and knew that if he did the act, he would do wrong and receive punishment, and that, if the act was contrary to the dictates of justice and right and injurious to others, he would be responsible, and that the law is that, whether insanity be general or partial, the degree must be so great as to have taken from accused the freedom of moral action. Commonwealth v. Lewis, 71 A. 18, 222 Pa. 302. An instruction that a delusion must be of such a character that, if things were as the defendant imagined them to be, they would justify the act springing from the delusion. Thurman v. State, 32 Neb. 224, 49 N. W. 338. A charge that, "although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, and possess withal a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for his crime." Dejarnette v. Commonwealth, 75 Va. 867. On the trial of an indictment for murder, where insanity is pleaded, an instruction to the jury that "the alleged insanity and the alleged crime must be connected, the one with the other, and the latter be the offspring of the former, in order to have the effect of rightfully declaring one irresponsible for his acts," is correct, where there is no evidence tending to show that the defendant was insane on all subjects, or was homicidally insane. State v. Hockett, 70 Iowa, 442, 30 N. W. 742. Where the defense was general insanity, and there was no evidence of special dementia, it was proper to charge that insanity is a total or partial impairment of the intellect to such an extent that the person affected does not know the difference between right and wrong as to the act he is committing. Carr v. State, 96 Ga. 284, 22 S. E. 570.

Use of word "delusion." In an instruction, the use of the word "delusion" is not ground for reversal, where the evidence, and the connection in which it was used, show clearly that by it was intended insanity on a particular subject. People v. Schmitt, 106 Cal. 48, 39 P. 204.

Instructions held misleading. A charge to the jury that "if they believe from the evidence that the defendant committed the crime 'in a fit of mania,' or 'while laboring under an insane delusion,' defendant is not responsible, and they must acquit," tends to mislead. Gunter v. State, 83 Ala. 96, 3 So. 600.

[52] People v. Kernaghan, 72 Cal. 609, 14 P. 566; Genz v. State, 58 N. J. Law, 482, 34 A. 816.

isted, was simply such as rendered the accused incapable of knowing that his acts in question were wrong.[53]

§ 328. Presumption as to sanity and burden of proof or sufficiency of evidence to support defense

The burden of overthrowing the presumption of sanity and of showing insanity is upon the person who alleges it; but, if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the alleged criminal act was committed by a person responsible for his acts, and upon this question the presumption of sanity and the evidence are all to be considered, the prosecutor holding the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt and to an acquittal. This principle may be stated in a variety of language. There is no rigid rule prescribing the particular terms to be employed if the substance of the principle is preserved.[54]

It is proper to charge that the law presumes a man to be sane,[55] where appropriate instructions are given with respect to the burden of proof in case evidence is introduced tending to show insanity,[56] and it is proper to refuse to charge that the state must affirmatively establish as part of its case that the defendant was

Instructions held proper. Where, on a trial for murder, defendant requested a charge that "insanity produced by jealousy or anger, if it incapacitates the subject from knowing right from wrong, would be a defense," it was held that the court, on assenting to the request, properly charged that, "if there is any such thing as insanity produced by jealousy or revenge or wrath, * * * if there is any genuine insanity produced by any cause, then, so far as affecting the prisoner, it is the same as any other kind of insanity. The heat of passion, and feeling produced by motives of anger, hatred, or revenge, is not insanity. The law holds the doer of the act, under such conditions, responsible for the crime, because a large share of homicides committed are occasioned by just such motives as these." People v. Foy, 138 N. Y. 664, 34 N. E. 396.

[53] Hurst v. State, 46 S. W. 635, 40 Tex. Cr. R. 378.

[54] Brotherton v. People, 75 N. Y. 159.

[55] State v. Clevenger, 56 S. W. 1078, 156 Mo. 190.

Instructions held proper within rule. An instruction that the law presumes every man sane until the contrary is shown, and that before defendant could be excused of a homicide for insanity the jury must believe from the evidence that defendant at the time of the killing was without sufficient reason to know what he was doing, or that, as the result of mental unsoundness, he had not then sufficient will power to govern his action by reason of some insane impulse which he could not resist or control, was not objectionable as placing the burden of proof of insanity on accused. Mathley v. Commonwealth, 86 S. W. 988, 120 Ky. 389, 27 Ky. Law Rep. 785.

[56] Shellenberger v. State, 156 N. W. 777, 99 Neb. 370; Massengale v. State, 24 Tex. App. 181, 6 S. W. 35.

and is sane.[57] Where there is evidence in support of such a defense, the accused is entitled to an instruction that positive or direct testimony is not required to establish insanity, and that it is not necessary to make out such defense beyond a reasonable doubt.[58]

In some jurisdictions it is proper to charge that the burden is upon the accused to establish a defense of insanity by a preponderance of the evidence,[59] and in such jurisdictions it is not improper to instruct that the defendant must prove such insanity to the satisfaction, or the reasonable satisfaction, of the jury,[60] or that it must be clearly proved,[61] or must be proved to a reasonable certainty, if the jury are distinctly informed that a preponderance of the evidence is all that is requisite to produce such certainty,[62] and it is proper to refuse an instruction requiring an acquittal of the defendant if the evidence leaves in the minds of the jury any reasonable doubt of his sanity.[63] On the other hand, it is proper to instruct that, while the burden of proof is on the accused to

[57] People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

[58] State v. Porter, 111 S. W. 529, 213 Mo. 43, 127 Am. St. Rep. 589.

Instructions held proper. An instruction that "in order to establish insanity, it is not necessary that the proofs shall be direct and positive, but it may be shown by such facts and circumstances as convince the mind of its existence the same as any other fact; but, when the claim set up as a defense is unusual, unnatural, and out of the ordinary course of affairs, you are not required to take the same for granted, upon slight evidence, nor should you so find, except upon evidence of a reliable character, and which satisfies you that the defense has been made out." State v. Hockett, 70 Iowa, 442, 30 N. W. 742.

[59] State v. Thiele, 94 N. W. 256, 119 Iowa, 659; State v. Novak, 79 N. W. 465, 109 Iowa, 717; Clawson v. State, 36 A. 886, 59 N. J. Law, 434.

Instructions held proper within rule. In prosecution for selling intoxicating liquor, instruction that to establish defense of insanity accused must show by preponderance of evidence that at time of sale he was insane to such extent as to render him incapable of distinguishing right from wrong in respect to sale of liquor, and that the mere fact that he was drunk would not excuse him, was not erroneous. Carty v. State, 204 S. W. 207, 135 Ark. 169.

[60] State v. Lyons, 37 So. 890, 113 La. 959; State v. Palmer, 61 S. W. 651, 161 Mo. 152; State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; Hite v. Commonwealth, 31 S. E. 895, 96 Va. 489.

Requirement that jury "must be satisfied." An instruction on trial for murder, where the defense is insanity, that the jury "must be satisfied" that the defendant was insane when he committed the act, is proper, as calling the attention to the distinction between the degree of proof required of the prisoner on that point, and the requirement that the state should prove the prisoner's guilt beyond a reasonable doubt. Commonwealth v. Kilpatrick, 53 A. 774, 204 Pa. 218.

[61] Smith v. State, 19 Tex. App. 95.

[62] Minder v. State, 39 S. E. 284, 113 Ga. 772, affirmed 22 S. Ct. 224, 183 U. S. 559, 46 L. Ed. 328.

[63] James v. State, 69 So. 569, 193 Ala. 55, Ann. Cas. 1918B, 119; Porter v. State, 37 So. 81, 140 Ala. 87; State v. Soper, 49 S. W. 1007, 148 Mo. 217; State v. Overton, 88 A. 689, 85 N. J. Law, 287; State v. Herron, 71 A. 274, 77 N. J. Law, 523.

show that he was insane at the time of the commission of the acts charged against him as an offense, he cannot be convicted if the jury have a reasonable doubt of his sanity.[64]

An instruction is erroneous which requires an accused to establish a defense of insanity beyond a reasonable doubt,[65] or which requires more than a preponderance of the evidence to sustain such a plea,[66] and where an instruction is given that the burden is on the defendant to clearly prove such a defense by a preponderance of the evidence the court should explain that this does not mean that he must prove his insanity beyond a reasonable doubt.[67]

In some jurisdictions it is error to charge that such a defense must be made out by a preponderance of the evidence,[68] it being sufficient, as heretofore stated, to entitle the defendant to an acquittal, if upon the whole evidence the jury have a reasonable doubt of the sanity of the defendant or of his mental competency to distinguish between right and wrong and to understand the nature of the act charged at the time of its commission,[69] and instructions are objectionable which do not clearly state this rule to the jury,[70] or which deprive the accused of the benefit of any

[64] Matheson v. United States, 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

[65] Smith v. State, 62 So. 184, 182 Ala. 38.

[66] People v. Wells, 78 P. 470, 145 Cal. 138; Kelch v. State, 45 N. E. 6, 55 Ohio St. 146, 39 L. R. A. 737, 60 Am. St. Rep. 680; Commonwealth v. Lee, 75 A. 411, 226 Pa. 283. See People v. Zentgraf (Cal. App.) 193 P. 274.

[67] Stanfield v. State, 94 S. W. 1057, 50 Tex. Cr. R. 69; McCullough v. State, 94 S. W. 1056, 50 Tex. Cr. R. 132.

[68] German v. United States (C. C. A. Ky.) 120 F. 666, 57 C. C. A. 128; State v. Shuff, 72 P. 664, 9 Idaho, 115.

Instructions not improper within rule. Where, in a prosecution for homicide, the court charged that a complete purpose or design to kill must be shown, and that the burden of proof was on the commonwealth to satisfy the jury beyond a reasonable doubt that defendant was legally responsible at the time, or was sane, and that in order to constitute a crime a person must have intelligence and capacity enough to have a criminal intent and purpose, and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming evidence of mental disease, his intellectual power is for the time obliterated, he is not punishable for criminal acts, a subsequent instruction requiring that it must be proved to the satisfaction of the jury that the mind of accused was in a diseased and unsound state at the time of the killing, etc., was not subject to exception as placing on defendant the burden of proving by a preponderance of the evidence that he was mentally irresponsible. Commonwealth v. Johnson, 74 N. E. 939, 188 Mass. 382.

[69] State v. Shuff, 72 P. 664, 9 Idaho, 115.

[70] State v. Crowe, 102 P. 579, 39 Mont. 174, 18 Ann. Cas. 643; Revoir v. State, 82 Wis. 295, 52 N. W. 84.

Reasonable doubt. The instruction that it is for the jury to say whether the evidence as a whole convinces them of defendant's insanity, or raises in their minds a reasonable doubt as to his insanity, is objectionable because of its alternative form;

evidence which merely creates a reasonable doubt as to his sanity.[71] An instruction on the capacity of the defendant to commit the crime alleged should not restrict the jury to evidence which relates to the commission of the offense and subsequent events.[72]

§ 329. Presumption of continuance of insanity

In order to justify an instruction that, if the defendant has shown that he was insane at any time before the commission of the alleged offense, the jury will presume that he was insane at the time of the act alleged to constitute such offense, there must be some evidence tending to show his general insanity, as distinguished from mere temporary aberration,[73] and it is proper to instruct that, if the defendant is shown to have been permanently insane before the commission of the crime charged, the presumption would be that such insanity continued and existed at the time of the offense, but that by "permanently insane" is meant insanity not due to a temporary cause, such as delirium tremens, fever, or the like.[74]

C. Effect of Intoxication of Accused as Bearing on Guilt or Punishment

§ 330. Necessity and propriety of instructions in general

Where there is evidence that an act for which one is criminally prosecuted was committed by him while intoxicated, it is proper

the only matter for the jury's determination being whether the evidence as a whole raises a reasonable doubt of defendant's sanity. State v. Crowe, 102 P. 579, 39 Mont. 174, 18 Ann. Cas. 643.

[71] Pribble v. People, 112 P. 220, 49 Colo. 210.

Instructions held improper within rule. Where the sole defense was insanity, an instruction that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under a defect of reason from disease of the mind, is erroneous, in that it is calculated to mislead the jury as to the evidence necessary to put the burden of proof as to sanity on the prosecution, and as to the effect of a reasonable doubt, regarding defendant's sanity, which may be created in the minds of the jury. People v. Nino, 149 N. Y. 317, 43 N. E. 853.

[72] Bell v. State, 91 Ga. 15, 16 S. E. 207.

[73] People v. Francis, 38 Cal. 183.

Instructions held sufficient on presumption of continuance of insanity. A charge that insanity of a permanent nature, when once shown to exist, is presumed to continue until the contrary appears, but, where delirium tremens is relied on, the delirium must exist when the act was committed, as this is a mere transient derangement of the mind, and there is no presumption of its recurrence from antecedent fits, is correct; nor is it rendered inapplicable by medical testimony that delirium tremens weakens the mind. Wagner v. State, 116 Ind. 181, 18 N. E. 833.

[74] Kellogg v. United States (C. C. A. Tenn.) 103 F. 200, 43 C. C. A. 179.

to instruct,[75] and the court should instruct,[76] on the law as to drunkenness, and that such intoxication is a matter to be considered by the jury as bearing upon the state of the defendant's mind, and therefore as evidence upon the question of his intent;[77] and while it is held in one jurisdiction that it is seldom, if ever, the duty of the court to go further and instruct that the jury may, from the intoxication alone, infer the absence of any intent to commit the specific offense charged and the consequent innocence of the defendant,[78] and in another jurisdiction it has been held that the fact of drunkenness should not be singled out from the other evidence bearing on intent and malice,[79] the weight of authority supports the rule that in a proper case the court may be required to instruct that if such intoxication was of such a character as to render the defendant incapable of forming an intent to commit the crime alleged he should be acquitted.[80] If there was intoxication

[75] **Ark.** White v. State, 86 S. W. 296, 174 Ark. 491.
Ill. Bleich v. People, 81 N. E. 36, 227 Ill. 80.
Mo. State v. Murray, 193 S. W. 830.
Or. State v. Morris, 163 P. 567, 83 Or. 429.
Pa. Commonwealth v. Ault, 10 Pa. Super. Ct. 651.
Tex. Unchurch v. State (Cr. App.) 39 S. W. 371.

[76] People v. Van Zandt, 120 N. E. 725, 224 N. Y. 354.

[77] **Ala.** Chatham v. State, 92 Ala. 47, 9 So. 607.
Cal. People v. Hill, 55 P. 692, 123 Cal. 47.
Kan. State v. White, 14 Kan. 538.
Ky. Hayes v. Commonwealth, 188 S. W. 415, 171 Ky. 291.
N. Y. People v. Mills, 3 N. Y. Cr. R. 184; Rodgers v. People, 15 How. Prac. 557.
Vt. State v. Turley, 88 A. 562, 87 Vt. 163.
See Nichols v. State, 8 Ohio St. 435.
Instructions held sufficient on question of intent. In a prosecution for assault with a dangerous weapon, the court properly instructed the jury on the law of intoxication in the language of the statute, and that it was for the jury to determine whether defendant's mind was in such condition that he knew right from wrong or the probable consequences or result of his act. State v. Kapelino, 108 N. W. 335, 20 S. D. 591. An instruction that while voluntary drunkenness, of itself, cannot avail as a defense to a charge of murder in the first degree, yet it should be considered on the question of whether defendant committed the act with deliberation and premeditation, in connection with all the other facts, in determining the degree of guilt, properly covers the question of intent. State v. Zorn, 22 Or. 591, 30 P. 317.

[78] State v. White, 14 Kan. 538.

[79] Nichols v. Commonwealth, 11 Bush. (Ky.) 575.

[80] **Ala.** Granberry v. State, 62 So. 52, 182 Ala. 4.
Ark. Chowning v. State, 121 S. W. 735, 91 Ark. 503, 18 Ann. Cas. 529.
Fla. Garner v. State, 9 So. 835, 28 Fla. 113, 29 Am. St. Rep. 232.
Ill. People v. Wright, 123 N. E. 64, 287 Ill. 580.
Iowa. State v. Steffens, 89 N. W. 974, 116 Iowa, 227; State v. Desmond, 80 N. W. 214, 109 Iowa, 72.
Neb. Kraus v. State, 169 N. W. 3, 102 Neb. 690.
N. Y. Rogers v. People, 3 Parker, Cr. R. 632.
See State v. Pasnau, 92 N. W. 682, 118 Iowa, 501; People v. Haley, 12 N. W. 671, 48 Mich. 495.
Instructions insufficient within rule. On a trial for shooting with

of the accused to any extent at the time of the commission of the alleged offense, he is entitled to have the jury pass upon the effect thereof upon the question of intent, and it is error to instruct that the intoxication must be such that defendant could not form a criminal intent in order to be considered on the question of purpose, motive, or intent.[81]

Where the accused is entitled to a charge on intoxication, he may demand a distinctive instruction thereon, disassociated from a charge as to the effect of drugs.[82]

A request to charge upon a general assumption that drunkenness, whether producing insensibility or not, will reduce the grade of the offense, is bad,[83] and the evidence may be such as to make it proper to refuse instructions on the effect of intoxication which ignore the consideration whether the defendant made himself drunk for the purpose of doing the alleged criminal act, or whether he availed himself of a drunken condition to do such act.[84]

It is not reversible error to charge that evidence of drunkenness on the part of the accused should be received with caution,[85] although it is better to omit such a charge.[86]

Instructions as to the effect of drunkenness as bearing upon the question of a criminal intent must be based upon the evidence.[87]

intent to kill and murder an instruction that drunkenness, unless defendant became drunk for the purpose of committing the offense he is accused of, is a palliation or excuse for the commission of it when defendant is so drunk at the time of the commission as to be unable to know what he is doing, was properly refused as not being explicit enough, in that it did not explain when it is that intoxication is a defense to crime. State v. Wilson, 49 So. 986, 124 La. 82.

[81] People v. Gerdvine, 104 N. E. 129, 210 N. Y. 184.

[82] Barton v. State, 81 S. W. 742, 46 Tex. Cr. R. 493.

[83] Walker v. State, 91 Ala. 76, 9 So. 87.

[84] State v. Kole, 32 S. E. 892, 124 N. C. 816; State v. Dilliard, 53 S. E. 117, 59 W. Va. 197.

[85] People v. Ferris, 55 Cal. 588.

[86] People v. Nihell, 77 P. 916, 144 Cal. 200.

[87] **Ala.** Davis v. State, 44 So. 561, 152 Ala. 25.

Colo. Ryan v. People, 114 P. 306, 50 Colo. 99, Ann. Cas. 1912B, 1232.

Kan. State v. Guthridge, 129 P. 1143, 88 Kan. 846.

Ky. Hayes v. Commonwealth, 188 S. W. 415, 171 Ky. 291.

Mo. State v. Church, 98 S. W. 16, 199 Mo. 605; State v. Riley, 100 Mo. 493, 13 S. W. 1063.

N. M. State v. Orfanakis, 159 P. 674, 22 N. M. 107.

N. Y. Lanergan v. People, 50 Barb. 266.

Tex. Berry v. State, 80 S. W. 630, 46 Tex. Cr. R. 420; Wright v. State, 40 S. W. 491, 37 Tex. Cr. R. 627; Leeper v. State, 29 Tex. App. 63, 14 S. W. 398.

Evidence sufficient to justify instruction. Where it is shown that the defendant said that he was drunk when he committed the homicide, and another witness testifies that he acted as though he had been drinking, it is proper to instruct the jury as to the law in regard to homicide committed during intoxication, although

Thus an instruction that, if defendant voluntarily became intoxicated to better nerve himself to do the alleged criminal act, such drunkenness would not constitute an excuse, will constitute cause for reversal, where there is no evidence in support thereof,[88] and the court is not required to state specifically any of the exceptions to the rule that drunkenness does not excuse or extenuate crime, in the absence of any evidence on which to base such statement.[89] Ordinarily a charge upon the effect of the intoxication of the defendant is not required, in the absence of a request therefor.[90]

§ 331. Drunkenness as excuse for crime

While in some jurisdictions it is proper to charge that voluntary intoxication is no excuse for the commission of a crime,[91] and in some jurisdictions, under statutory provisions, that such drunkenness can be considered only in mitigation of the penalty,[92] in other jurisdictions such an instruction, without qualification, will constitute reversible error, if an intent is a necessary element of the crime charged.[93]

most of the witnesses testify that defendant was sober. Jamison v. People, 145 Ill. 357, 34 N. E. 486.

[88] Clark v. State, 49 N. W. 367, 32 Neb. 246.

[89] State v. Guthridge, 129 P. 1143, 88 Kan. 846.

[90] Thomas v. State, 91 Ga. 204, 18 S. E. 305.

[91] Hanvey v. State, 68 Ga. 612; State v. Woodward, 90 S. W. 90, 191 Mo. 617; State v. Marriner, 108 A. 306, 93 N. J. Law, 273; Murphy v. State (Tex. Cr. App.) 40 S. W. 978; White v. State (Tex. Cr. App.) 30 S. W. 556. See Crew v. State (Tex. Cr. App.) 23 S. W. 14.

Drunkenness set up to show physical inability. When drunkenness is set up, not as an excuse for an admitted act, but to show physical inability to do the act at all, it is proper to charge that, while drunkenness is no excuse for crime, it is a fact which may be proved to throw light on other facts or circumstances in the case. Jenkins v. State, 93 Ga. 1, 18 S. E. 992.

[92] Stoudenmire v. State, 125 S. W. 390, 58 Tex. Cr. R. 258.

[93] Garner v. State, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; People v. Jones, 105 N. E. 744, 263 Ill. 564; Golliher v. Commonwealth, 2 Duv. (Ky.) 163, 87 Am. Dec. 493; Latimer v. State, 76 N. W. 207, 55 Neb. 609, 70 Am. St. Rep. 403. See Cook v. State, 35 So. 665, 46 Fla. 20.

Instructions held not improper within rule. Where, on an indictment for murder, there was evidence that defendant was in some degree intoxicated, and the jury were instructed that if they believed he was frenzied from the use of liquor, so that he was incapable of knowing what he was doing, they would be justified in acquitting him, and that they were to take all the circumstances together, and see whether he had acted with deliberation, and no more definite instruction was asked for defendant, it was held that there was no error in further charging that "drunkenness is no excuse for crime." Cross v. State, 55 Wis. 261, 12 N. W. 425.

Absence of evidence of intoxication. Where the evidence fails to show that defendant was intoxicated at the time of the homicide, it is error to instruct the jury that "voluntary intoxication furnishes no excuse for a crime committed under its

In one jurisdiction an instruction on voluntary intoxication as furnishing no excuse for crime should contain the phrase "when sane and responsible." [94]

D. Instructions on Alibi

§ 332. Necessity of instructions

The general rule is that, where there is evidence in a criminal case tending to support an alibi, the court should, on request, instruct on such issue,[95] and that it will be reversible error not to so instruct.[96] Where the question of alibi is bound up with another issue, so that they are virtually the same defense, it is not necessary, however, to instruct separately on such issues,[97] and where the evidence is largely circumstantial instructions covering the law of circumstantial evidence and the question of alibi generally may be sufficient.[98]

In some jurisdictions the court is not required to instruct on alibi as an independent issue,[99] it being sufficient to charge that

influences, even if the intoxication is so extreme as to make the author of the crime unconscious of what he is is doing, or to create a temporary insanity." Montag v. People, 141 Ill. 75, 30 N. E. 337.

Drunkenness not set up as excuse. Where drunkenness was not set up as an excuse for the homicide, but as the contributing cause of an accident which resulted in the death, it was error to instruct abstractly that drunkenness is not an excuse for the commission of a crime. State v. Cross, 42 W. Va. 253, 24 S. E. 996.

[94] People v. Trebilcox, 86 P. 684, 149 Cal. 307.

[95] **Ala.** McKissack v. State, 75 So. 701, 16 Ala. App. 109.

Conn. State v. Braunels, 79 A. 70, 84 Conn. 222.

Ga. Montford v. State, 87 S. E. 797, 144 Ga. 582; Holland v. State, 86 S. E. 739, 17 Ga. App. 311; Callahan v. State, 81 S. E. 380, 14 Ga. App. 442.

Iowa. State v. Porter, 38 N. W. 514, 74 Iowa, 623.

Mich. People v. Coston, 153 N. W. 831, 187 Mich. 538.

Tex. Burkhalter v. State, 184 S. W. 221, 79 Tex. Cr. R. 336; Schaper v. State, 122 S. W. 257, 57 Tex. Cr. R. 201; Ballentine v. State, 107 S. W. 546, 52 Tex. Cr. R. 369; Harper v. State (Cr. App.) 98 S. W. 839; Rountree v. State (Cr. App.) 55 S. W. 827; Smith v. State (Cr. App.) 50 S. W. 362, denying rehearing (Cr. App.) 49 S. W. 583.

Wash. State v. King, 97 P. 247, 50 Wash. 312, 16 Ann. Cas. 322.

Wis. Abaly v. State, 158 N. W. 308, 163 Wis. 609.

[96] **Ala.** Burton v. State, 107 Ala. 108, 18 So. 284.

Ind. Binns v. State, 46 Ind. 311.

Kan. State v. Conway, 55 Kan. 323, 40 P. 661.

N. C. State v. Byers, 80 N. C. 426.

Tenn. Wiley v. State, 5 Baxt. 662; Davis v. State, Id. 612.

Tex. Tittle v. State, 35 Tex. Cr. R. 96, 31 S. W. 677; Anderson v. State, 34 Tex. Cr. R. 546, 31 S. W. 673.

[97] Dale v. State, 88 Ga. 552, 15 S. E. 287.

[98] Marshall v. State, 37 Tex. Cr. R. 450, 36 S. W. 86.

[99] State v. Powers, 47 A. 830, 72 Vt. 168; Jenkins v. State, 134 P. 260, 22 Wyo. 34, rehearing denied 135 P.

if there is any reasonable doubt of the guilt of the defendant on the whole evidence he is entitled to an acquittal,[1] and after the court has properly charged as to the burden of proof where the evidence is circumstantial it need not further charge that the burden is upon the state to prove the presence of the defendant at the scene of the crime beyond a reasonable doubt.[2] An instruction on the effect of evidence of an alibi as raising a reasonable doubt of the guilt of the defendant is properly refused, where the court has already sufficiently charged on the subject of reasonable doubt.[3]

Ordinarily the failure of the court to charge on an alleged alibi will not be error, in the absence of a request for an instruction on such subject;[4] it being held that where no such request is made the defense of alibi is sufficiently embraced in a general charge on the presumption of innocence or reasonable doubt.[5] In jurisdictions, however, where the court is required to instruct the jury on all questions of law arising in the case, an instruction on the subject of alibi must be given, whether requested by the defendant or not, if the evidence raises the issue.[6]

In Georgia the rule is that where alibi is the main defense,[7] or the accused submits evidence on the trial which, if credible, is

749, 22 Wyo. 34. See State v. Reed, 62 Iowa, 40, 17 N. W. 150.

[1] Wallace v. Commonwealth, 220 S. W. 1051, 187 Ky. 775; State v. Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344.

Compare State v. Edwards, 109 Mo. 315, 19 S. W. 91; State v. Kelly, 16 Mo. App. 213.

[2] Jenkins v. State, 134 P. 260, 22 Wyo. 34, rehearing denied 135 P. 749, 22 Wyo. 34.

[3] Benton v. State, 94 S. W. 688, 78 Ark. 284; Gibbs v. State, 1 Tex. App. 12.

Contra, Fleming v. State, 136 Ind. 149, 36 N. E. 154.

[4] **Ill.** People v. Bolik, 89 N. E. 700, 241 Ill. 394.

Iowa. State v. Lightfoot, 78 N. W. 41, 107 Iowa, 344.

Kan. State v. Woods, 185 P. 21, 105 Kan. 554.

Neb. Bloom v. State, 146 N. W. 965, 95 Neb. 710; Heidelbaugh v. State, 113 N. W. 145, 79 Neb. 499.

Tex. Fowler v. State, 148 S. W. 576, 66 Tex. Cr. R. 500; Jones v. State, 143 S. W. 621, 64 Tex. Cr. R. 510; Maulding v. State, 108 S. W. 1182, 53 Tex. Cr. R. 220; Lyon v. State (Cr. App.) 34 S. W. 947; Rider v. State, 26 Tex. App. 334, 9 S. W. 688.

Sufficiency of request for instruction. Where the defendant testifies that he was not present at the place where the crime was committed, the failure to instruct as to the effect of an alibi is erroneous; the attention of the court being called thereto by the allegation that the instructions given "do not cover the whole law of the case." State v. Koplan, 66 S. W. 967, 167 Mo. 298.

[5] State v. Sutton, 70 Iowa, 268, 30 N. W. 567; Myers v. State, 144 S. W. 1134, 65 Tex. Cr. R. 448.

[6] State v. Taylor, 118 Mo. 153, 24 S. W. 449.

Compare State v. Dockery, 147 S. W. 976, 243 Mo. 592.

Contra, State v. Bond, 90 S. W. 830, 191 Mo. 555.

[7] Holland v. State, 86 S. E. 739, 17 Ga. App. 311; Hobbs v. State, 68 S. E. 515, 8 Ga. App. 53; Duggan v. State, 59 S. E. 846, 3 Ga. App. 332.

sufficient to sustain his defense of alibi, the court should of its own motion charge thereon,[8] but where the defendant does not produce sufficient evidence to establish such defense, and the evidence is not close on the issue, the court need not instruct thereon without a request so to do;[9] this rule applying where the issue is raised only by the prisoner's statement.[10]

§ 333. Rule where issue of alibi not raised

Where the issue of an alibi is not raised by the pleadings and evidence, the court need not,[11] and should not,[12] give an instruction on alibi, and it is erroneous to instruct that the defendant relies upon proof of an alibi.[13] Thus, where the defendant simply denies any participation in the crime alleged in the indictment, it is error to instruct as to the defense of an alibi and that such defense merely tends to cast a reasonable doubt on the case made by the state.[14]

§ 334. Sufficiency of evidence to authorize or require instructions on alibi

Evidence in support of the defense of alibi must be of clear and probative value, in order to require or authorize the court to charge upon the law of alibi, especially in the absence of a request therefor,[15] and the mere fact that the unsworn statement of the defendant presents the issue of alibi does not necessitate an instruction on such issue, in the absence of a request therefor.[16]

To entitle a defendant to an instruction on alibi, the evidence must show that at the time of the commission of crime he was at a place so far away or under such circumstances that he could not with ordinary exertion have reached the scene of the crime in time

[8] Sharpe v. State, 100 S. E. 567, 149 Ga. 472.

[9] Barbour v. State, 99 S. E. 782, 24 Ga. App. 31; Holliday v. State, 98 S. E. 386, 23 Ga. App. 400; Pritchett v. State, 90 S. E. 492, 18 Ga. App. 737; Moore v. State, 86 S. E. 822, 17 Ga. App. 344; Strickland v. State, 75 S. E. 491, 11 Ga. App. 417; Coney v. State, 75 S. E. 445, 11 Ga. App. 415; Paulk v. State, 70 S. E. 50, 8 Ga. App. 704; Smith v. State, 65 S. E. 300, 6 Ga. App. 577.

[10] Sheffeld v. State, 83 S. E. 871, 15 Ga. App. 514; Reed v. State, 83 S. E. 674, 15 Ga. App. 435; Brundage v. State, 81 S. E. 384, 14 Ga. App. 460; Watson v. State, 71 S. E. 122, 136 Ga. 236.

[11] Morris v. State, 27 So. 336, 124 Ala. 44; Johnson v. State (Tex. Cr. App.) 58 S. W. 105; Benavides v. State (Tex. Cr. App.) 61 S. W. 125.

[12] People v. Darr, 104 N. E. 389, 262 Ill. 202, affirming judgment 179 Ill. App. 130; State v. Bosworth, 152 N. W. 581, 170 Iowa, 329; Mitchell v. State, 159 S. W. 1073, 71 Tex. Cr. R. 185; Hardin v. State, 123 S. W. 613, 57 Tex. Cr. R. 401.

[13] Flege v. State, 133 N. W. 431, 90 Neb. 390.

[14] People v. Lukoszus, 89 N. E. 749, 242 Ill. 101.

[15] Throckmorton v. State, 97 S. E. 664, 23 Ga. App. 112.

[16] Young v. State, 54 S. E. 82, 125 Ga. 584; Murphy v. State, 45 S. E. 609, 118 Ga. 780.

to have participated in it.[17] To require such an instruction it is not necessary that there should be direct evidence of an alibi,[18] or that the defendant should testify in so many words that at the time of the commission of the crime he was at a place other than where it was alleged to have been committed.[19]

The mere denial by the defendant that he was at the place where the crime was committed will not necessarily make it incumbent on the court to give such an instruction,[20] but the court should so instruct on request, if he swears that he was at another place at the time of the alleged crime,[21] and so where the state introduces the testimony of the defendant on a former trial in support of the defense of alibi.[22]

§ 335. Propriety and sufficiency of instructions on alibi

In some jurisdictions an instruction on the defense of alibi should state the elements thereof,[23] that the jury should consider all the evidence on the issue whether introduced by the state or

[17] **Cal.** People v. Charles, 99 P. 383, 9 Cal. App. 338.

Iowa. State v. Seymour, 94 Iowa, 690, 63 N. W. 661.

Mo. State v. Bond, 90 S. W. 330, 191 Mo. 555.

Okl. Barbe v. Territory, 86 P. 61, 16 Okl. 562.

Tex. Funk v. State, 208 S. W. 509, 84 Tex. Cr. R. 402; Woods v. State, 188 S. W. 980, 80 Tex. Cr. R. 73; Click v. State, 155 S. W. 270; Russell v. State, Id.; Thornton v. State, Id.; Caples v. State, 155 S. W. 267, 69 Tex. Cr. R. 394; Johnson v. State, 120 S. W. 1000, 56 Tex. Cr. R. 540; Underwood v. State, 117 S. W. 809, 55 Tex. Cr. R. 601; Delaney v. State, 90 S. W. 642, 48 Tex. Cr. R. 594.

Evidence of alibi insufficient to require an instruction thereon. The fact that defendant, charged with a homicide occurring in a free fight, was present during the fight, but fled therefrom during the fight does not authorize an instruction as to alibi. Jackson v. State (Tex. Cr. App.) 67 S. W. 497. In a prosecution for burglary the accused having admitted that 15 minutes prior to the time a person was detected attempting to rifle a safe in a mill building he was in close proximity thereto, and one witness having identified him as the guilty party, it was not prejudicial after charging, as to the burden of proof, the presumption of innocence, and the reasonable doubt, to refuse to specifically instruct as to the defense of alibi, though accused testified at the precise time the burglary was committed he was about 20 rods distant from the building. Schultz v. State, 130 N. W. 105, 88 Neb. 613, 34 L. R. A. (N. S.) 243.

[18] Sapp v. State (Tex. Cr. App.) 77 S. W. 456.

Evidence to show defendant's presence at scene of crime entirely circumstantial. Though defendant, charged with robbery, introduced no affirmative evidence to prove an alibi, it was proper to instruct the jury on the law of alibi, where the evidence to show defendant's presence at the robbery was all circumstantial. Tabor v. State, 107 S. W. 1116, 52 Tex. Cr. R. 387.

[19] Padron v. State, 55 S. W. 827, 41 Tex. Cr. R. 548.

[20] Byas v. State, 51 S. W. 923, 41 Tex. Cr. R. 51, 96 Am. St. Rep. 762.

[21] Wilson v. State, 51 S. W. 916, 41 Tex. Cr. R. 115.

[22] Davis v. State. 152 S. W. 1094, 68 Tex. Cr. R. 400.

[23] Collins v. State, 70 So. 995, 14 Ala. App. 54.

the defendant,[24] that the defense of alibi is as proper as any other, that if the jury have a reasonable doubt as to whether the defendant was at a place other than where the crime is alleged to have been committed at the time it was committed they should give him the benefit of the doubt, and that he need not prove such alibi by a preponderance of the evidence.[25]

An otherwise sufficient instruction on alibi is not rendered improper, however, by the failure to include the statement that an alibi is a legitimate defense,[26] and in other jurisdictions it is sufficient to charge in substance that, if the evidence raises a reasonable doubt in the minds of the jury as to the presence of the defendant at the scene of the crime at the time of its commission, they should acquit him.[27] Thus an instruction that it would be

[24] Thompson v. State, 117 P. 216, 6 Okl. Cr. 50; Jenkins v. State, 134 P. 260, 22 Wyo. 34, rehearing denied 135 P. 749, 22 Wyo. 34.

Instructions held proper within rule. An instruction that one of the defenses interposed is an alibi—that is, that defendant was in another place when the crime was committed—and that the evidence must be such as to show that, at the very time of the commission of the crime, the accused was at another place, so that he could not, with ordinary exertion, have reached the place where the crime was committed, and that in considering this question the jury should consider the whole of the evidence, and then, if they have any reasonable doubt of the guilt of accused, should acquit, is sufficient. Buck v. Territory, 98 P. 1017, 1 Okl. Cr. 517.

[25] Burns v. State, 79 N. E. 929, 75 Ohio St. 407.

Instructions held sufficient. Instructions that jury should acquit if they believed that defendant was not present when the crime was committed, and that the burden of proving his presence at the time and place beyond a reasonable doubt was on the state. State v. King, 165 P. 665, 101 Kan. 189.

[26] State v. Sepult, 81 Iowa, 40, 46 N. W. 748; State v. Anglin (Mo.) 222 S. W. 776.

[27] **U. S.** (C. C. A. Tenn.) McCool v. U. S., 263 F. 55.

Cal. People v. Winters, 57 P. 1067, 125 Cal. 325.

Fla. Blackwell v. State, 86 So. 224.

Mich. People v. Resh, 107 Mich. 251, 65 N. W. 99.

Mo. State v. Anglin, 222 S. W. 776; State v. Bonner, 168 S. W. 591, 259 Mo. 342; State v. Brown, 153 S. W. 1027, 247 Mo. 715; State v. Shelton, 122 S. W. 732, 223 Mo. 118; State v. Adair, 61 S. W. 187, 160 Mo. 391.

Mont. State v. Spotted Hawk, 55 P. 1026, 22 Mont. 33.

Tex. Ellis v. State, 154 S. W. 1010, 69 Tex. Cr. R. 468; Clay v. State, 146 S. W. 166, 65 Tex. Cr. R. 590; McCoy v. State, 120 S. W. 858, 56 Tex. Cr. R. 551; Fox v. State, 109 S. W. 370, 53 Tex. Cr. R. 150; Tinsley v. State, 106 S. W. 347, 52 Tex. Cr. R. 91; Villereal v. State (Cr. App.) 61 S. W. 715; Stevens v. State, 59 S. W. 545, 42 Tex. Cr. R. 154; Gutirrez v. State (Cr. App.) 59 S. W. 274; Pink v. State, 48 S. W. 171, 40 Tex. Cr. R. 23.

See State v. Taylor, 134 Mo. 109, 35 S. W. 92.

Instructions held sufficient within rule. An instruction that it was incumbent on defendants to establish the claim that they were elsewhere at the time of the murder by a preponderance of the evidence, but not beyond a reasonable doubt, and "if, therefore, after consideration of all the evidence in the case, * * * you have a reasonable doubt as to whether the defendants were at the place where the crime was committed, or were in some other locality, * * * you shall give the defendants the benefit of that doubt, and

the duty of the jury to acquit the defendant if his testimony as to his whereabouts is sufficient to create in their minds a reasonable doubt of his having committed the act charged against him is adequate on the question of alibi, although the court does not specifically say that the defense is an alibi and does not define the meaning of the term.[28] In still other jurisdictions it is proper to instruct that evidence given in support of the defense of an alibi should be considered in connection with all the other evidence, and if on the whole evidence the jury have a reasonable doubt of the guilt of the defendant they should acquit him.[29]

An instruction that defendant is not bound to prove an alibi set

find them not guilty," imposes on the prosecution the obligation to demonstrate beyond a reasonable doubt that defendants were at the place of the killing, and gives them the benefit of their testimony to create in the minds of the jury a reasonable doubt as to their presence at the place. Borrego v. Territory, 46 P. 349, 8 N. M. 446, affirmed Same v. Cunningham, 17 S. Ct. 182, 164 U. S. 612, 41 L. Ed. 572. A charge that if the testimony as to the alibi was sufficient to raise a reasonable doubt as to defendant's presence at the place and time charged, or as to his participation in the murder, the defendant must be discharged, given in connection with instructions on reasonable doubt and presumption of innocence. State v. Kritchman, 79 A. 75, 84 Conn. 152. An instruction that defendant had interposed an alibi, that is, that even if the crime was committed as charged, he was at the time at a different place, and was not and could not have been the person who committed it, and that, if the evidence left a reasonable doubt as to his presence at the place where the offense was committed at the time of the commission thereof to find him not guilty. State v. Hillebrand, 225 S. W. 1006. In a criminal case, where defendant attempted to show an alibi, an instruction that such defense "is as legitimate and valid as any other defense, * * * nor is the defendant bound to establish this defense beyond a reasonable doubt, and if, from the whole evidence, you have a reasonable doubt of his presence at the commission of the offense, as before explained, you must give him the benefit of that doubt, and acquit," is sufficiently explicit to show defendant's rights under that defense. State v. Bryant, 134 Mo. 246, 35 S. W. 597. An instruction "among other defenses set up by defendant is what is known in legal phraseology as an 'alibi'; that is, that if the offense was committed as alleged, and defendant was at another and different place * * * at the time of the commission thereof, and therefore was not, and could not have been, the person who committed the crime. Now, if the evidence raises in your mind a reasonable doubt as to the presence of defendant at the place where the offense was committed, if any such was committed, at the time of the commission thereof, you will give defendant the benefit of such doubt and acquit him"—was proper. O'Hara v. State, 124 S. W. 95, 57 Tex. Cr. R. 577. An instruction that if, in view of all the evidence, the jury have a reasonable doubt as to whether defendants were in some other place when the crime was committed, they should be given the benefit of the doubt, and acquitted; that they are not required to prove an alibi beyond a reasonable doubt to be entitled to an acquittal; but it is enough if the evidence raises a reasonable doubt of their presence at the time of the commission of the crime, is correct. State v. Hassan, 128 N. W. 960, 149 Iowa, 518.

[28] Commonwealth v. De Palma, 110 A. 756, 268 Pa. 25.

[29] State v. Worthen, 100 N. W. 330, 124 Iowa, 408; State v. Standley, 76

up, and that the jury should acquit him if his evidence raises a reasonable doubt as to his complicity in the offense charged, gives him the full benefit of the evidence relating to such defense.[30]

It is proper to instruct on behalf of the state that if, after considering all the facts and circumstances in evidence, the jury have no reasonable doubt of the presence of the defendant at the time and place of the commission of the crime, then the defense of alibi has not been made out.[31]

§ 336. Propriety of instructions on burden of proof

In the majority of jurisdictions instructions which place the burden on the defendant to establish an alibi by a preponderance of the evidence are erroneous.[32] In some jurisdictions, however, the rule is that an alibi as a distinct issue must be shown by preponderance of the evidence, and accordingly a charge that, when

Iowa, 215, 40 N. W. 815; State v. Ardoin, 22 So. 620, 49 La. Ann. 1145, 62 Am. St. Rep. 678.

Instructions proper within rule. An instruction that accused was not required to prove the defense of alibi beyond a reasonable doubt, but was entitled to an acquittal if the evidence raised a reasonable doubt of defendant's presence at the time and place of the commission of the crime charged, etc., sufficiently directed the jury to take into account the evidence relating to alibi in determining whether they were satisfied beyond a reasonable doubt on all the evidence as to defendant's guilt. State v. Thomas, 109 N. W. 900, 135 Iowa, 717, writ of error dismissed Thomas v. State of Iowa, 28 S. Ct. 487, 209 U. S. 258, 52 L. Ed. 782. In a criminal trial an instruction that the burden was on defendant to establish an alibi by a preponderance of the evidence, but that if the entire evidence, including "the defense of alibi" raised a reasonable doubt as to defendant's guilt he should be acquitted, was not reversible error as leading the jury to understand that before defendant could have advantage from the evidence tending to prove an alibi, he must have established such defense by a preponderance of the evidence on that subject; the court having obviously inadvertently used the word "defense" for "evidence." State v. Nugent, 111 N. W. 927, 134 Iowa, 237.

An instruction that a defense of alibi, to be entitled to consideration, must show that at the very time of the commission of the crime the accused was at another place, so far away that he could not, with ordinary exertion, have reached the place where the crime was committed to have participated in it, and stating that the jury should consider the whole of the evidence, both as to the alibi and that relating to other facts in the case, and, if it entertained any reasonable doubt, should acquit, does not place the burden of proof on the defendant. Tucker v. Territory, 87 P. 307, 17 Okl. 56.

[30] State v. Miller, 56 S. W. 907, 156 Mo. 76.

[31] Aneals v. People, 134 Ill. 401, 25 N. E. 1022.

[32] **Ariz.** Barton v. Territory of Arizona, 85 P. 730, 10 Ariz. 68.

Cal. People v. Hoosier, 142 P. 514, 24 Cal. App. 746; People v. Morris, 84 P. 463, 3 Cal. App. 1.

N. Y. People v. Montlake, 172 N. Y. S. 102, 184 App. Div. 578.

Ohio. Burns v. State, 79 N. E. 929, 75 Ohio St. 407.

Okl. Shoemaker v. Territory, 4 Okl. 118, 43 P. 1059.

Or. State v. Chee Gong, 19 P. 607, 16 Or. 534.

Tex. Ayres v. State, 21 Tex. App. 399, 17 S. W. 253.

See People v. Tarm Poi, 80 Cal. 225, 24 P. 998.

a defendant attempts to prove an alibi, the burden is on him to prove it successfully, or by a preponderance of the evidence, is not improper,[33] if in connection with such an instruction the jury is charged that any evidence of alibi should be considered in connection with all the other evidence in the case, and if, upon the evidence as a whole, there is a reasonable doubt of guilt, the defendant should be acquitted.[34]

The better doctrine is that, where the people have made a prima facie case and the defendant relies on the defense of alibi, the burden is on him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence and to such a degree of certainty as will, when the whole evidence is considered create and leave in the mind of the jury a reasonable doubt

[33] Parham v. State, 42 So. 1, 147 Ala. 57; Pellum v. State, 89 Ala. 28, 8 So. 83; Belcher v. State (Ga. App.) 103 S. E. 852; Jones v. State, 60 S. E. 840, 130 Ga. 274. See State v. O'Brien, 175 N. W. 769, 188 Iowa, 165.

Proof to reasonable satisfaction of jury. In a prosecution for rape, a charge that the burden was on accused to prove an alleged alibi to the reasonable satisfaction of the jury was proper, and could not be construed to mean that the accused had to prove the alibi beyond a reasonable doubt. Ryals v. State, 54 S. E. 168, 125 Ga. 266.

Instructions requiring too high a degree of proof. An instruction that "the burden of proof was on defendant to establish his alibi, and that it must be done to your satisfaction." Prince v. State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28. On a defense of alibi, it is error to charge that, because it is usually made out by members of the family of the accused, the law says it must be made out very clearly and satisfactorily (that is, that the proof must be pretty positive); that it must be such proof as will carry conviction to your minds, and which should, preponderate and fix pretty thoroughly the place that the defendants allege themselves to be; that the evidence must establish pretty thoroughly that they were at the identical place that they allege they were on the night that the crime was committed. Commonwealth v. Gutshall, 22 Pa. Super. Ct. 269.

Proof beyond reasonable doubt. An instruction requiring the defendant to establish the defense of alibi to the exclusion of a reasonable doubt is erroneous. Evans v. State, 79 S. E. 916, 13 Ga. App. 700.

[34] **Ark.** Rayburn v. State, 63 S. W. 356, 69 Ark. 177.

Ga. McDonald v. State, 94 S. E. 262, 21 Ga. App. 125; Eidson v. State, 94 S. E. 73, 21 Ga. App. 244; Moody v. State, 86 S. E. 285, 17 Ga. App. 121; Raysor v. State, 63 S. E. 786, 132 Ga. 237; Henderson v. State, 48 S. E. 167, 120 Ga. 504.

Iowa. State v. Thomas, 109 N. W. 900, 135 Iowa, 717; State v. Hogan, 88 N. W. 1074, 115 Iowa, 455; State v. McGarry, 83 N. W. 718, 111 Iowa, 709; State v. Maher, 74 Iowa, 82, 37 N. W. 5; Id., 74 Iowa, 77, 37 N. W. 2.

Pa. Rudy v. Commonwealth, 128 Pa. 500, 18 A. 344, 24 Wkly. Notes Cas. 502.

Vt. State v. Ward, 61 Vt. 153, 17 A. 483.

In Georgia, it is held that such a charge will not be necessary, especially in the absence of a request therefor, if the court has correctly charged on reasonable doubt as applicable to all the evidence and the statement of the defendant. Tooke v. State (Ga. App.) 102 S. E. 905; Bass v. State, 57 S. E. 1054, 1 Ga. App. 728, 790.

of his guilt of the crime charged,[35] and an instruction which, in effect, enunciates this rule is proper,[36] while instructions imposing a greater burden are erroneous.[37]

An instruction that, if the jury believe the defendant to have been at some place other than that where the crime was committed at the time of its commission, they should acquit him, is generally held erroneous, as placing the burden of proof upon the defendant,[38] although in some jurisdictions it is not objectionable if the court properly charges the doctrine of reasonable doubt as applicable to the whole case.[39]

§ 337. Propriety and sufficiency of instructions as to time

Alibi is not a substantive defense, but the burden of proof is upon the state to show that the defendant was at the scene of the crime at the time of its commission.[40] If the evidence of an alibi renders it very improbable that the defendant was present at the scene of the crime, it may be considered by the jury for what it is worth.[41] It is therefore misleading and erroneous to charge that it is essential to the satisfactory proof of an alibi that the evidence in support of it should cover the whole of the time of the transaction in question, or so much thereof as to render it im-

[35] State v. Ward, 173 P. 497, 31 Idaho, 419; State v. Bogris, 26 Idaho, 587, 144 P. 789; Mullins v. People, 110 Ill. 42; State v. Thornton, 73 N. W. 196, 10 S. D. 349, 41 L. R. A. 530. See Morris v. State (Ark.) 224 S. W. 724; Barnhart v. State, 177 N. W. 820, 104 Neb. 529.

Instructions not improper as placing burden of proof on defendant. It is not error to charge that an alibi is a good defense, if proved to the satisfaction of the jury, and such a charge does not convey an intimation that the burden of proving it rests upon the prisoner. State v. Starnes, 94 N. C. 973.

Instructions on burden of proof held proper in connection with other instructions. An instruction that an alibi is a good defense if proven, was not erroneous where the jury were directed in the same connection that, if they had a reasonable doubt as to defendant's presence, they must acquit. State v. Price, 55 Kan. 610, 40 P. 1001; State v. McGinnis, 59 S. W. 83, 158 Mo. 105. Where the jury were instructed to find for defendant, unless the state proved everything essential to the establishment of the charge to the exclusion of a reasonable doubt, it was not error to charge, immediately afterwards, that "the burden rests upon the commonwealth to make out its case, * * * to the exclusion of a reasonable doubt, but, where the accused * * * attempts to prove an alibi, * * * the burden of proving the alibi rests upon him." Thompson v. Commonwealth, 88 Va. 45, 13 S. E. 304.

[36] Ackerson v. People, 124 Ill. 563, 16 N. E. 847; Mullins v. People, 110 Ill. 42.

[37] Thompson v. State, 117 P. 216, 6 Okl. Cr. 50.

[38] People v. Fong Ah Sing, 64 Cal. 253, 28 P. 233; Henderson v. State, 101 S. W. 245, 51 Tex. Cr. R. 193; Bennett v. State, 30 Tex. App. 341, 17 S. W. 545.

[39] State v. Johnson, 91 Mo. 439, 3 S. W. 868.

[40] Gawn v. State, 13 Ohio Cir. Ct. R. 116, 7 O. C. D. 19.

[41] Ford v. State, 47 S. W. 703, 101 Tenn. 454.

possible for the defendant to have committed the crime;[42] such an instruction shifting the burden of proof from the state to the defendant,[43] and violating the rule that the defendant is entitled to an acquittal if the whole evidence generates a reasonable doubt as to his guilt.[44]

So it is error to charge that, if it was possible for the defendant to have been at either the place of the crime or the place where he claimed to be at the time of its commission, the evidence of alibi is of no value whatever.[45] It is not error, however, to instruct that evidence of an alibi, to be satisfactory, must account for his whereabouts during the whole of the period in question, where the court also instructs that, if the jury have any reasonable doubt as to whether the defendant was present at the scene of the crime, they should acquit.[46] Where the witnesses for the state have fixed the date of the crime within a few days, it is error for the court to charge that the exact date of the offense is immaterial, and that it is sufficient to support a conviction if the evi-

[42] Doby v. State, 74 So. 724, 15 Ala. App. 591; McAnally v. State, 74 Ala. 9; Wisdom v. People, 11 Colo. 170, 17 P. 519; Briggs v. People, 76 N. E. 499, 219 Ill. 330; Gawn v. State, 13 Ohio Cir. Ct. R. 116, 7 O. C. D. 19.

Right of jury to consider incomplete proof of alibi. The jury should not be told not to consider any evidence on the subject of an alibi, unless it covers the whole period of time during which the offense was committed. Haskins v. State (Ark.) 230 S. W. 5.

[43] Pollard v. State, 53 Miss. 410, 24 Am. Rep. 703.

[44] Beavers v. State, 103 Ala. 36, 15 So. 616; Allbritton v. State, 94 Ala. 76, 10 So. 426.

[45] Ford v. State, 47 S. W. 703, 101 Tenn. 454.

Effect of use of terms "possible" and "impossible." Where, in a murder case, the court charged that time, as far as the question of an alibi is concerned, is very material, and the jury should remember all every witness had stated in regard to that question, and determine whether it was possible for defendant, under all the circumstances, to leave the house of D., and go to the house of deceased, and fire the fatal shot at the time it was fired; that if, from all the circumstances, it was impossible for defendant to do so, then the alibi was made out, and was a complete defense, but, if it was possible for defendant to leave the house of D., go to the house of deceased, and fire the fatal shot, the evidence failed to establish the alibi, it was held that the use of the terms "possible" and "impossible" was erroneous, as they were too strong in the connection in which they were used. Snell v. State, 50 Ind. 516.

[46] People v. Worden, 45 P. 844, 113 Cal. 569; Barr v. People, 71 P. 392, 30 Colo. 522.

Exact time of commission of offense not shown. On the trial of a criminal cause, where evidence has been introduced tending to show that the defendant was at a place other than the place where the crime was committed, at the time of its commission, but where the exact time of the commission of the crime is not shown, but it is shown to have been committed during a night, or part of a night, it is right to instruct the jury that evidence of an alibi must cover the whole of such time. West v. State, 48 Ind. 483.

dence shows that the defendant committed the crime at any time within the period of limitations.[47]

§ 338. Propriety and sufficiency of instructions as to place

The distance between the place where the defendant claims to have been at the time of the commission of the crime of which he is accused and the place where the crime was committed is not the controlling element of an alibi, and the general rule is that it is error to instruct that, satisfactorily to establish his defense of alibi, it must appear that such distance was so great as to preclude the possibility that defendant could have been at the scene of the crime.[48] While it may not be impossible for the defendant to have been present at the place of the crime, it may be highly improbable, and this the jury should be allowed to take into account.[49] In some jurisdictions, however, in some cases, under the terms of a statute, it is not improper to instruct that in order to make out the defense of alibi the evidence must satisfy the jury that the accused was at a place where it was impossible for him to have committed the crime.[50] An instruction that, if the accused was not so far away from the place where the crime was committed but that he could with ordinary exertion have reached such place, the jury may consider such fact, is not improper, as allowing the jury to infer that the defendant would be presumed to have been at such place at the time of the commission of the offense if he could by ordinary exertion have reached it.[51]

[47] State v. King, 97 P. 247, 50 Wash. 312, 16 Ann. Cas. 322.

[48] Peyton v. State, 74 N. W. 597, 54 Neb. 188.

Instructions held proper within rule. Where on an indictment for larceny, defendant set up an alibi, and the court instructed that, "if he has shown that at the time of the larceny he was at such distance from the scene that he could not have participated in the commission of the crime, this will overcome any presumption of guilt which would arise from the fact of his having possession of the property," it was held that the giving of this instruction does not warrant a new trial on the ground that it conveys the idea that the establishment of the alibi depends, not upon absence from the locus in quo, but upon the distance therefrom. State v. Butler, 67 Iowa, 643, 25 N. W. 843. Where the evidence tends to show an alibi, it is not error to instruct that the evidence tended to show that the defendant was, when the crime was being committed, at such a distant and different place that he could not have participated in its commission, and that they should acquit unless the evidence satisfied them beyond a reasonable doubt that he was present when the crime was committed. Nightingale v. State, 87 N. W. 158, 62 Neb. 371.

[49] West v. State, 48 Ind. 483.

[50] McCool v. U. S. (C. C. A. Tenn.) 263 F. 55; Field v. State, 55 S. E. 502, 126 Ga. 571; Harris v. State, 47 S. E. 520, 120 Ga. 167; Simpson v. State, 78 Ga. 91.

[51] State v. Burton, 67 P. 1097, 27 Wash. 528.

§ 339. Disparagement of defense of alibi

Evidence of an alibi is to be subjected to the same test as any other evidence of a material fact,[52] and the general rule is that an instruction tending to cast suspicion on such evidence or to disparage the defense of an alibi is erroneous.[53] Thus it is error to instruct, without any accompanying explanation or qualification, that the defense of alibi is to be weighed with great caution, because it is a defense easily fabricated and often attempted by contrivance and perjury.[54] It is, however, proper in some jurisdictions to advise the jury to scan the evidence of an alibi with care and attention,[55] and call attention to the fact that such a defense is more easy to build than some others,[56] such an instruc-

[52] Sater v. State, 56 Ind. 378.

[53] **Ind.** Binns v. State, 46 Ind. 311.

Mich. People v. Pearsall, 50 Mich. 233, 15 N. W. 98.

Miss. Simmons v. State, 61 Miss. 243.

Mo. State v. Crowell, 50 S. W. 893, 149 Mo. 391, 73 Am. St. Rep. 402.

N. Y. People v. Kelly, 35 Hun, 295.

Or. State v. Chee Gong, 16 Or. 534, 19 P. 607.

S. C. State v. Danelly, 107 S. E. 149.

Tex. Walker v. State, 37 Tex. 366.

Instructions held not objectionable within rule. An instruction that the defendant has introduced evidence tending to establish "what is known as an alibi." Rownd v. State, 140 N. W. 790, 93 Neb. 427. Where, on a prosecution for homicide, the court charged that if the plea of an alibi was not interposed in good faith, or the evidence to sustain it was simulated, it was a discrediting circumstance, which the jury could consider, with the other evidence, in determining the guilt or innocence of the defendant, it was held that although the reference to the plea of an alibi, there being no such separate plea in the case, was inapt, the instruction, when applied to the defense of an alibi which was sought to be proved under the general issue, was proper. Tatum v. State, 31 So. 369, 131 Ala. 32. An instruction that a preliminary question for the jury is whether defendant has proven an alibi, that such defense, if established, is decisive of the case, and that, if the jury think it is sustained by the evidence, they need investigate no further, is not erroneous, as intimating that such defense is doubtful or untrue. Huff v. State, 91 Ga. 5, 16 S. E. 99.

[54] Dawson v. State, 62 Miss. 241; Nelms v. State, 58 Miss. 362.

Similar instructions held erroneous. A charge that the defense of alibi is, liable to great abuse, growing out of the ease with which it may be fabricated, and the difficulty with which such fabrication can be detected." Albin v. State, 63 Ind. 598. It is error for the court to advise the jury that the defense of alibi is one "easily fabricated, that it has occasionally been successfully fabricated, and that the temptation to resort to it as a spurious defense is very great, especially in cases of importance." Henry v. State, 70 N. W. 924, 51 Neb. 149, 66 Am. St. Rep. 450.

[55] Provo v. State, 55 Ala. 222; People v. Carson (Cal. App.) 192 P. 318; State v. Worthen, 100 N. W. 330, 124 Iowa, 408; People v. Tice, 73 N. W. 108, 115 Mich. 219, 69 Am. St. Rep. 560.

[56] **U. S.** (C. C. A. Okl.) Fielder v. United States, 227 F. 832, 142 C. C. A. 356.

Cal. People v. Levine, 85 Cal. 39, 24 P. 631; People v. Lee Gam, 69 Cal. 552, 11 P. 183; People v. Wong Ah Foo, 69 Cal. 180, 10 P. 375.

Iowa. State v. Cartwright, 174 N.

tion not being regarded as discrediting the testimony of the defendant,[57] and it is not error to characterize an alibi as a defense.[58]

§ 340. Effect of failure to prove alibi

In some jurisdictions it is not improper for the court to tell the jury that an unsuccessful attempt of the defendant to prove an alibi is a circumstance to be weighed against him in connection with the other evidence,[59] and it is not error to refuse to charge the negative of such proposition.[60] But an instruction that, if the defendant fails to establish his defense of alibi by a preponderance of the evidence, he will not be entitled to have the evidence in support of such defense considered as a basis of a reasonable doubt, is erroneous,[61] and it is error to charge that an unsuccessful attempt to prove an alibi is a circumstance of great weight against the defendant,[62] or to instruct that the omission of a defendant to account for his whereabouts is of a "conclusive character" against the defendant;[63] and it is error to instruct that a failure to prove an alibi implies an admission of the truth and relevancy of the

W. 586, 188 Iowa, 579; State v. Newcomber, 174 N. W. 255; State v. Leete, 174 N. W. 253, 187 Iowa, 305; State v. Rowland, 72 Iowa, 327, 33 N. W. 137.

[57] People v. Portenga, 96 N. W. 17, 134 Mich. 247.

[58] State v. Hale, 56 S. W. 881, 150 Mo. 102; McVey v. State, 77 N. W. 1111, 57 Neb. 471.

[59] **Ala.** Bell v. State, 86 So. 139, 17 Ala. App. 399; Wiley v. State, 65 So. 204, 10 Ala. App. 249; Wray v. State, 57 So. 144, 2 Ala. App. 139; Crittenden v. State, 32 So. 273, 134 Ala. 145; Jackson v. State, 23 So. 47, 117 Ala. 155.

Pa. Commonwealth v. McMahon, 145 Pa. 413, 22 A. 971.

Vt. State v. Hier, 63 A. 877, 78 Vt. 488.

Instructions held proper within rule. An instruction that the introduction of false evidence of an alibi constituted a circumstance against defendant, and was an inferential admission of guilt, but not conclusive, that the fact that he had been guilty of introducing it should be established beyond all question, and that, if the evidence of such fact was doubtful, no weight should be given it, was correct. State v. Ward, 61 Vt. 153, 17 A. 483. Where the court charged that if defendant attempts to prove an alibi, and fails, it is a circumstance for the jury to consider, and, as the Supreme Court has said, they should carefully scrutinize the evidence because of its liability to abuse, and that by scrutinizing he meant them to study carefully, examine, and cautiously receive the evidence, it was held that this charge was not error, it not indicating that failure to prove an alibi was any evidence of guilt, and, considered as a whole, it could not have been misleading. State v. Rochelle, 72 S. E. 481, 156 N. C. 641.

[60] State v. Callahan, 111 P. 445, 83 Kan. 448.

[61] State v. McGarry, 83 N. W. 718, 111 Iowa, 709; Turner v. Commonwealth, 86 Pa. 54, 27 Am. Rep. 683.

[62] Allbritton v. State, 94 Ala. 76, 10 So. 426; People v. Malaspina, 57 Cal. 628.

[63] Gordon v. People, 33 N. Y. 501.

Fabricated alibi as positive proof of guilt. A charge that, if defendant fabricated his alibi, the jury have a right to consider that as

facts alleged by the state,[64] and in some jurisdictions it is improper to tell the jury that such a failure may be considered as a circumstance proving guilt, since the burden is on the state throughout, and the defendant is not bound to explain anything.[65]

positive proof of guilt, is calculated to mislead the jury to suppose that in that event they are bound to convict, whereas a fabricated alibi is merely a criminative circumstance, and not conclusive. State v. Manning, 52 A. 1033, 74 Vt. 449.

[64] State v. Collins, 20 Iowa, 85.

[65] Parker v. State, 136 Ind. 284, 35 N. E. 1105.

CHAPTER XXVII

INSTRUCTIONS BEARING ON RELIEF AWARDED OR PUNISHMENT INFLICTED

A. Measure of Damages and Amount of Recovery in Civil Cases

§ 341. Necessity and sufficiency of instructions in general.
342. Use of words expressive of obligation.
343. Remote or speculative damages.
344. Personal injuries aggravating prior diseased condition.
345. Duty of plaintiff to mitigate damages.
346. Permitting double recovery.
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351. Calling attention to ad damnum.
352. Effect, as evidence, of mortality and annuity tables.
353. Confining jury to evidence.

B. Punishment in Criminal Cases

354. Necessity and propriety of instructions in general.
355. Rule as to instructions where jury has some power with respect to fixing punishment.
356. Recommendation to mercy or of mitigation of punishment.

A. Measure of Damages and Amount of Recovery in Civil Cases

§ 341. Necessity and sufficiency of instructions in general.

When the law provides a definite measure of damages,[1] or when a reasonably safe standard is afforded by the circumstances of the particular case by which the compensation can be measured,[2] the general rule is that it is the duty of the court, in the discharge of its function, to lay down the rules of law applicable to the case, either on its own motion or on request, to instruct the jury as to the measure of damages and the various elements entering into the amount of recovery,[3] not necessarily in such terms that the amount

[1] Creighton v. Campbell, 149 P. 448, 27 Colo. App. 120; Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 55 N. W. 211.

[2] Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6 S. W. 464.

[3] **Ariz.** Curry v. Windsor, 194 P. 958.

Colo. Northern Colorado Irr. Co. v. Reuter, 186 P. 286, 67 Colo. 483.

Ga. Central of Georgia Ry. Co. v. Hughes, 56 S. E. 770, 127 Ga. 593.

Md. Western Maryland R. Co. v. Martin, 73 A. 267, 110 Md. 554.

Neb. Carpenter v. City of Red Cloud, 89 N. W. 637, 64 Neb. 126.

Pa. Burns v. Pennsylvania R. Co., 82 A. 246, 233 Pa. 304, Ann. Cas. 1913B, 811.

Tex. Southern Traction Co. v. Owens (Civ. App.) 198 S. W. 150; Missouri, K. & T. Ry. Co. of Texas v. Lightfoot, 106 S. W. 395, 48 Tex. Civ. App. 120; Houston & T. C. R. Co. v.

can be exactly determined, but so as to define the reasonable limits within which the calculations are to be computed;[4] this rule applying whether the action is for personal injuries,[5] for injuries to property,[6] or for breach of contract.[7]

Buchanan, 84 S. W. 1073, 38 Tex. Civ. App. 165.

In Missouri instructions are not erroneous because they leave the case without charges on the measure of damages, since in a civil action it is not compulsory to give instructions. Lathrop v. Quincy, O. & K. C. Ry. Co., 115 S. W. 493, 135 Mo. App. 16.

Omission to instruct as to injuries not permanent. Where there was an issue whether personal injuries were permanent or temporary, an instruction as to measure of damages where injury was permanent, omitting to instruct as to injuries not permanent, even without proper request, would be cause for reversal. Seaboard Air Line Ry. v. Brewton (Ga. App.) 102 S. E. 920.

Recovery on quantum meruit. In an action on quantum meruit to determine the value of services rendered to defendants' aged and infirm testator, a charge that the law would import a promise to pay the reasonable value of the services rendered furnished a sufficient guide to the measure of recovery under the evidence, in the absence of any request for more specific instructions. Meador v. Patterson (Ga. App.) 103 S. E. 95.

Interest as element of recovery. Where the prevailing party to an action is entitled to any interest, it is error for the court to fail to instruct the jury respecting the rate of interest that it may assess in its verdict. Kimball v. Lanning, 165 N. W. 890, 102 Neb. 63.

Effect of statute requiring court to charge only as to the law. Under a statute requiring the court to charge the jury only as to the law of the case, failure of the court to instruct as to the law of the case is error, and a court, in a personal injury action, which merely charges that it cannot determine the sum to be allowed, but that is entirely for the jury, without pointing out the elements on which a recovery may be had, does not comply with the statute, especially where there is a proper requested charge on the measure of damages. Jageriskey v. Detroit United Ry., 128 N. W. 726, 163 Mich. 631.

[4] Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6 S. W. 464.

[5] **Ala.** Southern Ry. Co. v. Cochran, 42 So. 100, 149 Ala. 673.

Ga. Central of Georgia Ry. Co. v. Hill, 94 S. E. 50, 21 Ga. App. 231.

Idaho. Holt v. Spokane P. Ry. Co., 35 P. 39, 3 Idaho (Hasb.) 703.

Ill. Boggs v. Iowa Cent. Ry. Co., 187 Ill. App. 621; Gallagher v. Singer Sewing Mach. Co., 177 Ill. App. 198; Chicago, E. & L. S. Ry. Co. v. Adamick, 33 Ill. App. 412.

Ky. Weil v. Hagan, 170 S. W. 618, 161 Ky. 292.

Mo. Hawes v. Kansas City Stockyards Co., 103 Mo. 60, 15 S. W. 751.

Okl. Ft. Smith & W. R. Co. v. Green, 156 P. 349, 56 Okl. 585.

Pa. Burns v. Pennsylvania R. Co., 82 A. 246, 233 Pa. 304, Ann. Cas. 1913B, 811.

Tenn. Citizens' St. R. Co. v. Burke, 40 S. W. 1085, 98 Tenn. 650.

Tex. Gulf, C. & S. F. Ry. Co. v. Head (App.) 15 S. W. 504.

[6] **Ky.** Adams & Sullivan v. Sengel, 197 S. W. 974, 177 Ky. 535, 7 A. L. R. 268; Southern Ry. in Kentucky v. Kentucky Grocery Co., 178 S. W. 1162, 166 Ky. 94.

Md. Pettit v. Commissioners of Wicomico County, 90 A. 993, 123 Md. 128, Ann. Cas. 1916C, 35.

Mo. Badgley v. City of St. Louis, 50 S. W. 817, 149 Mo. 122.

Tex. Quanah, A. & P. Ry. Co. v. Price (Civ. App.) 192 S. W. 805.

Wyo. Hatch Bros. Co. v. Black, 165 P. 518, 25 Wyo. 109.

[7] **Ala.** Howard v. Taylor, 90 Ala. 241, 8 So. 36.

Ga. Southern Ry. Co. v. O'Bryan, 37 S. E. 161, 112 Ga. 127.

Thus an instruction authorizing the jury to find for the plaintiff in such sum as they believe from the evidence will equal the damage sustained by him,[8] or in such sum as will fairly compensate him for his injury,[9] or that the jury should render a verdict for such damages as appears from all the evidence to be just,[10] will ordinarily be too general. In one case it is said that appellate courts steadily set their faces against the practice of issuing a roving commission to juries to establish their own standards of damages in place of those defined by the rules of law.[11]

The use of the abbreviation "etc.," in a charge enumerating the items of damage recoverable for personal injuries, is erroneous as practically giving the jury unlimited scope in the assessment of damages.[12] In an action of trespass it is error to say, as to compensatory damages, that the amount is not fixed by law, but is left to the sound judgment and the discretion of the jury.[13] Even in those actions in which the amount of recovery depends upon the sound discretion of the jury, as in actions for libel, the court should, so far as it can, prevent the jury from acting upon improper theories of what should be regarded in estimating the elements which

Ill. Newman v. Tishenor, 107 Ill. App. 53; Comstock v. Price, 103 Ill. App. 19.

Kan. Jenkins v. Kirtley, 79 P. 671, 70 Kan. 801; Union Pac. Ry. Co. v. Shook, 3 Kan. App. 710, 44 P. 685.

Ky. Miles v. Miller, 12 Bush, 134; Alsop v. Adams, 7 Ky. Law Rep. (abstract) 746.

La. Varillat v. New Orleans & C. R. Co., 10 La. Ann. 88.

Md. Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 A. 1052.

Mich. Howe v. North, 69 Mich. 272, 37 N. W. 213.

Mo. Rhodes v. Holladay-Klotz Land & Lumber Co., 105 Mo. App. 279, 79 S. W. 1145; Haystler v. Owen, 61 Mo. 270; Matney v. Gregg Bros. Grain Co., 19 Mo. App. 107.

N. C. C. B. Coles & Sons Co. v. Standard Lumber Co., 63 S. E. 736, 150 N. C. 183.

Pa. Otis Elevator Co. v. Flanders Realty Co., 90 A. 624, 244 Pa. 186; McCloskey v. Bell's Gap R. Co., 156 Pa. 254, 27 A. 246; Sanderson v. Pennsylvania Coal Co., 102 Pa. 370; Erie City Iron Works v. Barber, 102 Pa. 156; Schofield v. Simpson, 6 Leg. Gaz. 70.

Tex. Glasscock v. Shell, 57 Tex. 215.

[8] Elswick v. Ramey, 163 S. W. 751, 157 Ky. 639.

[9] Lexington Ry. Co. v. Herring, 97 S. W. 1127, 30 Ky. Law Rep. 269.

[10] Trabing v. California Nav. & Imp. Co., 53 P. 644, 121 Cal. 137; Union Pac. Ry. Co. v. Shook, 3 Kan. App. 710, 44 P. 685.

[11] Camp v. Wabash R. Co., 68 S. W. 96, 94 Mo. App. 272.

Instructions not improper within rule. An instruction that the jury will assess plaintiff's damages at such a sum as they believe from the evidence will reasonably compensate him for the injuries sustained, whether temporary or permanent, if any, as shown by the evidence, together with all the facts and circumstances detailed in the evidence. Hurst v. Chicago, B. & Q. R. Co., 219 S. W. 566, 280 Mo. 566, 10 A. L. R. 174.

[12] Lodwick Lumber Co. v. Taylor, 87 S. W. 358, 39 Tex. Civ. App. 302.

[13] Steele v. Davis, 75 Ind. 191.

go to make up the injury to be redressed.[14] The court is not excused from instructing on the measure of damages by the fact that the jury find the facts specially.[15]

Where the court has properly instructed the jury as to the matters they are to consider in assessing the damages, it need not specially instruct against considering other matters which, although in evidence are not proper elements of damage,[16] and where the court lays down the proper measure or rule of damages it is not obliged to formulate a particular method of computation for the jury to pursue in estimating the damages of plaintiff,[17] at least without request.[18] In jurisdictions where the rule of comparative negligence prevails, it is held not to be error to fail to state that any damages recovered are to be diminished in proportion to the contributory negligence of the plaintiff, if the jury find him to be negligent, unless a request for such a declaration is made.[19]

In an action for personal injuries, the instruction should be so framed as not to permit recovery for permanent injuries unless it is reasonably certain that the injuries will be permanent.[20] An instruction that, if the jury are satisfied from the evidence that the plaintiff has sustained permanent injuries they may allow permanent damages does not violate this rule.[21] Where it is sought to recover permanent damages, the instructions should not permit the jury to get the impression that damages are to be allowed on the basis of the expectancy of life of the plaintiff before he was injured.[22]

Instructions should not be so framed as to suggest that it will be difficult to make adequate compensation for plaintiff's loss or injury.[23] Thus it is improper to instruct that, if the jury should find for plaintiff, they shall bring in such damages as "will make him whole in dollars as far as possible."[24]

Instructions with respect to damages should be predicated upon the hypothesis that certain facts are found, or that the jury find for one party or the other.[25]

[14] Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

[15] Western Union Tel. Co. v. Newhouse, 6 Ind. App. 422, 33 N. E. 800.

[16] Powell v. Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757.

[17] Reeks v. Seattle Electric Co., 104 P. 126, 54 Wash. 609.

[18] Kyd v. Cook, 76 N. W. 524, 56 Neb. 71, 71 Am. St. Rep. 661.

[19] Lindsey Wagon Co. v. Nix, 67 So. 459, 108 Miss. 814.

[20] McBride v. St. Paul City Ry. Co., 75 N. W. 231, 72 Minn. 291.

[21] Kenyon v. City of Mondovi, 73 N. W. 314, 98 Wis. 50.

[22] Howell v. Lansing City Electric Ry. Co., 99 N. W. 406, 136 Mich. 432.

[23] Whitehead v. Pittsburg Rys. Co., 79 A. 240, 230 Pa. 79.

[24] Guinard v. Knapp, Stout & Co., 70 N. W. 671, 95 Wis. 482.

[25] Cannon v. Lewis, 18 Mont. 402, 45 P. 572.

§ 342. Use of words expressive of obligation

It is proper to tell the jury that it is their duty, in case they find for the plaintiff, to assess his compensatory damages at such amount as the evidence shows will reimburse him for his injuries,[26] or that they "should" take certain elements into consideration in assessing such damages.[27] Thus, where the evidence presents the issue, the court should tell the jury, not that they may take into consideration, in awarding damages, future pain and suffering which they should find, to a reasonable certainty, the plaintiff will sustain in consequence of his injury, but that they are bound to do so.[28] So where, in an action for personal injuries, recoverable damages include injuries to the feelings, the jury should be made to understand that compensation therefor is a matter of right, not a matter within their discretion.[29]

§ 343. Remote or speculative damages.

An instruction as to the measure of damages should confine the compensation to be awarded to injuries which are the proximate result of the act of defendant,[30] and a general instruction that the plaintiff is only entitled to such damages as naturally and directly result from the wrongful acts alleged may not, in all cases, be sufficient.[31] Under this rule it is error to instruct that the jury may award such damages as they feel the plaintiff is entitled to.[32]

Where there is testimony as to speculative and possible consequences of the act of defendant of which complaint is made, the jury should be instructed not to consider such evidence, except so far as it shows probable results of the injury in question,[33] and an instruction that the jury cannot base their award upon evidence which is speculative merely as to the amount of damages suffered by plaintiff should point out clearly what the testimony is which the jury should disregard as speculative.[34] But, where only proxi-

[26] City of Salem v. Webster, 61 N. E. 323, 192 Ill. 369; Illinois Cent. R. Co. v. Cole, 74 So. 766, 113 Miss. 896.

Contra, Chicago & N. W. Ry. Co. v. Chisholm, 79 Ill. 584.

[27] Galveston, H. & S. A. Ry. Co. v. Collins, 71 S. W. 560, 31 Tex. Civ. App. 70; Galveston, H. & S. A. Ry. Co. v. Jenkins, 69 S. W. 233, 29 Tex. Civ. App. 440.

[28] Hallum v. Village of Omro, 99 N. W. 1051, 122 Wis. 337.

[29] Gatzow v. Buening, 81 N. W. 1003, 106 Wis. 1, 49 L. R. A. 475, 80 Am. St. Rep. 1.

[30] Birmingham Ry. Light & Power Co. v. Moore, 56 So. 593, 2 Ala. App. 499; Conlon v. Chicago Great Western Ry. Co., 139 Ill. App. 555; Etzkorn v. City of Oelwein, 120 N. W. 636, 142 Iowa, 107, 19 Ann. Cas. 999.

[31] Candland v. Mellen, 151 P. 341, 46 Utah, 519.

[32] Fries v. American Lead Pencil Co., 75 P. 164, 141 Cal. 610.

[33] Brininstool v. Michigan United Rys. Co., 121 N. W. 728, 157 Mich. 172.

[34] Curtis v. Curtis, 96 N. W. 32, 134 Mich. 220.

mate damages are alleged and sought to be proven, it is misleading to charge that remote and speculative damages cannot be recovered.[35]

§ 344. Personal injuries aggravating prior diseased condition

In a proper case the jury should be informed as to the effect upon the measure of damages for personal injuries of the existence, prior to the injury, of some disease or disability of the plaintiff,[36] and told that the damages must be limited to such as are the natural and proximate result of the negligence of defendant.[37]

§ 345. Duty of plaintiff to mitigate damages

In a proper case the jury should be informed as to the rule of avoidable consequences.[38] An instruction as to the duty of the plaintiff to mitigate damages should be so framed as not to prevent him from recovering for damages which he could not have avoided by the exercise of reasonable care.[39]

§ 346. Permitting double recovery

Care must be taken in framing instructions not to permit a double recovery for a single loss.[40] Within this rule an instruction that, if the jury find for the plaintiff, they may allow such sum as will reasonably compensate him for the injury sustained, if any, and that if the injuries are permanent they may find "in addition" such sum as will be a fair compensation for his diminished ca-

[35] Tennessee & C. R. Co. v. Danforth, 112 Ala. 80, 20 So. 502.

[36] Taylor Coal Co. v. Miller, 182 S. W. 920, 168 Ky. 719.

[37] City of Rock Island v. Starkey, 59 N. E. 971, 189 Ill. 515.

[38] **Ga.** Central of Georgia Ry. Co. v. Madden, 69 S. E. 165, 135 Ga. 205, 31 L. R. A. (N. S.) 813, 21 Ann. Cas. 1077; Akridge v. Atlanta & W. P. R. Co., 90 Ga. 232, 16 S. E. 81.

Iowa. White v. Chicago & N. W. Ry. Co., 124 N. W. 309, 145 Iowa, 408.

Ky. Louisville & N. R. Co. v. Bennett, 209 S. W. 358, 183 Ky. 445; Louisville & N. R. Co. v. Mount, 101 S. W. 1182, 125 Ky. 593.

Neb. Swift & Co. v. Bleise, 89 N. W. 310, 63 Neb. 739, 57 L. R. A. 147.

Wash. Harvey v. Tacoma Ry. & Power Co., 116 P. 644, 64 Wash. 143.

[39] Chicago & E. R. Co. v. Meech, 45 N. E. 290, 163 Ill. 305; Donada v. Power (Tex. Civ. App.) 184 S. W. 793; Galveston, H. & S. A. Ry. Co. v. Kurtz (Tex. Civ. App.) 147 S. W. 658.

[40] **Ga.** Western & A. R. Co. v. Smith, 88 S. E. 983, 145 Ga. 276; Southern Ry. Co. v. Jordan, 59 S. E. 802, 129 Ga. 665.

Ky. Forgy v. Rutledge, 180 S. W. 90, 167 Ky. 182; Louisville & N. R. Co. v. Moore, 150 S. W. 849, 150 Ky. 692.

Md. John Cowan, Inc., v. Meyer, 94 A. 18, 125 Md. 450.

Mo. Laycock v. United Rys. Co. of St. Louis (App.) 227 S. W. 883.

Tex. Huggins v. Carey, 194 S. W. 133, 108 Tex. 358; Gulf, C. & S. F. Ry. Co. v. Davis (Civ. App.) 139 S. W. 674; Chicago, R. I. & G. Ry. Co. v. De Bord, 132 S. W. 845, 62 Tex. Civ. App. 302; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160, 61 Tex. Civ. App. 80; Stamford Oil Mill Co. v. Barnes, 119 S. W. 872, 55

the jury find from the evidence the plaintiff will suffer is not objectionable within this rule.[55] So it is proper to instruct that the jury are to take into consideration pain and suffering reasonably certain to be endured in the future, if any, as a result of the injury complained of,[56] or pain which plaintiff "may certainly suffer" in the future.[57] So an instruction authorizing recovery for such suffering as the jury may believe the plaintiff in all "probability" will endure in the future is not improper,[58] and an instruction authorizing recovery for suffering and pain which the jury think probable from the evidence the plaintiff will experience in the future is not erroneous.[59]

So an instruction permitting recovery for future pain and suffering which the plaintiff "may" endure as the ordinary and actual result and as a consequence of the injury sued for has been sustained,[60] and it is held that there is no substantial difference between the phrases "may reasonably and probably suffer" and "will reasonably and probably suffer."[61] An instruction that, if the jury should find that the plaintiff is entitled to recover, they may take into consideration in making up their verdict the probable amount of pain, the probable loss of time, and the probable amount of expense he would suffer in the future on account of his injuries, has been construed to mean that these things are to be taken into consideration, if the jury should find by a fair preponderance of the evidence that the plaintiff would suffer pain and would be

[55] **Ill.** Chicago & M. Electric Ry. Co. v. Ullrich, 72 N. E. 815, 213 Ill. 170.

Iowa. Parks v. Town of Laurens, 133 N. W. 1054, 153 Iowa, 567; Westercamp v. Brooks, 88 N. W. 372, 115 Iowa, 159.

Ky. Louisville & N. R. Co. v. Roe, 134 S. W. 437, 142 Ky. 456.

Mo. King v. City of St. Louis, 157 S. W. 498, 250 Mo. 501; Lackland v. Lexington Coal Mining Co., 85 S. W. 397, 110 Mo. App. 634.

Wis. Kliegel v. Aitken, 69 N. W. 67, 94 Wis. 432, 35 L. R. A. 249, 59 Am. St. Rep. 901.

See Scally v. W. T. Garratt & Co., 104 P. 325, 11 Cal. App. 138; Anderson v. Hurley-Mason Co., 121 P. 815, 67 Wash. 342, Ann. Cas. 1913D, 148.

[56] Wiley v. Young, 174 P. 316, 178 Cal. 681; Fuller v. Illinois Cent. R. Co., 173 N. W. 137, 186 Iowa, 686.

[57] Du Val v. Boos Bros. Cafeteria Co. (Cal. App.) 187 P. 767.

"Without conjecture." An instruction that the plaintiff can recover for pain and suffering which the evidence, without conjecture shows that he will sustain in the future is not subject to criticism, as permitting the jury to enter the field of speculation. (C. C. A. Ohio) Pennsylvania Co. v. Clark, 266 Fed. 182.

[58] Welborn v. Metropolitan St. Ry. Co., 156 S. W. 778, 170 Mo. App. 351.

[59] Harris v. Brown's Bay Logging Co., 106 P. 152, 57 Wash. 8.

[60] Kirkham v. Wheeler-Osgood Co., 81 P. 869, 39 Wash. 415, 4 Ann. Cas. 532.

[61] St. Louis Southwestern Ry. Co. of Texas v. Garber (Tex. Civ. App.) 108 S. W. 742.

See Central Texas & N. W. Ry. Co. v. Gibson (Tex. Civ. App.) 83 S. W. 862.

subject to loss of time and expenditures in the future on account of his injuries, and, so construed, is proper.[62]

§ 349. Loss of earnings and impairment of earning capacity

The rule for ascertaining the sum to be awarded as damages for future impairment of earning capacity is one of law, which the jury cannot be presumed to know, and the court, therefore, should carefully instruct thereon, where the pleadings and evidence authorize such an instruction.[63]

Instructions upon diminished earning capacity may be predicated upon evidence that the plaintiff had some earning capacity at the time of his injury, without evidence of the amount he was earning at that time.[64] It is proper to instruct that, if the power of plaintiff to earn money in the future has been impaired by his injury, he should be awarded such sums as will compensate him for such loss of power.[65] An instruction that the plaintiff may recover any loss of earnings he "may" suffer in the future as the direct and reasonable result of his injuries sufficiently requires proof that loss of future earnings is reasonably certain to occur.[66]

An instruction permitting plaintiff to recover concurrently for loss of time and impairment of his earning power is reversible error.[67] It may be the duty of the court to call the attention of the jury to the fact that the earning capacity of plaintiff will decrease in his declining years.[68]

An instruction that the expectancy of life of plaintiff may be considered in assessing damages for loss of earning capacity should limit the jury to finding the present worth of his earnings.[69] In instructing as to the present value of the gross amount which the jury may find to fairly represent loss of the plaintiff in earning capacity, the court should be careful to avoid inaccuracy of expression calculated to confuse the jury,[70] and the jury should have such guidance as will give them an intelligent understanding of

[62] Gallamore v. City of Olympia, 75 P. 978, 34 Wash. 379.

[63] Alabama Northern R. Co. v. Methvin, 64 So. 175, 9 Ala. App. 519; Bourke v. Butte Electric & Power Co., 83 P. 470, 33 Mont. 267; Missouri, K. & T. Ry. Co. of Texas v. Beasley, 155 S. W. 183, 106 Tex. 160.

[64] Southern Bell Tel. & Tel. Co. v. Shamos, 77 S. E. 312, 12 Ga. App. 463.

[65] Price v. Northern Electric Ry. Co., 142 P. 91, 168 Cal. 173.

[66] Dean v. St. Louis Transit Co., 99 S. W. 33, 121 Mo. App. 379.

[67] Louisville & N. R. Co. v. Kirby, 191 S. W. 113, 173 Ky. 399.

[68] Western & A. R. Co. v. Roberts, 86 S. E. 933, 144 Ga. 250; Tennessee, G. & A. R. Co. v. Neely (Ga. App.) 103 S. E. 177.

[69] Williams v. Clark County, 120 N. W. 306, 143 Iowa, 328.

[70] Macon Ry. & Light Co. v. Mason, 51 S. E. 569, 123 Ga. 773.

what "present worth" means.[71] While, however, the attention of the jury may well be directed to their duty to allow only the present worth of future earnings lost because of the injury sued for,[72] the omission to specifically so instruct in the absence of a request therefor, will not constitute error, if the instructions given do not preclude the jury from so estimating such loss.[73]

If, in an action for personal injuries, there is no testimony showing the earning capacity of plaintiff, or how much it has been diminished by the injury, or his expectancy of life, the defendant will be entitled to an instruction, on request, that the jury cannot guess at any loss of earning capacity, and that damages therefor cannot be awarded.[74]

§ 350. Exemplary damages

Where plaintiff's evidence, however slight, presents the question, the court should instruct on punitive damages,[75] and in most jurisdictions the rule is that, if there be evidence tending to show aggravation, the jury may and should be instructed first as to actual compensation, and then told the circumstances under which exemplary damages may be awarded,[76] and that, if the act of the defendant was prompted by malice, or was attended by circumstances of outrage or insult, they may find additional damages, not in all exceeding the amount claimed.[77]

The jury should be further given rules to guide them in determining the amount of such damages,[78] and should be told that, in ascertaining the amount, they are to look to the evidence, and are not to exceed the amount claimed in the complaint,[79] although it

[71] Pauza v. Lehigh Valley Coal Co., 80 A. 1126, 231 Pa. 577.

[72] Greenway v. Taylor County, 122 N. W. 943, 144 Iowa, 332.

[73] Greenway v. Taylor County, 122 N. W. 943, 144 Iowa, 332.

[74] Pierce v. C. H. Bidwell Thresher Co., 116 N. W. 1104, 153 Mich. 323.

[75] Mobile & O. R. Co. v. Reeves, 80 S. W. 471, 25 Ky. Law Rep. 2236.

[76] **Ky.** Neely v. Strong, 217 S. W. 898, 186 Ky. 540.

Mich. Baumler v. Autlau, 65 Mich. 31, 31 N. W. 888.

Minn. Sneve v. Lunder, 110 N. W. 99, 100 Minn. 5; Seeman v. Feeney, 19 Minn. 79 (Gil. 54).

Mo. Clark v. Fairley, 30 Mo. App. 335.

Okl. Atchison, T. & S. F. R. Co. v. Chamberlain, 46 P. 499, 4 Okl. 542.

Pa. Keil v. Chartiers Gas Co., 19 A. 78, 131 Pa. 466, 17 Am. St. Rep. 823.

Tex. King v. Sassaman (Civ. App.) 54 S. W. 304; Beeman St. Clair Co. v. Caradine (Civ. App.) 34 S. W. 980; Galveston, H. & S. A. Ry. Co. v. Dunlavy, 56 Tex. 256.

Wis. Haberman v. Gasser, 80 N. W. 105, 104 Wis. 98.

[77] Wormald v. Hill, 4 Ky. Law Rep. 723; Sorg v. Frederick, 100 A. 481, 255 Pa. 617; Greeney v. Pennsylvania Water Co., 29 Pa. Super. Ct. 136; International & G. N. Ry. Co. v. Underwood, 64 Tex. 463.

[78] Coleman v. Pepper, 49 So. 310, 159 Ala. 310.

[79] Foster v. Pitts, 38 S. W. 1114, 63 Ark. 387.

is held that, in a proper case, an instruction that the jury may find punitive damages in such sum as they "see fit," or "deem proper," not exceeding the amount sued for, is not erroneous.[80]

The court may instruct as to both actual and exemplary damages in one instruction.[81] In one jurisdiction it is considered incorrect to separate what is called actual from what is called exemplary damage, and here the proper form of instruction is that, if the jury find the defendant has been malicious, the rule of damages will be more liberal, and that, instead of awarding damages only for those matters which are capable of exact pecuniary valuation, they may take into consideration all the circumstances of aggravation—the insults, offended feelings, degradation and so on—and endeavor according to their best judgment, to award such damages by way of compensation or indemnity, as the plaintiff, on the whole, ought to receive and the defendant ought to pay.[82] In other jurisdictions, it is considered better practice to submit the two classes of damages in separate instructions;[83] the matter of such separate submission, however, resting in the sound discretion of the trial court.[84]

In most jurisdictions the rule is that the jury should not be told that it is their duty to assess exemplary damages;[85] the proper instruction being that they may award them in their discretion, not exceeding the amount claimed in the complaint.[86] In South Carolina, however, it is proper to tell the jury that, while they have a discretion in fixing the amount which shall be awarded by way of exemplary damages, they have no discretion to refuse to award any exemplary damages, if a case is made which in law justifies such damages.[87]

[80] Yazoo & M. V. R. Co. v. Williams, 39 So. 489, 87 Miss. 344.

[81] Groh v. South, 89 A. 321, 121 Md. 639.

[82] Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475.

[83] Zeliff v. Jennings, 61 Tex. 458.

[84] Cottle v. Johnson, 102 S. E. 769, 179 N. C. 426.

[85] **Ill.** Pisa v. Holy, 114 Ill. App. 6; City of Salem v. Webster, 95 Ill. App. 120.

Iowa. White v. International Text-Book Co., 146 N. W. 829, 164 Iowa, 693.

Ky. Louisville & N. R. Co. v. Cottengim, 104 S. W. 280, 31 Ky. Law Rep. 871, 13 L. R. A. (N. S.) 624.

Mo. Nicholson v. Rogers, 129 Mo. 136, 31 S. W. 260.

N. C. Hodges v. Hall, 89 S. E. 802, 172 N. C. 29.

Tenn. Ferguson v. Moore, 39 S. W. 341, 98 Tenn. 342.

W. Va. Duckworth v. Stalnaker, 69 S. E. 850, 68 W. Va. 197; Fink v. Thomas, 66 S. E. 650, 66 W. Va. 487, 19 Ann Cas. 571.

Wis. Marlatt v. Western Union Telegraph Co., 167 N. W. 263, 167 Wis. 176.

[86] Illinois Central R. Co. v. Houchins, 89 S. W. 530, 121 Ky. 526, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205; Louisville & N. R. Co. v. Ballard, 88 Ky. 159, 10 S. W. 429, 2 L. R. A. 694.

[87] Wilcox v. Southern Ry. Co., 74 S. E. 122, 91 S. C. 71.

An instruction that the jury "may" award punitive damages is not improper as an absolute direction,[88] and the court may instruct, in a proper case that, if they believe the evidence produced establishes certain facts, then there was as a matter of law gross and wanton negligence, or that certain results would follow which would warrant the jury in awarding such damages.[89] An instruction with respect to the consideration by the jury of the wealth of defendant in estimating exemplary damages should say that the jury "may" not that they "should," consider such circumstance.[90]

Instructions on exemplary damages must be based on the pleadings and evidence, and where the complaint is framed on the theory of compensation only it is error to instruct that exemplary damages on any theory may be awarded.[91] So, in the absence of evidence that defendant acted either willfully, wantonly, or recklessly, it is error to instruct on exemplary damages,[92] except that the court should charge, on request, that such damages cannot be recovered.[93]

Where a plaintiff fails to recover actual damages,[94] or the jury has found only actual damages,[95] the defendant cannot complain of the refusal of the court to instruct as to exemplary damages.

§ 351. Calling attention to ad damnum

While there are decisions that it is not good practice to mention the ad damnum in the instructions,[96] the general rule is that an instruction referring to the amount sued for, or limiting the right of recovery to the amount claimed in the declaration, is not error,[97] unless the instruction is so worded as to suggest giving

[88] Cincinnati, N. O. & T. P. Ry. Co. v. Ackerman, 146 S. W. 1113, 148 Ky. 435.

[89] Illinois Cent. R. Co. v. Cole, 74 So. 766, 113 Miss. 896.

[90] Thomas v. Williams, 121 N. W. 148, 139 Wis. 467.

[91] Welsh v. Stewart, 31 Mo. App. 376.

[92] People v. Nichols, 177 P. 861, 39 Cal. App. 29; Western Union Tel. Co. v. Jackson, 49 So. 737, 95 Miss. 471; Lewis v. Jannou-Poulo, 70 Mo. App. 325; Stephenson v. Brown, 147 Pa. 300, 23 A. 443.

[93] Columbus & W. Ry. Co. v. Bridges, 86 Ala. 448, 5 So. 864, 11 Am. St. Rep. 58; Alabama G. S. R. Co. v. Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354; Wormald v. Hill, 4 Ky. Law Rep. 723; Baltimore Belt R. Co. v. Sattler, 62 A. 1125, 102 Md. 595; Trimmier v. Atlanta & C. A. L. Ry. Co., 62 S. E. 209, 81 S. C. 203.

[94] Myers v. Wright, 44 Iowa, 38.

[95] Texas & P. Ry. Co. v. Watts (Tex.) 18 S. W. 312.

[96] Illinois Cent. R. Co. v. Hicks, 122 Ill. App. 349; Swift & Co. v. Griffin, 109 Ill. App. 414; North Chicago St. R. Co. v. Burgess, 94 Ill. App. 337.

[97] **Ala.** Carpenter v. Walker, 54 So. 60, 170 Ala. 659, Ann. Cas. 1912D, 863.

Ark. St. Louis, I. M. & S. Ry. Co. v. Boyles, 95 S. W. 783, 78 Ark. 374.

D. C. District of Columbia v. Duryee, 29 App. D. C. 327, 10 Ann. Cas. 675.

Ill. Calumet Electric St. Ry. Co. v. Van Pelt, 50 N. E. 678, 173 Ill.

the amount so named,[98] and it may be error not to limit the recovery to the amount claimed in the complaint.[99] The giving of such a direction in each of a series of instructions has been held ground for reversal, as laying undue stress upon the amount claimed.[1]

§ 352. Effect, as evidence, of mortality and annuity tables

The court should instruct as to the use of the annuity table, where the evidence tends to show that the injuries of plaintiff will permanently affect his earning capacity.[2] Instructions as to mortality or annuity tables are inappropriate, unless there is some evidence as to the value of the services of plaintiff or his capacity to earn money,[3] and if the evidence is conflicting as to whether the injuries of plaintiff are permanent an instruction as to such tables should inform the jury that they are not to be used unless the injury is permanent.[4]

When mortality tables are introduced in evidence, it is the duty of the court carefully to guard the effect to be given them by the

70; Pioneer Fire-Proofing Co. v. Clifford, 135 Ill. App. 417.

Ind. Baltimore & O. S. W. R. Co. v. Cavanaugh, 71 N. E. 239, 35 Ind. App. 32.

Mo. Salmons v. St. Joseph & G. I. Ry. Co., 197 S. W. 35, 271 Mo. 395.

N. C. Patillo v. Camp Mfg. Co., 98 S. E. 323, 177 N. C. 156; Bradley v. Same, 98 S. E. 318, 177 N. C. 153.

Tex. Gulf, C. & S. F. Ry. Co. v. Funk, 92 S. W. 1032, 42 Tex. Civ. App. 490.

Va. Chesapeake & O. Ry. Co. v. Carnahan, 86 S. E. 863, 118 Va. 46, judgment affirmed 36 S. Ct. 594, 241 U. S. 241, 60 L. Ed. 979; Southern Ry. Co. v. Grubbs, 80 S. E. 749, 115 Va. 876.

[98] **Ill.** Triggs v. McIntyre, 74 N. E. 400, 215 Ill. 369; Central Ry. Co. v. Bannister, 62 N. E. 864, 195 Ill. 48.

Kan. Root v. Cudahy Packing Co., 147 P. 69, 94 Kan. 339.

Okl. Seay v. Plunkett, 145 P. 496, 44 Okl. 794.

Tex. El Paso Electric Ry. Co. v. Kelly (Civ. App.) 109 S. W. 415; Willis v. McNeill, 57 Tex. 465.

Instructions held not improper within rule. Where an instruction, after enumerating the elements of damages which might be considered by the jury if they found for plaintiff, charged that the jury might allow plaintiff such sum as in their judgment, under the evidence and instructions, would be fair compensation for the injury plaintiff had sustained or would sustain, if any, so far as such damages and injuries were claimed and alleged in the first count of the declaration and shown by the evidence, etc., it was not objectionable as improperly calling the attention of the jury to the amount of the ad damnum of the declaration. Illinois Cent. R. Co. v. Heath, 81 N. E. 1022, 228 Ill. 312, affirming judgment 129 Ill. App. 143.

[99] Charles City Plow & Mfg. Co. v. Jones, 71 Iowa, 234, 32 N. W. 280; Blue Grass Traction Co. v. Ingles, 131 S. W. 278, 140 Ky. 488; Cumberland & O. R. Co. v. Wood, 7 Ky. Law Rep. (abstract) 520; Harmon v. Dickerson (Mo. App.) 184 S. W. 139; Beggs v. Shelton, 155 S. W. 885, 173 Mo. App. 127.

[1] Lake Shore & M. S. Ry. Co. v. May, 33 Ill. App. 366.

[2] Western & A. Ry. Co. v. Knight, 83 S. E. 943, 142 Ga. 801.

[3] Atlanta, K. & N. Ry. Co. v. Gardiner, 49 S. E. 818, 122 Ga. 82.

[4] Western & A. R. Co. v. Smith, 88 S. E. 983, 145 Ga. 276.

jury. Unless this is done in a very pointed and direct way by the court, the jury may be misled as to the value and weight to be attached to this character of evidence.[5] The court should instruct that mortality tables are not to be accepted as establishing the expectancy of the life of the injured party, but only as an aid in arriving at what that expectancy might be, in view of all the conditions surrounding the particular life in question,[6] and where reference is made to the expectancy of life as stated in mortality tables the court should explain that such tables indicate only the expectancy for perfectly sound and healthy lives, or the duration of life of healthy persons who are insurable risks.[7] An instruction with respect to the effect of mortality tables is sufficient which states that the result set forth in such tables is not to be taken as a fact in the case, but only as an aid in arriving at what may be the continuation of life, and that the duration of life depends largely upon the health, habits, and conduct of the particular person involved.[8]

Where, in a proper case, the court tells the jury that they may use the mortality tables, it should also inform them how to estimate the damage after ascertaining the expectancy of the plaintiff,[9] and the court should, on request, instruct the jury that the table does not show the duration of ability to earn money, and that it is to be considered with other proof for what it may be worth, considering the state of health of plaintiff, in determining the probable duration of his capacity to earn money.[10]

§ 353. Confining jury to evidence

The jury should be informed that they are to be governed by the evidence in assessing damages,[11] and it is error to tell the

[5] Pauza v. Lehigh Valley Coal Co., 80 A. 1126, 231 Pa. 577.

[6] Cornell v. Great Northern Ry. Co., 187 P. 902, 57 Mont. 177; Pauza v. Lehigh Valley Coal Co., 80 A. 1126, 231 Pa. 577; Rundle v. Slate Belt Electric St. Ry. Co., 33 Pa. Super. Ct. 233.

[7] Denman v. Johnston, 85 Mich. 387, 48 N. W. 565.

[8] Iseminger v. York Haven Water & Power Co., 59 A. 64, 209 Pa. 615.

[9] Southern Ry. Co. v. O'Bryan, 45 S. E. 1000, 119 Ga. 147.

[10] Illinois Cent. R. Co. v. Houchins, 89 S. W. 530, 121 Ky. 526, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205.

[11] **Ark.** Weigel v. McCloskey, 166 S. W. 944, 113 Ark. 1, Ann. Cas. 1916C, 503; St. Louis, I. M. & S. Ry. Co. v. Steed, 151 S. W. 257, 105 Ark. 205.

Idaho. Holt v. Spokane & P. Ry. Co., 35 P. 39, 3 Idaho, 703.

Ill. Cleveland, C., C. & St. L. Ry. Co. v. Jenkins, 51 N. E. 811, 174 Ill. 398, 62 L. R. A. 922, 66 Am. St. Rep. 296; Threlkeld v. Norwodowski, 202 Ill. App. 599; Presley v. Kinlock-Bloomington Tel. Co., 158 Ill. App. 220; Illinois Cent. R. Co. v. Farrell, 86 Ill. App. 436; East St. Louis & C. Ry. Co. v. Frazier, 19 Ill. App. 92.

Ky. Louisville & N. R. Co. v. Ashley, 183 S. W. 921, 169 Ky. 330, L. R. A. 1916E, 763.

jury that they are the sole judges of the amount of damages which plaintiff should recover, without also instructing that the damages must be estimated from the evidence.[12] An instruction that the jury are to assess such damages as in their judgment under the evidence a party is entitled to is not erroneous under this rule,[13] and an instruction is not erroneous which tells the jury that in making an estimate of damages they shall base their judgment upon the evidence in the case, bringing to bear on such evidence their general knowledge and experience which they are supposed to possess in common with the generality of mankind.[14] In some jurisdictions a charge on the measure of damages will not be erroneous, because it does not expressly refer to the evidence,[15] and a defendant is not prejudiced by an instruction which states the correct elements of damage of which there is evidence, although it does not restrict the consideration of the jury to the evidence.[16]

Where the evidence does not disclose any definite damages, the court should instruct the jury to find for the plaintiff in nominal damages only.[17]

An instruction on damages should limit the jury to a consideration of the facts and circumstances in evidence bearing upon the question of damages,[18] and an instruction directing the jury, in determining the amount of damages, to take into consideration all the facts and circumstances before them, is reversible error where the damages found are very high and apparently excessive.[19] Such an instruction, however, is not a cause for reversal, if there is nothing in the evidence, not relating to damages, which might have influenced the jury to the detriment of the defeated party in fixing the amount of their verdict.[20] An instruction which limits the jury to the consideration of the facts and circumstances attending the injury sued for is proper.[21]

[12] Martin v. Johnson, 89 Ill. 537; Girdner v. Taylor, 6 Heisk. (Tenn.) 244.

[13] Calumet R. Ry. Co. v. Moore, 124 Ill. 329, 15 N. E. 764.

[14] Springfield Consol. Ry. Co. v. H. Hoeffner, 51 N. E. 884, 175 Ill. 634.

[15] Thomas Madden, Son & Co. v. Wilcox, 91 N. E. 933, 174 Ind. 657.

[16] Vandalia Coal Co. v. Yemm, 92 N. E. 49, 94 N. E. 881, 175 Ind. 524.

[17] Morrison v. Yancey, 23 Mo. App. 670.

[18] Kingan v. Gleason, 101 N. E. 1027, 55 Ind. App. 684; Mesker v. Leonard, 96 N. E. 485, 48 Ind. App. 642; Knoefel v. Atkins, 81 N. E. 600, 40 Ind. App. 428; May v. Chicago, B. & Q. R. Co. (Tex. Civ. App.) 225 S. W. 660.

[19] Levitan v. Chicago City Ry. Co., 203 Ill. App. 441.

[20] Chicago City Ry. Co. v. Sheehan, 110 Ill. App. 492; City of Chicago v. Davies, 110 Ill. App. 427; West Chicago St. R. Co. v. Dougherty, 110 Ill. App. 204.

[21] Malloy v. City of Chicago, 169 Ill. App. 593.

B. Punishment in Criminal Cases

§ 354. Necessity and propriety of instructions in general

The question of the extent of the punishment of the defendant in a criminal case in the event of his conviction is usually within the province of the court, and a matter with which the jury has nothing to do,[22] and where this is the case the court need not instruct as to the penalty to be imposed in case of conviction,[23] this rule applying to an instruction as to the proper course of the jury in case they cannot agree upon the punishment to be inflicted upon a convicted defendant,[24] and it is not error in such a case to tell the jury that the matter of punishment is exclusively for the court to determine,[25] such an instruction not being objectionable, as presenting to the jury only the question of the guilt of the defendant and not of his innocence.[26]

Under ordinary circumstances it is not improper, however, to inform the jury what the penalty is for the offense of which the defendant is accused,[27] and that, in reading a statute as an accurate and concise way of defining the offense for which a defendant is being tried, the judge necessarily informs the jury what

[22] Norris v. State, 74 So. 394, 15 Ala. App. 567; State v. Ausplund, 167 P. 1019, 86 Or. 121, judgment affirmed on rehearing 171 P. 395, 87 Or. 649.

[23] **Fla.** Eggart v. State, 25 So. 144, 40 Fla. 527.

Idaho. State v. Altwatter, 157 P. 256, 29 Idaho, 107.

Ind. Currier v. State, 60 N. E. 1023, 157 Ind. 114.

Iowa. State v. O'Meara, 177 N. W. 563.

Kan. State v. Bell, 193 P. 373, 107 Kan. 707.

Mo. State v. Ragsdale, 59 Mo. App. 590.

Neb. Edwards v. State, 95 N. W. 1038, 69 Neb. 386, 5 Ann. Cas. 312; Ford v. State, 46 Neb. 390, 64 N. W. 1082.

N. M. State v. Ellison, 144 P. 10, 19 N. M. 428.

N. Y. People v. Jordan, 109 N. Y. S. 840, 125 App. Div. 522.

Okl. Colbert v. State, 113 P. 558, 4 Okl. Cr. 500.

Or. State v. Garrison, 117 P. 657, 59 Or. 440; State v. Daley, 103 P. 502, 54 Or. 514, rehearing denied 104 P. 1, 54 Or. 514.

Utah. State v. Inlow, 141 P. 530, 44 Utah, 485, Ann. Cas. 1917A. 741.

[24] Brown v. State, 72 Miss. 997, 17 So. 278.

[25] **Iowa.** State v. Powers, 163 N. W. 402, 180 Iowa, 693.

Ky. Caudill v. Commonwealth, 159 S. W. 1149, 155 Ky. 578.

Mo. State v. Howard, 118 Mo. 127, 24 S. W. 41; State v. Avery, 113 Mo. 475, 21 S. W. 193.

Neb. Clarey v. State, 85 N. W. 897, 61 Neb. 688.

Pa. Commonwealth v. Martin, 34 Pa. Super. Ct. 451.

[26] Williams v. People, 63 N. E. 681, 196 Ill. 173.

[27] State v. Yourex, 71 P. 203, 30 Wash. 611.

In Wisconsin the communication to the jury of the penalties for the crime charged is not considered good practice, although the court does not go so far as to hold that it is necessarily a ground for reversal. Bliss v. State, 94 N. W. 325, 117 Wis. 596.

the penalty is, does not constitute error, this being merely an incidental result of the definition.[28]

Where the court determines the place of confinement of the prisoner, it is error to tell the jury that if he should be found guilty he should be committed to one institution rather than another,[29] and the jury should not be reminded of the discretionary powers of the court in fixing punishment.[30]

§ 355. Rule as to instructions where jury has some power with respect to fixing punishment

Where the jury has certain powers and duties with respect to determining the punishment of a convicted defendant, they should be told what such powers are and fully instructed as to their duties,[31] or as to the effect of their failure to exercise their powers,[32] and the court may give such a charge in the absence of any request therefor by the defendant.[33] Thus where, under the law relating to suspended sentences, the jury are authorized to consider whether the accused has borne a good reputation in determining whether, in case of conviction sentence shall be suspended,

[28] Commonwealth v. Harris, 168 Pa. 619, 32 A. 92, 36 Wkly. Notes Cas. 343.

[29] State v. McGee, 110 S. W. 699, 212 Mo. 95.

[30] Abney v. State, 86 So. 341, 123 Miss. 546.

[31] **Ind. T.** Reynolds v. United States, 103 S. W. 762, 7 Ind. T. 51.

Iowa. State v. Wilson, 141 N. W. 337, 157 Iowa, 698.

Ky. Blair v. Commonwealth, 7 Bush, 227.

La. State v. Obregon, 10 La. Ann. 799.

Okl. Colbert v. State, 113 P. 561, 4 Okl. Cr. 487; Vickers v. United States, 98 P. 467, 1 Okl. Cr. 452.

Tex. Graham v. State, 163 S. W. 726, 73 Tex. Cr. R. 28; Duncan v. State, 29 Tex. App. 141, 15 S. W. 407; Washington v. State, 28 Tex. App. 411, 13 S. W. 606; Buford v. State, 44 Tex. 525; Cesure v. State, 1 Tex. App. 19.

Instructions held insufficient within rule. Under the statute which provides that, if the penalty for a misdemeanor be a fine, "it shall be in the discretion of the jury fixing the amount of the fine to say in its verdict whether, if the fine and costs are not immediately paid or replevied, he shall work at hard labor in lieu of imprisonment for nonpayment of the fine," it is not sufficient for the court in instructing the jury to tell them that if they find the defendant guilty they may, in their discretion, say that he shall work at hard labor until the fine and costs shall be paid, but it is the duty of the court to instruct the jury as to the nature and meaning of the statute. James v. Commonwealth, 16 Ky. Law Rep. (abstract) 271.

Instructions held not insufficient within rule. An instruction that the jury, on finding defendant guilty, should assess his punishment at imprisonment in the penitentiary for a term of not less than two years or more than seven years, or by imprisonment in the county jail not exceeding three months, was not misleading, for failing to designate the minimum punishment by imprisonment in the county jail. State v. Rose, 76 S. W. 1003, 178 Mo. 25.

[32] Walton v. State, 57 Miss. 533.

[33] Rambo v. State, 162 P. 449, 13 Okl. Cr. 119.

Compare Chandler v. State, 105 P. 375, 3 Okl. Cr. 254, rehearing denied 107 P. 735, 3 Okl. Cr. 254.

it is proper for the court to so instruct, as otherwise the jury would not be aware of this phase of the law.[34] An instruction, however, embodying a statutory provision giving the right to the jury to fix the punishment under certain conditions, may be properly refused, in the absence of any evidence of the existence of such conditions.[35]

In some jurisdictions, in the absence of a request therefor, it will usually not be error to fail to give instructions as to the penalty,[36] and the court may pronounce judgment upon a general verdict of guilty.[37] In other jurisdictions, instructions relating to punishment should be given, although not requested.[38]

Where the jury in a criminal case are vested with the power, in case of a verdict of guilty, to fix the punishment of defendant,[39] or have a discretion as to which of two or more modes of punishment shall be imposed,[40] any instruction which in any way tends

[34] Gilbert v. State, 209 S. W. 658, 84 Tex. Cr. R. 616.

[35] People v. Elgar, 178 P. 168, 39 Cal. App. 78.

[36] Cason v. State, 99 S. E. 61, 23 Ga. App. 540.

[37] Tudor v. State, 167 P. 341, 14 Okl. Cr. 67.

[38] State v. Chadwick, 174 S. W. 1144, 131 Tenn. 354.

[39] Rollings v. State, 34 So. 349, 136 Ala. 126; Leech v. Waugh, 24 Ill. 228; Martin v. State, 24 Tex. 61.

[40] **Ala.** Bibb v. State, 84 Ala. 13, 4 So. 275; Skains v. State, 21 Ala. 218.

Cal. People v. Ross, 66 P. 229, 134 Cal. 256.

Ind. Caiger v. State, 58 N. E. 1036, 155 Ind. 646; Roberts v. State, 12 N. E. 500, 111 Ind. 340.

Ky. Adams v. Commonwealth, 175 S. W. 10, 164 Ky. 148; Day v. Commonwealth, 96 S. W. 510, 29 Ky. Law Rep. 816.

La. State v. Melvin, 11 La. Ann. 535.

Miss. Mathison v. State, 40 So. 801, 87 Miss. 739.

Mo. State v. Milligan, 70 S. W. 473, 170 Mo. 215; State v. Gilbreath, 130 Mo. 500, 32 S. W. 1023.

N. D. State v. Peltier, 129 N. W. 451, 21 N. D. 188; State v. Noah, 124 N. W. 1121, 20 N. D. 281.

Okl. Williams v. State, 124 P. 330, 7 Okl. Cr. 529.

Tex. Petteway v. State, 36 Tex. Cr. R. 97, 35 S. W. 646; Prinzel v. State, 35 Tex. Cr. R. 274, 33 S. W. 350; Hargrove v. State, 33 Tex. Cr. R. 165, 25 S. W. 967; Sanchez v. State, 21 S. W. 364, 31 Tex. Cr. R. 484; Washington v. State, 28 Tex. App. 411, 13 S. W. 606; Irvin v. State, 25 Tex. App. 588, 8 S. W. 681; Longenotti v. State, 22 Tex. App. 61, 2 S. W. 620.

Instructions held erroneous within rule. An instruction, in a prosecution for homicide, that, if the jury found accused guilty, it was no more their moral duty under the law to hang him than to sentence him to the penitentiary. Thomas v. State, 43 So. 371, 150 Ala. 31. A charge, in a capital case, that cases of murder were fearfully numerous in the city; that a conviction on a charge of murder had ceased to be a cause of excitement, and had become a common affair of almost daily occurrence; that confinement in the state penitentiary for life was no adequate punishment for the crime of murder; that juries had no right to qualify their verdict, unless there were mitigating circumstances; that convicts in the penitentiary seldom served out their term when confined there for life; that a late governor of this state had pardoned almost everybody, and that convicts were always in the hope that, after a few years, they could

to swerve the judgment of the jury or to limit its discretion in the exercise of such power will be erroneous, and it is proper to refuse to instruct the jury as to how they shall exercise such a discretion.[41] It has been held, however, in one jurisdiction, although not without dissent, that a statute authorizing the jury, on rendering a verdict of guilty in a capital case, to dispense with the death penalty, does not prevent the court from admonishing the jury as to the circumstances under which it will be proper to reduce the punishment to life imprisonment.[42]

Where the punishment provided for an offense is a fine or imprisonment, it is error to tell the jury that they may assess a fine and imprisonment;[43] and, conversely, where the statute provides that there may be both fine and imprisonment, it is error to instruct that the penalty may be either fine or imprisonment.[44]

Where a verdict of guilty in a capital case carries the death penalty, unless the jury qualify their verdict by saying that capital punishment shall not be inflicted, instructions calculated to lead the jury to think that, in the absence of such a qualification, the court will have discretion to impose life imprisonment, are erroneous.[45]

appeal to a clement executive; that none but capital punishment would put a stop to the practice, now common, of men and women killing; and that he [the judge], on a late visit to the penitentiary, had been told by parties sentenced by him that they hoped in a short time to come out. State v. Melvin, 11 La. Ann. 535. An instruction that if there are circumstances in the case which would justify a recommendation of life imprisonment in case of a verdict of murder in the first degree, the jury could make such recommendation. State v. Romeo, 128 P. 530, 42 Utah, 46. An instruction that, if the jury have a reasonable doubt of defendant's guilt, they must acquit, and not resolve the doubt by a mitigation of the punishment, is error, as tending to influence the jury to inflict the death penalty, rather than milder punishment. Johnson v. State, 27 Tex. App. 163, 11 S. W. 106.

Instructions not improper within rule. An instruction to the effect that it is immaterial from what source malice springs does not interfere with or abridge "the prerogative of the jury to recommend imprisonment for life." Perry v. State, 30 S. E. 903, 102 Ga. 365. A charge that, if defendant were found guilty, the punishment should be assessed at imprisonment in the penitentiary between 2 and 12 years, provided that, if defendant were found not more than 16 years old, and his punishment by imprisonment assessed at 5 years or less, he might be confined in the house of correction or reformatory instead of the penitentiary, properly submitted the discretionary powers of the jury. Rocha v. State, 41 S. W. 611, 38 Tex. Cr. R. 69.

[41] People v. Kamaunu, 110 Cal. 609, 42 P. 1090.

[42] Winston v. United States, 13 App. D. C. 157; Smith v. United States, 13 App. D. C. 155; Strather v. United States, 13 App. D. C. 132.

[43] Ball v. Commonwealth, 99 S. W. 326, 30 Ky. Law Rep. 600.

[44] Moody v. State, 30 Tex. App. 422, 18 S. W. 94.

[45] Parker v. State, 161 P. 552, 24 Wyo. 491.

Where the court instructs, at the request of the defendant, that the jury may assess the punishment, it should also instruct that in case they find the defendant guilty, and fail to agree upon the punishment, they shall so state in their verdict.[46] The trial court has no authority to give instructions permitting the jury to fix a punishment other than that provided by the statute.[47] An instruction that the prosecuting attorney is not insisting on the extreme penalty attached to the offense charged, or that he is only asking for a fine or imprisonment, is improper.[48]

It is not proper, in some jurisdictions, to tell the jury that their verdict under certain circumstances can be changed by the court in its discretion, as this tends to lessen the responsibility of the jury.[49] But in other jurisdictions it is not error to inform the jury as the power of the board of pardons with respect to lessening the punishment that may accompany a verdict of guilty,[50] and in such jurisdictions it is not improper to tell the jury, in a prosecution for a capital offense, that if they award life imprisonment the board of pardons may set their sentence at nought.[51]

§ 356. Recommendation to mercy or of mitigation of punishment

It is proper to instruct the jury as to the effect upon the punishment of a convicted defendant of any recommendation to mercy which they may make;[52] such an instruction not being erroneous, as tending to induce a compromise verdict.[53]

Ordinarily, in the absence of a request therefor, an instruction that the jury in case of conviction may recommend the defendant to mercy is not necessary,[54] and there are decisions that the court is not bound in a capital case to instruct, unless so requested, that the jury, in case of conviction, may avert the infliction of the death penalty by recommending life imprisonment.[55] In other jurisdic-

[46] Oelke v. State, 133 P. 1140, 10 Okl. Cr. 49.

[47] Beck v. State, 166 P. 753, 14 Okl. Cr. 3.

[48] Love v. State, 158 S. W. 532, 71 Tex. Cr. R. 259.

[49] State v. Noah, 124 N. W. 1121, 20 N. D. 281.

[50] State v. Rombolo, 99 A. 434, 89 N. J. Law, 565.

[51] State v. Carrigan, 108 A. 315, 93 N. J. Law, 268.

[52] Lovett v. State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; State v. Carrigan, 108 A. 315, 93 N. J. Law. 268.

[53] Sterling v. State, 89 Ga. 807, 15 S. E. 743.

[54] Webster v. State, 36 So. 584, 47 Fla. 108; Milton v. State, 24 So. 60, 40 Fla. 251; State v. Adams, 47 S. E. 676, 68 S. C. 421; State v. Dodson, 16 S. C. 453; Honeycutt v. State, 8 Baxt. (Tenn.) 371.

[55] Keech v. State, 15 Fla. 591; State v. Beatty, 41 S. E. 434, 51 W. Va. 232.

Sufficiency of request. It was error, in a murder case, to refuse to instruct that the jury might punish murder in the first degree with either death or confinement in the penitentiary, though the request was not made until after the jury had announced its simple verdict of guilty,

tions the rule is that, where a recommendation to mercy makes a lighter punishment obligatory under the statute, the court must charge that the jury have the right to recommend to mercy, whether so requested or not.[56]

Where the statute provides that the jury may recommend that a convicted defendant shall be punished as for a misdemeanor, which recommendation shall be effectual, if approved by the court, the jury should be informed of such provision,[57] and under such a statute the court may[58] and should instruct, whether with or without request,[59] that the recommendation of the jury will not be effective unless it has the approval of the court, and the omission of the court to instruct the jury as to their right to make a recommendation which may, in the discretion of the court, lessen the punishment, is reversible error, where, in the absence of such a recommendation, only the highest penalty can be imposed.[60]

Where a recommendation to mercy can have no effect upon the sentence of the court, it is error to simply tell the jury that they can indorse on their verdict such a recommendation, without telling them of its ineffectiveness.[61] But where the court has correctly informed the jury as to their right to recommend mercy and as to the effect of such recommendation, it is not the duty of the court to call the attention of the jury to a statutory provision that the board of pardons shall not be at liberty to recommend a convict for pardon, except upon proof of his innocence beyond a reasonable doubt.[62]

and though, before the jury went out, the court suggested to counsel for defendant that it give that instruction, and counsel stated that it was not necessary at that time. State v. Cobbs, 40 W. Va. 718, 22 S. E. 310.

[56] Harris v. State, 59 Ga. 635.

[57] Ledford v. State, 91 S. E. 924, 19 Ga. App. 610; Glover v. State, 67 S. E. 687, 7 Ga. App. 628; Taylor v. State, 35 S. E. 161, 110 Ga. 150; Johnson v. State, 25 S. E. 940, 100 Ga. 78.

[58] Benton v. State, 71 S. E. 8, 9 Ga. App. 291; Green v. State, 71 Ga. 487.

[59] Winder v. State, 88 S. E. 1003, 18 Ga. App. 67; Braxley v. State, 86 S. E. 425, 17 Ga. App. 196; Bragg v. State, 83 S. E. 274, 15 Ga. App. 368; Frazier v. State, 83 S. E. 273, 15 Ga. App. 365; Taylor v. State, 81 S. E. 372, 14 Ga. App. 492; Echols v. State, 34 S. E. 1038, 109 Ga. 508.

Contra, Gaskins v. State, 76 S. E. 777, 12 Ga. App. 97; Lingerfelt v. State, 53 S. E. 803, 125 Ga. 4, 5 Ann. Cas. 310.

[60] Calton v. Utah, 130 U. S. 83, 9 S. Ct. 435, 32 L. Ed. 870.

[61] Hackett v. People, 8 Colo. 390, 8 P. 574.

Warning jury that recommendation will not relieve defendant from imprisonment. Where, in a trial for assault with intent to kill, the jury ask if they can recommend to mercy, and defendant requests a charge that, notwithstanding any recommendation to mercy, the punishment would still require confinement in the penitentiary, the court sufficiently charges them by reading the statute providing that the court shall determine the punishment, paying due respect to any recommendation which the jury may make. Fogarty v. State, 80 Ga. 450, 5 S. E. 782.

[62] State v. Schiller, 70 N. E. 505, 70 Ohio St. 1.

Instructions should not in any way embarrass or limit the jury in the exercise of their power to recommend a mitigation of punishment.[63] An instruction is therefore erroneous which tends to influence the exercise by the jury of discretion given to it by a statute to recommend imprisonment for life upon a conviction of

[63] **Ga.** Duncan v. State, 80 S. E. 317, 141 Ga. 4; Cohen v. State, 42 S. E. 781, 116 Ga. 573; Hill v. State, 72 Ga. 131.

S. C. State v. Bethune, 67 S. E. 466, 86 S. C. 143.

Tex. Morris v. State, 198 S. W. 141, 82 Tex. Cr. R. 13.

Utah. State v. Newhinney, 134 P. 632, 43 Utah, 135, L. R. A. 1916D, 590, Ann. Cas. 1916C, 537; State v. Thorne, 126 P. 286, 41 Utah, 414, Ann. Cas. 1915D, 90; State v. Thorne, 117 P. 58, 39 Utah, 208.

Limitation of discretion of jury by state of evidence. Under the Ohio statute, in determining whether to recommend mercy, the jury should be guided by the evidence or lack of evidence, as the case may be as disclosed upon the trial, and an instruction to this effect is proper. Howell v. State, 131 N. E. 706; Rehfeld v. State, 131 N. E. 712.

Instructions held not erroneous within rule. In a prosecution for murder, the remarks of a trial judge, containing a mere warning for thorough consideration of the facts and circumstances by the jury, before recommending the defendant to the mercy of the court, are not prejudicial. State v. Bates, 69 S. E. 1075, 87 S. C. 431. An instruction that, "if you think this is a case in which you would be justified in recommending a life imprisonment in the event of your finding the defendant guilty, you have a right to make such recommendation, as it is for you to say, in the event of your finding the defendant guilty, whether the facts and circumstances in this case warrant you in making such recommendation. It is all a question for you, under the law and the evidence"—is not ground for a new trial, but it would be better to omit the words "justified" and "warrant," and to substitute in their stead language leaving the jury free to dispose of the question of recommending or not recommending life imprisonment, without any intimation from the bench as to what should control or influence them in reaching a conclusion upon this matter. Cyrus v. State, 29 S. E. 917, 102 Ga. 616. A charge on a trial for murder that it was within the province of the jury, if they found defendant guilty, to recommend that he be punished by imprisonment for life, that there was no rule by which they were to be guided in making the recommendation, and that it was entirely for their determination, is not open to the criticism that it was calculated to prejudice the jury and prevent them from recommending that defendant be punished by imprisonment. Thomas v. State, 59 S. E. 246, 129 Ga. 419. A conviction for keeping a tippling house open on Sunday will not be reversed merely because the judge told the jury that the case was one not punishable by confinement in the penitentiary, and not one where they would be authorized to recommend to mercy, as the charge did not forbid the jury to make the recommendation. Hussey v. State, 69 Ga. 54. Where, in a murder case, the court charged that, if they found defendant guilty of murder, they might recommend that he be punished by imprisonment, and if they so recommended, that had to be the penalty; that, if they failed to recommend, defendant might be hung, or, if they recommended that he be imprisoned for life, then that was the penalty fixed by law; and that it was a matter entirely with them, and of which they had absolute control, it was held that it was not error to also charge "that the jury have nothing to do with the consequences of the verdict." Marshall v. State, 74 Ga. 26.

murder in the first degree.[64] An instruction that the responsibility is on the jury to recommend or forbear to recommend imprisonment for life, in place of death, and that to do what they think right and proper in that regard rests with them and their consciences is proper,[65] and an instruction that, while it is always competent for the jury to recommend to mercy, it is not incumbent on the judge to observe such recommendation, is not erroneous, as an intimation that the case against the accused is a bad one.[66]

Instructions with regard to the power of the jury to recommend a convicted defendant to mercy should ordinarily follow the language of the statute.[67]

[64] State v. Martin, 106 A. 385, 92 N. J. Law, 436.

[65] Fry v. State, 81 Ga. 645, 8 S. E. 308.

[66] State v. Jones, 54 S. E. 1017, 74 S. C. 456.

[67] Newton v. State, 21 Fla. 53.

CHAPTER XXVIII

DEFINITION OR EXPLANATION OF TERMS

§ 357. Propriety and necessity of defining terms having a technical or legal meaning.
358. Necessity of defining offense of which defendant is accused.
359. Necessity of definition of legal phrases in common use.
360. Defining words of witness.
361. Necessity of defining ordinary words having no special technical meaning.
362. Necessity of request for definition.
363. Effect of failure to give definition.
364. Sufficiency of definition or explanation of terms.
365. Sufficiency of definition of criminal offense.

§ 357. Propriety and necessity of defining terms having a technical or legal meaning

Where technical or legal terms are used in an instruction, or where ordinary words having a technical or legal meaning in the connection in which they are used are so included in a charge, the court may[1] and should, at least upon request,[2] define such words and phrases, and requests for instruction which contain words or

[1] Wickwire v. Webster City Savings Bank, 133 N. W. 100, 153 Iowa, 225; International & G. N. R. Co. v. Cruseturner, 98 S. W. 423, 44 Tex. Civ. App. 181.

[2] **Ala.** Chambers v. Morris (Sup.) 42 So. 549.

Ga. Holmes v. Clisby, 48 S. E. 934, 121 Ga. 241, 104 Am. St. Rep. 103; Roberts v. State, 40 S. E. 297, 114 Ga. 450.

Ill. People v. Blevins, 96 N. E. 214, 251 Ill. 381, Ann. Cas. 1912C, 451; Hayner v. People, 72 N. E. 792, 213 Ill. 142; Moshier v. Kitchell, 87 Ill. 18; Chicago & A. R. Co. v. Pelligreen, 65 Ill. App. 333.

Iowa. Long v. Ottumwa Ry. & Light Co., 142 N. W. 1008; State v. McKinnon, 138 N. W. 523, 158 Iowa, 619.

Ky. W. G. Duncan Coal Co. v. Thompson's Adm'r, 162 S. W. 1139, 157 Ky. 304; Romans v. McGinnis, 160 S. W. 928, 156 Ky. 205; Taylor v. Commonwealth, 75 S. W. 244, 119 Ky. 731, 25 Ky. Law Rep. 374; McArthur v. City of Dayton, 42 S. W. 343, 19 Ky. Law Rep. 882.

Mich. Derham v. Derham, 83 N. W. 1005, 125 Mich. 109.

Mo. Mullenix v. Briant (App.) 198 S. W. 90; Strother v. Metropolitan St. Ry. Co. (App.) 183 S. W. 657; Beggs v. Shelton, 155 S. W. 885, 173 Mo. App. 127; E. R. Darlington Lumber Co. v. Pottinger, 147 S. W. 179, 165 Mo. App. 442.

Mont. First Nat. Bank v. Carroll, 88 P. 1012, 35 Mont. 302.

Ohio. Jordan v. State, 13 Ohio Cir. Ct. R. 471, 7 O. C. D. 133.

Or. State v. Hogg, 129 P. 115, 64 Or. 57.

Pa. Commonwealth v. Ronello, 96 A. 826, 251 Pa. 329; Yanosh v. Earley, 67 Pa. Super. Ct. 585.

Tex. Hightower v. State, 165 S. W. 184, 73 Tex. Cr. R. 258; Davis v. Hardwick, 94 S. W. 359, 43 Tex. Civ. App. 71; Swain v. State, 86 S. W. 335, 48 Tex. Cr. R. 98; Vann v. State, 77 S. W. 813, 45 Tex. Cr. R. 431, 108 Am. St. Rep. 961; Matthews v. Boydstun (Civ. App.) 31 S. W. 814; Jolly v. State, 19 Tex. App. 76; Goode v. State, 16 Tex. App. 411.

phrases of such description without defining them are properly refused.[3] It is error to use words in a charge in a different sense from the popular one without explanation.[4] That some of the jury may be able to understand technical terms used will not dispense with the necessity of their definition.[5] Thus it is proper, or may be necessary, to define the words "actual notice,"[6] "actual possession,"[7] "abandonment,"[8] "accident,"[9] "adequate cause,"[10] "apparent authority,"[11] "approved" in certain connections,[12] "arbitrary prices,"[13] "cooling time,"[14] "constructive possession,"[15] "corpus delicti,"[16] "crossing,"[17] "deliberately,"[18] "deliberation and premeditation,"[19] "delivery,"[20] "extraordinary flood,"[21] "heat of passion,"[22] "implied malice,"[23] "independent

[3] Thomas v. Presbrey, 5 App. D. C. 217; Wilson v. Danville Collieries Coal Co., 106 N. E. 194, 264 Ill. 143, affirming judgment 184 Ill. App. 180; Momence Stone Co. v. Turrell, 68 N. E. 1078, 205 Ill. 515, affirming judgment 106 Ill. App. 160; Quirk v. Bradley Contracting Co. (Sup.) 161 N. Y. S. 296, 97 Misc. Rep. 368.

[4] Mullins v. Cottrell, 41 Miss. 291.

[5] State v. Clark, 47 S. E. 36, 134 N. C. 698.

[6] Ware v. Souders, 120 Ill. App. 209.

[7] Mayes v. Kenton, 64 S. W. 728, 23 Ky. Law Rep. 1052.

[8] Union Scale Co. v. Iowa Machinery & Supply Co., 113 N. W. 762, 136 Iowa, 171.

[9] Barnett & Record Co. v. Schlapka, 70 N. E. 343, 208 Ill. 426, affirming judgment 110 Ill. App. 672; Ebert v. Metropolitan St. Ry. Co., 160 S. W. 34, 174 Mo. App. 45.

In Illinois an instruction has been held not erroneous in failing to define the term "accident" employed therein. Larsen v. Chicago Union Traction Co., 131 Ill. App. 286.

[10] Robinson v. State, 156 S. W. 212, 70 Tex. Cr. R. 81; Beckham v. State (Tex. Cr. App.) 69 S. W. 534.

[11] Emerson-Brantingham Implement Co. v. Roquemore (Tex. Civ. App.) 214 S. W. 679.

[12] Pace v. Cochran, 86 S. E. 934, 144 Ga. 261.

[13] Kansas City, N. & Ft. S. R. Co. v. Dawley, 50 Mo. App. 480.

[14] Kannmacher v. State, 101 S. W. 238, 51 Tex. Cr. R. 118.

[15] People v. Csontos, 114 N. E. 123, 275 Ill. 402.

[16] People v. Frey, 131 P. 127, 165 Cal. 140.

[17] Texas & N. O. R. Co. v. Harrington (Tex. Civ. App.) 209 S. W. 685.

[18] State v. Garrett, 207 S. W. 784, 276 Mo. 302; Holt v. State, 89 S. W. 838, 48 Tex. Cr. R. 559; Mahon v. State, 79 S. W. 28, 46 Tex. Cr. R. 234.

[19] State v. Foster, 41 S. E. 284, 130 N. C. 666, 89 Am. St. Rep. 876.

Defining words separately. Though the words "premeditated" and "deliberation" have not exactly the same meaning, if an instruction on murder in the first degree is in words which express both ideas, and fully explain them to the jury, it is correct, though the court may not define each word separately. State v. Exum, 50 S. E. 283, 138 N. C. 599.

[20] Archambeau v. Edmunson, 171 P. 186, 87 Or. 476.

Omission to define not ground for new trial. Mere failure of the court, in instructing the jury, to give the definitions of such words as "delivery" and "delivered," is not cause for a new trial. Cordele Sash, Door & Lumber Co. v. Wilson Lumber Co., 58 S. E. 860, 129 Ga. 290.

[21] Sloss-Sheffield Steel & Iron Co. v. Mitchell, 52 So. 69, 167 Ala. 226.

[22] State v. Skaggs, 60 S. W. 1048, 159 Mo. 581; State v. Reed, 154 Mo. 122, 55 S. W. 278; State v. Strong, 153 Mo. 548, 55 S. W. 78.

Compare State v. Rose, 44 S. W. 329, 142 Mo. 418.

[23] Connell v. State, 81 S. W. 746, 46 Tex. Cr. R. 259.

contractor," [24] "inherent vice," [25] "intervening cause," [26] "last clear chance," [27] "malice," [28] "nuisance," [29] "prescription," [30] "probable cause," [31] "prompt and proper treatment," [32] "proportionate to the pecuniary injury," [33] "reasonable," [34] "requirements of the law," [35] "residence," [36] "satisfied," [37] "unavoidable accident," [38] "undue influence," [39] "value in money," [40] "warranty," [41] "willful," or "willfully," [42] "without just cause," [43] and "wrongful and without justifiable cause." [44]

[24] Overhouser v. American Cereal Co., 105 N. W. 113, 128 Iowa, 580.

[25] Ft. Worth & D. C. Ry. Co. v. Berry (Tex. Civ. App.) 170 S. W. 125.

[26] Rooney v. Levinson, 111 A. 794, 95 Conn. 466.

[27] Rooney v. Levinson, 111 A. 794, 95 Conn. 466.

[28] Cairns v. Moore, 69 So. 579, 194 Ala. 102.

Sufficient definitions of malice. An instruction that malice includes anger, hatred, and revenge, and every other unlawful motive, and denotes an action flowing from a wicked mind, and that the malice is inferred from any deliberate or cool act, however sudden, which shows a malignant heart, is not erroneous. Parsons v. People, 75 N. E. 993, 218 Ill. 386. See People v. Daniels, 34 P. 233, 4 Cal. Unrep. 248. An instruction that "malice is a condition of mind which shows a heart regardless of social duty, and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken," is correct. Bramlette v. State, 21 Tex. App. 611, 2 S. W. 765, 57 Am. Rep. 622.

"Malice aforethought." Failure to define malice aforethought is not error where the court defines both express and implied malice. Hatcher v. State, 65 S. W. 97, 43 Tex. Cr. R. 237; Hamp. v. State (Tex. Cr. App.) 60 S. W. 45; Bean v. State (Tex. Cr. App.) 51 S. W. 946; Moore v. State (Tex. Cr. App.) 50 S. W. 355. An instruction that the words "with malice," as used in the instruction, denoted a wrongful act intentionally done, and that the term "aforethought," as used, meant a predetermination to do the act, however suddenly or recently formed before the act was done, sufficiently defined "malice aforethought," especially when taken in connection with another instruction defining feloniously" as meaning to proceed from an evil heart or purpose done with the deliberate intention to commit a crime, though the definition of malice aforethought did not require that the act be done "without legal excuse." Potter v. Commonwealth, 134 S. W. 462, 142 Ky. 378.

[29] Kirchgraber v. Lloyd, 59 Mo. App. 59.

[30] Cobb v. Covenant Mut. Ben. Ass'n, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619.

[31] Atchison, T. & S. F. Ry. Co. v. Woodson, 100 P. 633, 79 Kan. 567.

[32] Dunnagan v. Briggs, 154 S. W. 428, 170 Mo. App. 691.

[33] Merchants' & Planters' Oil Co. v. Burns, 74 S. W. 758, 96 Tex. 573, reversing judgment (Civ. App.) 72 S. W. 626.

[34] Coblentz v. Putifer, 125 P. 30, 87 Kan. 719, 42 L. R. A. (N. S.) 298.

[35] City of Chicago v. Fields, 139 Ill. App. 250.

[36] Murray v. Geiser Mfg. Co., 99 P. 589, 79 Kan. 326.

[37] Riggs v. Thorpe, 69 N. W. 891, 67 Minn. 217.

[38] Leland v. Empire Engineering Co., 108 A. 570, 135 Md. 208.

[39] Gwinn v. Hobbs, 118 N. E. 155.

[40] McLaughlin v. United Railroads of San Francisco, 147 P. 149, 169 Cal. 494, L. R. A. 1915E, 1205, Ann. Cas. 1916D, 337.

[41] Flint-Walling Mfg. Co. v. Ball, 43 Mo. App. 504.

[42] Carney v. State, 175 S. W. 155, 76 Tex. Cr. R. 379; Roberts v. State,

[43] Jordan v. J. R. Webber Moulding Co., 72 Mo. App. 325.

[44] Kepley v. Park Circuit & Realty Co. (Mo. App.) 200 S. W. 750.

Where the question of negligence is submitted to the jury, the court is required in some jurisdictions and under some circumstances to define the terms "negligence," "ordinary care," "reasonable care," "concurrent negligent acts," etc.,[45] and may properly refuse instructions which do not include such a definition.[46] There is, however, as is implied in the foregoing statement, no inflexible rule that compels the definition of such terms in all cases,[47] and

143 S. W. 614, 65 Tex. Cr. R. 62; Dyrley v. State (Tex. Cr. App.) 63 S. W. 631; Wheeler v. State, 23 Tex. App. 598, 5 S. W. 160; Sparks v. State, 23 Tex. App. 447, 5 S. W. 135.

Sufficient definitions. An instruction that the term "willful" as used in the indictment signifies "without reasonable ground for believing the act to be lawful, or a reckless disregard of the rights of others," is correct. Finney v. State, 29 Tex. App. 184, 15 S. W. 175. In a prosecution for obstructing a public road, the definition of "willful" by the court in his charge that by the term it was meant that defendant knew at the time of the alleged obstruction that the road was public, and that the obstruction was placed, if it was obstructed, with an evil intent. Howard v. State, 216 S. W. 168, 86 Tex. Cr. R. 288. On a prosecution for perjury, a definition of "willfully" as meaning that the act of the defendant was done with an evil intent or without reasonable grounds to believe the act to be lawful was correct. Clay v. State, 107 S. W. 1129, 52 Tex. Cr. R. 555. Where the instructions defined the word "willfully" as meaning with evil intent or without reasonable grounds for believing the act to be lawful, it was not necessary to give any other instruction defining the word, nor was it necessary to carry the definition forward in each paragraph of the instructions wherein the word was used. Haynes v. State, 159 S. W. 1059, 71 Tex. Cr. R. 31.

Harmless error. Where, in a prosecution for perjury, the charge covered all the elements of the crime, and was that the statement must be willfully and deliberately made, and not through inadvertence, mistake, or during agitation, to which no objection was taken until on motion for new trial, error in not defining the word "willfully" was harmless. Garza v. State (Tex. Cr. App.) 47 S. W. 983.

[45] **U. S.** Denver & R. G. R. Co. v. Norgate, 141 F. 247, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448.

Kan. City of Junction City v. Blades, 1 Kan. App. 85, 41 P. 677.

Ky. Chesapeake & O. Ry. Co. v. Warnock's Adm'r, 150 S. W. 29, 150 Ky. 74.

Mo. Foy v. United Rys. Co. of St. Louis, 226 S. W. 325, 205 Mo. App. 521; Gardner v. Metropolitan St. R. Co., 152 S. W. 98, 167 Mo. App. 605; Mather v. Metropolitan St. Ry. Co., 148 S. W. 383, 166 Mo. App. 142; Raybourn v. Phillips, 140 S. W. 977, 160 Mo. App. 534; Magrane v. St. Louis & Suburban Ry. Co., 81 S. W. 1158, 183 Mo. 119.

Tex. Cleburne Electric & Gas Co. v. McCoy (Civ. App.) 149 S. W. 534; Galveston, H. & S. A. Ry. Co. v. De Castillo (Civ. App.) 83 S. W. 25.

Wis. Yerkes v. Northern Pac. Ry. Co., 88 N. W. 33, 112 Wis. 184, 88 Am. St. Rep. 961.

[46] Coney Island Co. v. Dennan (C. C. A. Ohio) 149 F. 687, 79 C. C. A. 375; Brilliant Coal Co. v. Barton, 81 So. 828, 203 Ala. 38.

"Great degree of care." An instruction that if plaintiff knew of the existence of a defect in a street, or by ordinary care might have known thereof, it was her duty while traveling on a dark night to use a great degree of care to avoid the defect, and that if she had exercised due care she would have prevented the accident, was properly refused, because referring to a great degree of care, without defining it. Roberts v. City of Piedmont, 148 S. W. 119, 166 Mo. App. 1.

[47] **Mo.** Malone v. St. Louis-San Francisco Ry. Co., 213 S. W. 864, 202 Mo. App. 489; Anderson v. American Sash & Door Co. (App.) 182 S. W. 819;

a definition of "negligence" is not necessary, where negligence is not the gist of the action,[48] nor where the jury are practically told what facts could or would constitute negligence.[49]

While the term "proximate cause" is held not to be so technical as to make the failure to define it in an instruction necessarily error,[50] and in some jurisdictions the rule is that it need not be defined,[51] in other jurisdictions a definition of such phrase should ordinarily be given, at least on request.[52]

The court is not required to give a definition which would be of no value to the jury,[53] and therefore it need not define technical words, if they are otherwise made definite and intelligible to the jury,[54] or where the evidence is of such a character that the jury cannot be misled by the failure to define such terms.[55]

§ 358. Necessity of defining offense of which defendant is accused

The general rule is that in a criminal prosecution the judge should define the offense charged, stating the essential elements thereof, either in the language of the statute or in appropriate words of his own,[56] and an instruction which leaves to the jury the

Richmond v. Missouri Pac. Ry. Co., 144 S. W. 168, 162 Mo. App. 422; Main v. Hall, 106 S. W. 1099, 127 Mo. App. 713; Warder v. Henry, 117 Mo. 530, 23 S. W. 776.

Tex. American Cotton Co. v. Smith, 69 S. W. 443, 29 Tex. Civ. App. 425.

[48] Kieselhorst Piano Co. v. Porter, 171 S. W. 949, 185 Mo. App. 676.

[49] St. Clair Mineral Springs Co. v. City of St. Clair, 96 Mich. 463, 56 N. W. 18; Burns v. United Rys. Co. of St. Louis, 158 S. W. 394, 176 Mo. App. 330; Landrum v. St. Louis & S. F. R. Co., 112 S. W. 1000, 132 Mo. App. 717.

[50] Kleet v. Southern Illinois Coal & Coke Co., 197 Ill. App. 243.

[51] Burk v. Creamery Package Mfg. Co., 102 N. W. 793, 126 Iowa, 730, 106 Am. St. Rep. 377; City of Louisville v. Arrowsmith, 140 S. W. 1022, 145 Ky. 498.

[52] **U. S.** (C. C. A. Pa.) Delaware & Hudson Co. v. Ketz, 233 F. 31, 147 C. C. A. 101.

Ill. Bagaini v. Donk Bros. Coal & Coke Co., 199 Ill. App. 76; Swift & Co. v. Rennard, 128 Ill. App. 181.

Mo. Mitchell v. Violette (App.) 203 S. W. 218; Turnbow v. Dunham, 197 S. W. 103, 272 Mo. 53; Mulderig v. St. Louis, etc., R. Co., 94 S. W. 801, 116 Mo. App. 655.

Request necessary. Instructions using the word "proximate" in reference to the cause of injury need not, in the absence of request, define it; it being an English word with a commonly understood meaning. Wolters v. Chicago & A. Ry. Co. (Mo. App.) 193 S. W. 877.

[53] Karkowski v. La Salle County Carbon Coal Co., 93 N. E. 780, 248 Ill. 195; Pitts v. State, 132 S. W. 801, 60 Tex. Cr. R. 524.

[54] Western Union Telegraph Co. v. Brasher, 124 S. W. 788, 136 Ky. 485; White v. Madison, 83 P. 798, 16 Okl. 212; Houston, E. & W. T. Ry. Co. v. Vinson (Tex. Civ. App.) 38 S. W. 540.

[55] State v. Jacobs, 54 S. W. 441, 152 Mo. 565; Vasquez v. State, 171 S. W. 1160, 74 Tex. Cr. R. 491.

[56] **Ga.** Holt v. State, 62 S. E. 992, 5 Ga. App. 184.

Ind. Welty v. State, 100 N. E. 73, 180 Ind. 411.

Kan. State v. Lynch, 121 P. 351, 86 Kan. 528.

Mich. People v. Prinz, 111 N. W. 739, 148 Mich. 307.

Mo. State v. Reakey, 62 Mo. 40.

Tex. Bailey v. State (Cr. App.) 30

determination of the elements of the offense is properly refused.[57]

§ 359. Necessity of definition of legal phrases in common use

The unexplained use of the words "burden of proof" is not improper,[58] although it is also proper to refuse instructions which fail to define such phrase.[59] It is not ordinarily necessary to define "preponderance," or "preponderance of the evidence," [60] in the absence of a request for an instruction on the subject.[61] So it is ordinarily not error to fail to define the words "felony" or "feloniously," [62] and it has been held that the court should not attempt

S. W. 669; Lindley v. State, 8 Tex. App. 445; Cady v. State, 4 Tex. App. 238.

[57] Whatley v. State, 39 So. 1014, 144 Ala. 68.

[58] Holmes v. Protected Home Circle, 204 S. W. 202, 199 Mo. App. 528; Steinwender v. Creath, 44 Mo. App. 356; Miller v. Woolman-Todd Boot & Shoe Co., 26 Mo. App. 57; Stine Oil & Gas Co. v. English (Tex. Civ. App.) 185 S. W. 1009.

[59] Walsh v. Metropolitan Life Ins. Co., 142 S. W. 815, 162 Mo. App. 546; Berger v. St. Louis Storage & Commission Co., 116 S. W. 444, 136 Mo. App. 36; Cramer v. Nelson, 107 S. W. 450, 128 Mo. App. 393; Laurence L. Prince & Co. v. St. Louis Cotton Compress Co., 86 S. W. 873, 112 Mo. App. 49; Mackin v. People's St. Ry. & E. L. & P. Co., 45 Mo. App. 82.

[60] **Cal.** Franklin v. Visalia Electric R. Co., 131 P. 776, 21 Cal. App. 270.

Del. Wilmington City Ry. Co. v. Truman, 72 A. 983, 7 Pennewill, 197.

Ill. Chicago City Ry. Co. v. Kastrzewa, 141 Ill. App. 10.

Iowa. State v. Richardson, 115 N. W. 220, 137 Iowa, 591.

Mo. Jones v. Durham, 67 S. W. 976, 94 Mo. App. 51.

Mont. Rand v. Butte Electric Ry. Co., 107 P. 87, 40 Mont. 398; State v. Felker, 71 P. 668, 27 Mont. 451.

Okl. City of Cushing v. Bay, 198 P. 877.

Tenn. Endowment Rank K. P. v. Steele, 69 S. W. 336, 108 Tenn. 624.

Tex. Galveston, H. & S. A. Ry. Co. v. Blumberg (Civ. App.) 227 S. W. 734; Gulf, C. & S. F. Ry. Co. v. Reagan (Civ. App.) 34 S. W. 796.

Greater weight of the evidence. The phrase "greater weight of the evidence" is not so technical as to require explanation or elaboration. If a party desire that it be defined, he may ask such definition by instructions tendered to the court. Ledford v. Hartford Fire Ins. Co., 161 Ill. App. 233.

[61] Georgia Southern & F. Ry. Co. v. Young Inv. Co., 46 S. E. 644, 119 Ga. 513; Schornak v. St. Paul Fire & Marine Ins. Co., 104 N. W. 1087, 96 Minn. 299

[62] **Ga.** Jordan v. State, 85 S. E. 327, 143 Ga. 449; Franklin v. State, 83 S. E. 196, 15 Ga. App. 349; Cantrell v. State, 80 S. E. 649, 141 Ga. 98; Faison v. State, 79 S. E. 39, 13 Ga. App. 180.

Iowa. State v. Penney, 84 N. W. 509, 113 Iowa, 691.

Ky. Collier v. Commonwealth, 169 S. W. 740, 160 Ky. 338; Metcalfe v. Commonwealth, 86 S. W. 534, 27 Ky. Law Rep. 704; Hutsell v. Commonwealth, 75 S. W. 225, 25 Ky. Law Rep. 262.

Mich. People v. Gregg, 135 N. W. 970, 170 Mich. 168.

Mo. State v. Rowland, 74 S. W. 622, 174 Mo. 373; State v. Weber, 156 Mo. 249, 56 S. W. 729, overruling State v. Brown, 104 Mo. 365, 16 S. W. 406; State v. Grant, 152 Mo. 57, 53 S. W. 432; State v. Barton, 142 Mo. 450, 44 S. W. 239; State v. Cantlin, 118 Mo. 100, 23 S. W. 1091; State v. Scott, 109 Mo. 226, 19 S. W. 89.

Wash. State v. Churchill, 100 P. 309, 52 Wash. 210.

Compare Holland v. State, 60 S. E. 205, 3 Ga. App. 465; State v. Johnson, 111 Mo. 578, 20 S. W. 302, explaining State v. Brown, 104 Mo. 365, 16 S. W. 406, State v. Hayes, 105

to define the legal meaning of the word "discretion."[63] The definition of "consideration" or "voluntary consideration" may not be necessary,[64] and failure to define the words "res gestæ" is not reversible error.[65]

§ 360. Defining words of witness

The court should not explain the meaning of words as used in the testimony of a witness.[66]

§ 361. Necessity of defining ordinary words having no special technical meaning

The meaning of words and phrases in common use, and which have no special technical meaning in the connection in which they are used,[67] or words which are plain in their meaning and easily understood by any one competent to serve on a jury, need not be

Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360, and State v. O'Connor, 105 Mo. 121, 16 S. W. 510.

Sufficient definition. On a murder trial, the definition of the word "felonious" as meaning "wickedly and against the administration of the law; unlawfully," is correct. State v. Parker, 106 Mo. 217, 17 S. W. 180.

[63] Holmes v. State, 119 P. 430, 6 Okl. Cr. 541.

[64] First Nat. Bank v. Garner, 118 N. E. 813, 187 Ind. 391, rehearing denied 119 N. E. 711, 187 Ind. 391; Farmers' Bank of West Louisville v. Birk, 201 S. W. 315, 179 Ky. 761.

[65] Calsky v. State, 39 S. W. 362, 37 Tex. Cr. R. 247.

[66] Smith v. Plant, 103 N. E. 58, 216 Mass. 91.

[67] **Fla.** Danford v. State, 43 So. 593, 53 Fla. 4.

Ga. Western Union Telegraph Co. v. Ford, 74 S. E. 70, 10 Ga. App. 606.

Ill. Henderson v. People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391.

Iowa. Wegner v. Kelly, 165 N. W. 449, 182 Iowa, 259, affirming judgment on rehearing 157 N. W. 206; State v. Pell, 119 N. W. 154, 140 Iowa, 655; Iowa State Sav. Bank v. Black, 91 Iowa, 490, 59 N. W. 283.

Ky. C. F. Kleiderer & Son v. Aldridge's Ex'x, 170 S. W. 23, 160 Ky. 638; Maysville & B. S. R. Co. v. Willis, 104 S. W. 1016, 31 Ky. Law Rep. 1249; Louisville & E. R. Co. v. Vincent, 96 S. W. 898, 29 Ky. Law Rep. 1049.

Me. Berry v. Billings, 47 Me. 328.

Mich. Miller v. Beck, 35 N. W. 899, 68 Mich. 76.

Mo. Ganahl v. United Rys. Co. of St. Louis, 197 S. W. 159, 197 Mo. App. 495; Moore v. McCutchen (App.) 190 S. W. 350; Morris v. St. Louis & S. F. R. Co., 168 S. W. 325, 184 Mo. App. 65; Clonts v. Laclede Gaslight Co., 140 S. W. 970, 160 Mo. App. 456; State v. Barrington, 95 S. W. 235, 198 Mo. 23; State v. McGuire, 91 S. W. 939, 193 Mo. 215; Kischman v. Scott, 166 Mo. 214, 65 S. W. 1031; Feary v. O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440; Farmer v. Farmer, 129 Mo. 530, 31 S. W. 926; State v. Harkins, 100 Mo. 666, 13 S. W. 830; Cottrill v. Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; Reeds v. Lee, 64 Mo. App. 683.

Neb. Home Fire Ins. Co. v. Decker, 75 N. W. 841, 55 Neb. 346.

N. J. State v. Rombolo, 103 A. 203, 91 N. J. Law, 560.

Tex. Lattimore v. Puckett & Wear (Civ. App.) 161 S. W. 951; Currington v. State, 161 S. W. 478, 72 Tex. Cr. R. 143; Blackburn v. State, 160 S. W. 687, 71 Tex. Cr. R. 625; Clay v. State, 146 S. W. 166, 65 Tex. Cr. R. 590; Southwestern Ry. Co. v. Bradford (Civ. App.) 139 S. W. 1046; Johnson v. W. H. Goolsby Lumber Co. (Civ. App.) 121 S. W. 883; Raley

defined.[66] Under this rule it is not necessary to define such words as "accommodation,"[69] "accrued,"[70] "agent,"[71] "assumed risk,"[72] "bona fide holder,"[73] "circumstantial evidence,"[74] "city,"[75] "cohabit,"[76] "conspiracy,"[77] "contributed,"[78] "control,"[79] "corroboration,"[80] "credible," or "credibility,"[81] "cruel or unusual man-

v. State, 105 S. W. 342, 47 Tex. Civ. App. 426; Robinson v. State (Cr. App.) 63 S. W. 869; A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 57 S. W. 575, 23 Tex. Civ. App. 328; Beard v. State, 53 S. W. 348, 41 Tex. Cr. R. 173; Galveston, H. & S. A. Ry. Co. v. Henning (Tex. Civ. App.) 39 S. W. 302, affirmed 40 S. W. 392, 90 Tex. 656.

Wash. Akin v. Bradley Engineering & Machinery Co., 99 P. 1038, 51 Wash. 658.

[68] **Cal.** People v. Wong Hing, 169 P. 357, 176 Cal. 699.

Colo. West v. People, 156 P. 137, 60 Colo. 488.

Ga. Jackson v. Georgia R. & Banking Co., 67 S. E. 898, 7 Ga. App. 644; Woodall v. State, 66 S. E. 619, 7 Ga. App. 245; Atlanta Baggage & Cab Co. v. Mizo, 61 S. E. 844, 4 Ga. App. 407.

Ill. People v. Capello, 118 N. E. 927, 282 Ill. 542; People v. Anderson, 87 N. E. 917, 239 Ill. 168.

Iowa. State v. Bresee, 114 N. W. 45, 137 Iowa, 673, 24 L. R. A. (N. S.) 103; State v. Bone, 87 N. W. 507, 114 Iowa, 537.

Ky. Kentucky Utilities Co. v. McCarty's Adm'r, 186 S. W. 150, 170 Ky. 543, modifying judgment 183 S. W. 237, 169 Ky. 38; J. V. Pilcher Mfg. Co. v. Teupe's Ex'x, 91 S. W. 1125, 28 Ky. Law Rep. 1350.

Mass. Commonwealth v. Buckley, 86 N. E. 910, 200 Mass. 346, 22 L. R. A. (N. S.) 225, 128 Am. St. Rep. 425.

Mo. State v. Long, 100 S. W. 587, 201 Mo. 664; Boettger v. Scherpe & Koken Architectural Iron Co., 38 S. W. 298, 136 Mo. 531; Goldsmith v. Wamsganz, 86 Mo. App. 1.

Mont. State v. Lewis, 159 P. 415, 52 Mont. 495.

Tex. Schramm v. Wolff (Civ. App.) 126 S. W. 1185; Trinity & B. V. Ry. Co. v. Elgin, 121 S. W. 577, 56 Tex. Civ. App. 573; Humphreys v. State, 34 Tex. Cr. R. 434, 30 S. W. 1066.

Vt. Eastman v. Curtis, 67 Vt. 432, 32 A. 232.

[69] Larimore v. Legg, 23 Mo. App. 645.

[70] McDonnell v. Nicholson, 67 Mo. App. 408.

[71] Harper v. Fidler, 105 Mo. App. 680, 78 S. W. 1034.

[72] Corell v. Williams & Hunting (Iowa) 148 N. W. 633.

[73] King v. Heilig, 203 Ill. App. 117.

In Missouri, however, it has been held that instructions should employ plain and unambiguous English, and to tell the jury that if defendant assigned his property in good faith and for the purpose of paying or securing his bona fide debts, that the assignment was not made to hinder, etc., without defining the terms "good faith" and "bona fide," is error. Bowles Live Stock Commission Co. v. Hunter, 91 Mo. App. 333.

[74] Pope v. Seaboard Air Line Ry., 94 S. E. 311, 21 Ga. App. 251.

[75] Stotler v. Chicago & A. Ry. Co., 98 S. W. 509, 200 Mo. 107.

[76] State v. Knost, 105 S. W. 616, 207 Mo. 18.

[77] Frederick v. Morse, 92 A. 16, 88 Vt. 126.

[78] Bunyan v. Loftus, 90 Iowa, 122, 57 N. W. 685.

[79] Texas Electric Ry. v. Stewart, 217 S. W. 1081.

[80] **Mo.** State v. Daly, 109 S. W. 53, 210 Mo. 664; Buckley v. State, 181 S. W. 729; Moore v. State, 144 S. W. 598, 65 Tex. Cr. R. 453; Harris v. State, 144 S. W. 232, 64 Tex. Cr. R. 594; Austin v. State, 101 S. W. 1162, 51 Tex. Cr. R. 327; Still v. State (Tex. Cr. App.) 50 S. W. 355.

Contra, People v. Sternberg, 111 Cal. 11, 43 P. 201; State v. Hunter, 80 S. W. 955, 181 Mo. 316; State v. McLain, 60 S. W. 736, 159 Mo. 340.

[81] Barber v. State, 142 S. W. 577,

ner,"[82] "dangerous,"[83] "deceptive," or "deceptively,"[84] "deliver," or "delivery,"[85] "drunkenness,"[86] "efficient and procuring cause,"[87] "exhibit,"[88] "extort,"[89] "fact,"[90] "flying switch,"[91] "fraud," "fraudulent," or "fraudulent statement," or kindred words,[92] "good repute,"[93] "habitual drunkard,"[94] "habitually,"[95] "imminent peril,"[96] "intoxicated,"[97] "lucid interval,"[98] "material fact,"[99] "materially,"[1] "may,"[2] "misrepresentation,"[3] "occupation," or "business,"[4] "open and gross,"[5] "passenger,"[6] "pimp,"[7] "prima facie,"[8] "procuring cause,"[9] "proper inspection,"[10] "pros-

64 Tex. Cr. R. 96; Chavarria v. State (Tex. Cr. App.) 63 S. W. 312.

[82] State v. Colvin, 126 S. W. 448, 226 Mo. 446; State v. Linney, 52 Mo. 40.

[83] Gilbert v. Hilliard (Mo. App.) 222 S. W. 1027.

[84] Glover v. American Hominy Flakes Co., 76 Mo. App. 103.

[85] Jameson v. Flournoy, 184 P. 910, 76 Okl. 227.

[86] State v. Bobbst, 190 S. W. 257, 269 Mo. 214.

Sufficient definition in absence of request for amplification. An instruction defining drunkenness as that condition of a person due to the excessive use of intoxicating liquors, in accordance with the common experience of the jurors, etc., was sufficient, in the absence of any request to amplify the same. People v. Lowrie, 128 N. W. 741, 163 Mich. 514.

[87] Ramsey v. Gibson (Tex. Civ. App.) 185 S. W. 1025.

[88] State v. Nichols, 170 S. W. 1110, 262 Mo. 113.

[89] State v. Louanis, 65 A. 532, 79 Vt. 463, 9 Ann. Cas. 194.

[90] In re Nutt's Estate, 185 P. 393, 181 Cal. 522.

[91] Lange v. Missouri Pac. Ry. Co., 91 S. W. 989, 115 Mo. App. 582.

[92] Barco v. Taylor, 63 S. E. 224, 5 Ga. App. 372; State v. Gregory, 71 S. W. 170, 170 Mo. 598; Kischman v. Scott, 65 S. W. 1031, 166 Mo. 214; Feary v. O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

[93] State v. Walker, 134 S. W. 516, 232 Mo. 252.

[94] Runkle v. Southern Pac. Milling Co. (Cal.) 195 P. 398.

[95] Johnson v. State, 104 S. W. 902, 51 Tex. Cr. R. 648.

[96] Bryant v. Kansas City Rys. Co. (Mo.) 228 S. W. 472.

[97] Mutual Life Ins. Co. v. Johnson, 166 P. 1074, 64 Okl. 222.

[98] Montgomery v. State, 151 S. W. 813, 68 Tex. Cr. R. 78.

[99] North Chicago St. R. Co. v. Shreve, 49 N. E. 534, 171 Ill. 438, affirming judgment 70 Ill. App. 666; State v. Davidson, 157 S. W. 890, 172 Mo. App. 356.

[1] Illinois Cent. R. Co. v. Tolar's Adm'r, 183 S. W. 242, 169 Ky. 114.

[2] Lewiston Milling Co. v. Cardiff (C. C. A. Idaho) 266 F. 753.

[3] Zackwik v. Hanover Fire Ins. Co. (Mo. App.) 225 S. W. 135.

[4] Figueroa v. State, 159 S. W. 1188, 71 Tex. Cr. R. 371; Dickson v. State, 146 S. W. 914, 66 Tex. Cr. R. 270.

[5] State v. Pedigo, 176 S. W. 556, 190 Mo. App. 293, certiorari dismissed (Sup.) State ex rel. Pedigo v. Robertson, 181 S. W. 987.

[6] Schwanenfeldt v. Metropolitan St. Ry. Co., 174 S. W. 143, 187 Mo. App. 588; Gillogly v. Dunham, 174 S. W. 118, 187 Mo. App. 551.

[7] People v. Gastro, 42 N. W. 937, 75 Mich. 127.

[8] Balfe v. People, 179 P. 137, 66 Colo. 94; Chicago & A. R. Co. v. Esten, 52 N. E. 954, 178 Ill. 192, affirming judgment 78 Ill. App. 326.

Contra, Nelson v. State, 168 P. 460, 14 Okl. Cr. 153.

[9] Lumsden v. Jones (Tex. Civ. App.) 227 S. W. 358.

[10] Brogan v. Union Traction Co., 86 S. E. 753, 76 W. Va. 698.

titution,"[11] "punitive," or "exemplary,"[12] "reasonable diligence,"[13] "reasonable proximity,"[14] "reasonable time,"[15] "reputation,"[16] "self-defense,"[17] "serious bodily injury,"[18] "stone,"[19] "substantial," or "substantially,"[20] and "theft."[21]

§ 362. Necessity of request for definition

As a general rule, a party who does not request an instruction defining a word or phrase cannot complain of the failure to give it;[22] this rule applying to the definition of such words as "accom-

[11] Clark v. State, 174 S. W. 354, 76 Tex. Cr. R. 348; Tores v. State (Tex. Cr. App.) 63 S. W. 880.

[12] St. Louis & S. F. R. Co. v. Moore, 58 So. 471, 101 Miss. 768, 39 L. R. A. (N. S.) 978, Ann. Cas. 1914B, 597; Distler v. Missouri Pac. Ry. Co., 147 S. W. 518, 163 Mo. App. 674.

In Michigan it has been held, in an action under a statute providing that one selling intoxicating liquor to a minor shall be liable for both actual and exemplary damages, that as "exemplary damages" does not mean "smart money," but means compensatory damages for wounded pride, mortification, injury to feelings, mental anxiety and the like, an instruction using the term "exemplary damages" should explain its real meaning. Hink v. Sherman, 129 N. W. 732, 164 Mich. 352.

[13] Texas Midland R. R. v. Ritchey, 108 S. W. 732, 49 Tex. Civ. App. 409.

[14] Oliver v. Forney Cotton Oil & Ginning Co. (Tex. Civ. App.) 226 S. W. 1094.

[15] Bettoki v. Northwestern Coal & Mining Co. (Mo. App.) 180 S. W. 1021; Houston & T. C. R. Co. v. Roberts, 109 S. W. 982, 50 Tex. Civ. App. 69.

[16] Pitman v. Drown, 195 S. W. 815, 176 Ky. 263.

[17] State v. Bailey, 88 S. W. 733, 190 Mo. 257.

Contra, Bone v. State, 68 So. 702, 13 Ala. App. 5.

[18] Thomas v. State, 116 S. W. 600, 55 Tex. Cr. R. 293.

[19] Commonwealth v. Carroll, 145 Mass. 403. 14 N. E. 618.

[20] Deatherage Lumber Co. v. Snyder, 65 Mo. App. 568.

[21] Bloch v. U. S. (C. C. A. Tex.) 261 F. 321, certiorari denied 40 S. Ct. 481, 253 U. S. 484, 64 L. Ed. 1025.

[22] **Ark.** Morris v. Collins, 191 S. W. 963, 127 Ark. 68.

Cal. People v. Hirsch, 132 P. 1062, 21 Cal. App. 737.

Ga. City of Americus v. Phillips, 79 S. E. 36, 13 Ga. App. 321.

Ill. Henderson v. People, 124 Ill. 607, 17 N. E. 68, 7 Am. St. Rep. 391.

Ind. Jenney Electric Mfg. Co. v. Flannery, 98 N. E. 424, 53 Ind. App. 397.

Iowa. Wegner v. Kelly, 165 N. W. 449, 182 Iowa, 259, affirming judgment on rehearing 157 N. W. 206; Richards v. Crosby, 162 N. W. 609, 179 Iowa, 1355; Wickwire v. Webster City Savings Bank, 133 N. W. 100, 153 Iowa, 225; State v. Mahoney, 97 N. W. 1089, 122 Iowa, 168; State v. Atkins, 97 N. W. 990, 122 Iowa, 161.

Ky. Louisville & E. R. Co. v. Vincent, 96 S. W. 898, 29 Ky. Law Rep. 1049; Louisville & N. R. Co. v. Fowler, 96 S. W. 568, 29 Ky. Law Rep. 905; Russell v. Cincinnati R. Co., 4 Ky. Law Rep. (abstract) 906.

Mass. Dunham v. Holmes, 113 N. E. 845, 225 Mass. 68.

Minn. Gruber v. German Roman Catholic Aid Ass'n of Minnesota, 129 N. W. 581, 113 Minn. 340; Kostuch v. St. Paul City Ry. Co., 81 N. W. 215, 78 Minn. 459.

Mo. Dabbs v. Kansas City Southern Ry. Co. (App.) 202 S. W. 276; State v. Fraser, 143 S. W. 545, 161 Mo. App. 333; Asmus v. United Rys. Co. of St. Louis, 134 S. W. 92, 152 Mo. App. 521; Kirby v. Lower, 124 S. W. 34, 139 Mo. App. 677.

N. D. Reichert v. Northern Pac. Ry. Co., 167 N. W. 127, 39 N. D. 114.

Pa. Lindemann v. Pittsburgh Rys. Co., 96 A. 1085, 251 Pa. 489.

S. C. State v. Allen, 96 S. E. 401, 110 S. C. 278.

modation,"[23] "accomplice,"[24] "adverse possession,"[25] "agent,"[26] "aid,"[27] "assault,"[28] "burden of proof,"[29] "carnal knowledge,"[30] "cattle guards,"[31] "circumstantial evidence,"[32] "concealed wea-

Tex. Millsaps v. Johnson (Civ. App.) 190 S. W. 202; Galveston, H. & S. A. Ry. Co. v. Roemer (Civ. App.) 173 S. W. 229; Ellerd v. Campfield (Civ. App.) 161 S. W. 392; Day v. Becker (Civ. App.) 145 S. W. 1197; Kretzschmar v. Peschel (Civ. App.) 144 S. W. 1021; Knight v. Durham (Civ. App.) 136 S. W. 591; Berry v. State (Civ. App.) 135 S. W. 631; St. Louis, B. & M. Ry. Co. v. West, 131 S. W. 839, 62 Tex. Civ. App. 553; Texas & N. O. R. v. Walker, 125 S. W. 99, 58 Tex. Civ. App. 615; Galveston, H. & S. A. Ry. Co. v. Harper, 114 S. W. 1168, 53 Tex. Civ. App. 614, judgment affirmed on rehearing, 114 S. W. 1199, 53 Tex. Civ. App. 614; Western Union Telegraph Co. v. Craven (Civ. App.) 95 S. W. 633; Pacific Mut. Life Ins. Co. v. Terry, 84 S. W. 656, 37 Tex. Civ. App. 486; Galveston, H. & S. A. Ry. Co. v. Ford, 54 S. W. 37, 22 Tex. Civ. App. 131; Arkansas Const. Co. v. Eugene, 50 S. W. 736, 20 Tex. Civ. App. 601; Schulz v. Tessman (Tex. Civ. App.) 48 S. W. 207, reversed 49 S. W. 1031, 92 Tex. 488.

Wis. Holmes v. State, 102 N. W. 321, 124 Wis. 133.

Definition of statutory phrase. In an action for causing the death of plaintiff's son, failure to define the meaning of the statutory phrase, "such damages as they may think proportioned to the injury," is not ground for reversal, where no request is made therefor, and the court charges the jury in the language of the statute, and gives the construction placed on it by the supreme court, and also charges that the jury cannot give punitive, but only compensatory, damages. Nohrden v. Northeastern R. Co., 37 S. E. 228, 59 S. C. 87, 82 Am. St. Rep. 826. Where a statute provides that if a person is injured at a crossing, and the railroad corporation neglects to give the statutory signals, and such neglect contributes to the injury, the corporation shall be liable, etc., it is not error to omit to explain to the jury the meaning of the term "contributes," as used in said statute, where no request therefor is made at the trial. Wragge v. South Carolina & G. R. Co., 47 S. C. 105, 25 S. E. 76, 58 Am. St. Rep. 870, 33 L. R. A. 191.

Necessity of request for fuller definition. In a homicide case, if the court's charge on manslaughter, in defining adequate cause as being such as "would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection," was insufficient, in that the evidence showed accused to be subject to epileptic fits and nervous and irritable, he should have offered some other definition. Zimmerman v. State, 215 S. W. 101, 85 Tex. Cr. R. 630.

[23] Sales v. Martin, 191 S. W. 480, 173 Ky. 616.

[24] Driggers v. United States, 104 S. W. 1166, 7 Ind. T. 752, judgment reversed 95 P. 612, 21 Okl. 60, 1 Okl. Cr. 167, 129 Am. St. Rep. 823, 17 Ann. Cas. 66.

[25] Western North Carolina Land Co. v. Scaife (C. C. A. N. C.) 80 F. 352, 25 C. C. A. 461; Robinson v. McIver (Tex. Civ. App.) 23 S. W. 915.

[26] Smith v. Brinson, 89 S. E. 363, 145 Ga. 406.

[27] State v. McDonald, 193 P. 179, 107 Kan. 568.

[28] Roark v. State, 32 S. E. 125, 105 Ga. 736; State v. Baker, 135 N. W. 1097, 157 Iowa, 126, judgment modified on rehearing 138 N. W. 841, 157 Iowa, 126.

[29] Howard v. Beldenville Lumber Co., 108 N. W. 48, 129 Wis. 98.

[30] Drake v. State, 151 S. W. 315, 68 Tex. Cr. R. 94.

[31] Quinn v. Atchison, T. & S. F. Ry. Co. (Mo. App.) 193 S. W. 933.

[32] Hamilton v. State, 89 S. E. 449, 18 Ga. App. 295.

pons,"[33] "conspiracy,"[34] "conspiracy to defraud creditors,"[35] "converted,"[36] "deliberation and premeditation,"[37] "disease of a serious nature,"[38] "efficient and procuring cause,"[39] "exigency,"[40] "false," or "forgery,"[41] "felony,"[42] "fornication,"[43] "fraud" or "undue influence,"[44] "fraudulent taking,"[45] "gambling house,"[46] "heat of passion,"[47] "in evasion of the statute,"[48] "inmate,"[49] "interstate commerce,"[50] "malice,"[51] "malt,"[52] "margin,"[53] "market value,"[54] "mitigate, excuse or justify,"[55] "murder,"[56] "negligence," "ordinary care," and kindred words,[57] "nighttime,"[58] "no-

[33] Johnson v. State, 40 So. 678, 51 Fla. 44.

[34] Vasser v. State, 87 S. W. 635, 75 Ark. 373.

[35] Wiler v. Manley, 51 Ind. 169.

[36] Walker v. Lewis, 124 S. W. 567, 140 Mo. App. 26.

[37] State v. Armstrong, 79 P. 490, 37 Wash. 51.

[38] Woodmen of the World v. Locklin, 67 S. W. 331, 28 Tex. Civ. App. 486.

[39] Black v. Wilson (Tex. Civ. App.) 187 S. W. 493.

[40] Rocci v. Massachusetts Acc. Co., 110 N. E. 477, 226 Mass. 545.

[41] People v. Warner, 104 Mich. 337, 62 N. W. 405.

[42] Evans v. State, 102 S. E. 43, 24 Ga. App. 700; Smith v. State, 99 S. E. 142, 23 Ga. App. 541; Cook v. State, 96 S. E. 393, 22 Ga. App. 266; Pressley v. State, 63 S. E. 784, 132 Ga. 64; People v. Meyer, 124 N. E. 447, 289 Ill. 184.

[43] Hembree v. State, 86 S. E. 286, 17 Ga. App. 117.

[44] Pye v. Pye, 65 S. E. 424, 133 Ga. 246; Bugg v. Holt, 97 S. W. 29, 29 Ky. Law Rep. 1208.

[45] Ellington v. State, 140 S. W. 1102, 63 Tex. Cr. R. 420.

[46] Schmidt v. Territory, 108 P. 246, 13 Ariz. 77; Bluhakis v. State, 88 S. E. 911, 18 Ga. App. 112.

[47] State v. Buffington, 81 P. 465, 71 Kan. 804, 4 L. R. A. (N. S.) 154; Beauregard v. State, 131 N. W. 347, 140 Wis. 280.

[48] State v. Fountain, 168 N. W. 285, 183 Iowa, 1159.

[49] State v. Burley, 165 N. W. 190, 181 Iowa, 981.

[50] Malott v. Hood, 66 N. E. 247, 201 Ill. 202, affirming judgment 99 Ill. App. 360.

[51] People v. Glaze, 72 P. 965, 139 Cal. 154; State v. Moynihan, 106 A. 817, 93 N. J. Law, 253.

[52] Edwards v. City of Gulfport, 49 So. 620, 95 Miss. 148.

[53] Gill v. State, 30 Ohio Cir. Ct. R. 278.

[54] Texarkana & Ft. S. Ry. Co. v. Spencer, 67 S. W. 196, 28 Tex. Civ. App. 251.

[55] Kelly v. State, 151 S. W. 304, 68 Tex. Cr. R. 317.

[56] Dixon v. State, 64 So. 468, 106 Miss. 697, overruling suggestions of error 64 So. 379.

[57] **U. S.** Western Union Tel. Co. v. Engler (C. C. A. Nev.) 75 F. 102, 21 C. C. A. 246, affirming judgment Engler v. Western Union Tel. Co. (C. C.) 69 F. 185.

Ark. Western Coal & Mining Co. v. Jones, 87 S. W. 440, 75 Ark. 76.

Cal. O'Connor v. United Railroads of San Francisco, 141 P. 809, 168 Cal. 43.

Colo. Colorado & S. Ry. Co. v. Webb, 85 P. 683, 36 Colo. 224.

Ga. Wakefield v. Lee, 90 S. E. 224, 18 Ga. App. 648; Atlantic & B. Ry. Co. v. Smith, 58 S. E. 542, 2 Ga. App. 294.

Iowa. Fisher v. Cedar Rapids & M. C. Ry. Co., 157 N. W. 860, 177 Iowa, 406.

Ky. Blue Grass Traction Co. v. Ingles, 131 S. W. 278, 140 Ky. 488; South Covington & C. St. Ry. Co. v. Brown, 104 S. W. 703, 31 Ky. Law Rep. 1072; Cincinnati, N. O. & T. P.

[58] Shaffel v. State, 72 N. W. 888, 97 Wis. 377.

tice," [59] "not guilty," [60] "part with ownership," [61] "penetration," [62] "plea of avoidance," [63] "premeditated design," [64] "premises," [65] "prima facie," or "prima facie evidence," [66] "probable profits," [67] "proximate cause," [68] "proximate result," [69] "publication," [70] "reasonable cause," [71] "remove," [72] "reputation," [73] "robbery," [74] "spe-

Ry. Co. v. Cecil, 90 S. W. 585, 28 Ky. Law Rep. 830; Cincinnati, etc., R. Co. v. Richardson, 14 Ky. Law Rep. (abstract) 367.

Mo. Unionville Produce Co. v. Chicago, B. & Q. R. Co., 153 S. W. 63, 168 Mo. App. 168; Rippetoe v. Missouri, K. & T. Ry. Co., 122 S. W. 314, 138 Mo. App. 402; Rattan v. Central Electric Ry. Co., 96 S. W. 735, 120 Mo. App. 270; Ashby v. Elsberry & N. H. Gravel Road Co., 85 S. W. 957, 111 Mo. App. 79; Priesmeyer v. St. Louis Transit Co., 77 S. W. 313, 102 Mo. App. 518; Quirk v. St. Louis United Elevator Co., 126 Mo. 279, 28 S. W. 1080; Johnson v. Missouri Pac. Ry. Co., 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351.

N. J. Blumenfeld v. Hudson & M. R. Co., 99 A. 312, 89 N. J. Law, 580.

Tex. Atchison, T. & S. F. Ry. Co. v. Mills, 116 S. W. 852, 53 Tex. Civ. App. 359; International & G. N. R. Co. v. Tisdale, 87 S. W. 1063, 39 Tex. Civ. App. 372; Taylor v. Houston & T. C. R. Co. (Civ. App.) 80 S. W. 260; Western Union Tel. Co. v. James, 73 S. W. 79, 31 Tex. Civ. App. 503; International & G. N. R. Co. v. Clark (Civ. App.) 71 S. W. 587, judgment reversed 72 S. W. 584, 96 Tex. 349; Dallas Consol. Electric St. Ry. Co. v. Broadhurst, 68 S. W. 315, 28 Tex. Civ. App. 630; Milligan v. Texas & N. O. R. Co., 66 S. W. 896, 27 Tex. Civ. App. 600; Galveston, H. & S. A. Ry. Co. v. Smith, 57 S. W. 999, 24 Tex. Civ. App. 127; Galveston, H. & S. A. Ry. Co. v. Waldo (Civ. App.) 26 S. W. 1004; Galveston, H. & S. A. Ry. Co. v. Arispe, 81 Tex. 517, 17 S. W. 47.

Wash. Cogswell v. West St. & N. E. Electric Rv Co., 5 Wash. 46, 31 P. 411.

Wis. Brunette v. Town of Gagen, 82 N. W. 564, 106 Wis. 618.

Insufficient definition. Where the court charged that "by the term 'negligence,' when used in this charge, is meant the omission or failure to do something which an ordinarily prudent and careful person would have done under like circumstances," it was held that appellant waived objection that the definition did not include the doing of any affirmative act. by his failure to request a further charge to that effect. Campbell v. Warner (Civ. App.) 24 S. W. 703.

[59] Collins v. Kelsey (Tex. Civ. App.) 97 S. W. 122.

[60] Knoxville, C. G. & L. R. Co. v. Wyrick, 42 S. W. 434. 99 Tenn. 500.

[61] Wylie v. State, 215 S. W. 593, 140 Ark. 24.

[62] State v. Oden, 138 P. 1083, 69 Or. 385.

[63] Texas & N. O. R. Co. v. Scott, 71 S. W. 26, 30 Tex. Civ. App. 496.

[64] McDonald v. State, 46 So. 176. 55 Fla. 134.

[65] Carter v. State, 94 S. E. 630, 21 Ga. App. 493.

[66] Fagnani v. State, 140 S. W. 542. 66 Tex. Cr. R. 291; San Antonio & A. P. Ry. Co. v. Ilse (Tex. Civ. App.) 59 S. W. 564.

[67] Ramsay v. Meade, 86 P. 1018, 37 Colo. 465.

[68] Varney v. Ajax Forge Co., 204 Ill. App. 208; Singer v. Martin, 164 P. 1105, 96 Wash. 231; Miles v. Stanke. 89 N. W. 833, 114 Wis. 94.

[69] Western Union Tel. Co. v. Giffin. 65 S. W. 661, 27 Tex. Civ. App. 306.

[70] Chaddick v. Haley, 81 Tex. 617, 17 S. W. 233.

[71] Ross v. Grand Pants Co., 156 S. W. 92, 170 Mo. App. 291.

[72] State v. Bosworth, 152 N. W. 581, 170 Iowa, 329.

[73] Pitman v. Drown, 195 S. W. 815, 176 Ky. 263.

[74] People v. Rogers, 126 P. 143, 163 Cal. 476.

cie," "in kind" and "for consumption," [75] "subsidiary facts," [76] "substantial performance," [77] "successful impeachment," [78] "unlawful purpose," [79] "usages of civilized warfare," [80] and "wantonly" or "willfully." [81]

§ 363. Effect of failure to give definition

The failure of the court to define a word or phrase will not constitute ground for reversal, where it appears that the jury understood its meaning,[82] or that they could not have attached to it a meaning more damaging to the appellant than that which the court intended to convey.[83]

§ 364. Sufficiency of definition or explanation of terms

Where the court undertakes to define words or phrases, it should use terms having a precise and definite meaning.[84] In an action based on a statute, it will usually be sufficient to define terms used therein in the language of the statute.[85] The court is not required to supplement a definition by the use of illustrations.[86] The jury should not be told to look to the evidence for the "ordinary and usual" meaning of words and terms, since such meaning is a matter for the determination by the jury upon their own knowledge, information, and experience, independent of evidence or instruction.[87] It is the better practice to adhere to charges which have already received the approval of the court of last resort.[88]

[75] Foote v. Kelley, 55 S. E. 1045, 126 Ga. 799.

[76] Hinshaw v. State (Ind. Sup.) 47 N. E. 157, 147 Ind. 334.

[77] Connell v. Higgins, 150 P. 769, 170 Cal. 541.

[78] Kelly v. State, 88 S. E. 822, 145 Ga. 210.

[79] State v. Jacobs, 97 S. E. 835, 111 S. C. 283.

[80] White v. Crump, 19 W. Va. 583.

[81] State v. Barrett, 65 S. E. 894, 151 N. C. 665.

[82] Miller v. Barnett, 101 S. W. 155, 124 Mo. App. 53.

[83] Cody v. Gremmler, 99 S. W. 46, 121 Mo. App. 359.

[84] Equitable Produce & Stock Exchange v. Keyes, 67 Ill. App. 460; Ware v. Flory, 201 S. W. 593, 199 Mo. App. 60.

Definitions lacking in precision. In an action for personal injuries from a defective sidewalk, there was no error in refusing an instruction in which the word "reasonably" was defined to mean "in a reasonable manner; consistent with reason; in a moderate degree; tolerably." York v. City of Everton, 97 S. W. 604, 121 Mo. App. 640.

"Etc." The use of the expression "etc." in an instruction defining actual malice as "actual ill will, hatred, etc.," is harmless error; the meaning of the word "malice" being well understood. Louisville Press Co. v. Tennelly, 49 S. W. 15, 105 Ky. 365, 20 Ky. Law Rep. 1231.

[85] Skeen v. Chambers, 86 P. 492, 31 Utah, 36.

[86] Rowe v. United Commercial Travelers' Ass'n, 172 N. W. 454, 186 Iowa, 454, 4 A. L. R. 1235.

[87] Garrity v. Catholic Order of Foresters, 148 Ill. App. 189, judgment affirmed 90 N. E. 753, 243 Ill. 411.

[88] State v. Nerzinger, 119 S. W. 379, 220 Mo. 36; Miller v. State, 119 N. W. 850, 139 Wis. 57.

§ 365. Sufficiency of definition of criminal offense

In a criminal prosecution it is not improper for the court to define the crime charged in the exact words of the statutory definition of it,[89] and it is perhaps better that the court should do so;[90] and it is no objection to quoting the statute that there is no evidence that the defendant has made use of all the means designated in the statute of committing the crime charged;[91] but it is not necessary for the court to use the words of the statute in defining the offense, so long as the language which it does use has the same meaning and cannot be misconstrued by the jury.[92]

Where the statute on which a criminal prosecution is based defines more than one offense, the court should give to the jury only that part of the statute dealing with the offense charged;[93] but it will not be reversible error to quote the statute in full, if the court limits its application to the allegations of the indictment.[94]

[89] **Ill.** Duncan v. People, 134 Ill. 110, 24 N. E. 765.

Iowa. State v. Wilson, 141 N. W. 337, 157 Iowa, 698.

Mont. State v. Tracey, 90 P. 791, 35 Mont. 552.

Mo. State v. Frank, 103 Mo. 120, 15 S. W. 330; State v. Miller, 93 Mo. 263, 6 S. W. 57.

Neb. Alt v. State, 129 N. W. 432, 88 Neb. 259, 35 L. R. A. (N. S.) 1212.

Tex. Jackson v. State (Cr. App.) 38 S. W. 990.

Wis. State v. Essex, 175 N. W. 795, 170 Wis. 512; Giskie v. State, 71 Wis. 612, 38 N. W. 334.

Defining "practice of dentistry." An instruction on a trial for practicing dentistry without a license, which defines the practice of dentistry in the language of the statute, regulating the practice, is not erroneous. People v. Fortch, 110 P. 823, 13 Cal. App. 770.

[90] Long v. State, 23 Neb. 33, 36 N. W. 310.

[91] People v. McGonegal, 62 Hun, 622, 17 N. Y. S. 147.

[92] Jones v. State, 99 S. E. 893, 24 Ga. App. 129; State v. Ireland, 83 P. 1036, 72 Kan. 265; Holmes v. State, 118 N. W. 99, 82 Neb. 406; Adkins v. State, 56 S. W. 63, 41 Tex. Cr. R. 577.

Departure from statute after once quoting it. Where the precise terms of the statute are once used, and thereafter there is a slight departure from the literal words of the statute, the obvious equivalent being used, no reversible error is committed. Ward v. State, 126 S. W. 1145, 59 Tex. Cr. R. 62.

[93] Jones v. State, 22 Tex. App. 680, 3 S. W. 478; Clubb v. State, 14 Tex. App. 192.

[94] Simons v. State (Cr. App.) 34 S. W. 619; Hargrave v. State (Cr. App.) 30 S. W. 444.

CHAPTER XXIX

NECESSITY AND PROPRIETY OF INSTRUCTIONS AS TO DUTIES OF JURY

§ 366. In general.
367. Instructions as to province of court and jury.
368. Duty of court to avoid coercing jury.
369. Urging agreement.
370. Encouraging disagreement.
371. Charges that juror should not surrender his individual judgment or conscientious convictions.
372. Instructions tending to increase feeling of responsibility by jury.
373. Instructions objectionable or criticized as tending to lessen sense of responsibility of jurors.
374. Obligation of oath.
375. Duty to look to the whole evidence.
376. Duty to reconcile conflicting evidence.

§ 366. In general

The giving of cautionary instructions with respect to the duties of the jury rests largely in the discretion of the trial court.[1] Thus there is no error in refusing a requested instruction that special charges given by the court at the request of either party, have the same dignity and binding force as the main charge of the court, and that such special charges should be given the same consideration as the main charge.[2] So the refusal of instructions that the jury should find upon the issues submitted without reference to their opinions as to the legal rights of the parties is not error.[3] So the court is not required to tell the jury to specify in their general verdict under what count or counts of the declaration the same is returned.[4] On the other hand, cautionary instructions may be proper as to the right to sue in one county for an injury occurring in another county,[5] or as to the duty of the jury to consider written and oral instructions together,[6] or as to their duty to consider the appearance of the witnesses on the stand,[7] or that the jury must answer a special question submitted one way or the other,[8] or as to

[1] Penney v. Johnston, 142 Ill. App. 634; Bernier v. Nute, 94 A. 509, 77 N. H. 568; Barnhart v. North Pacific Lumber Co., 162 P. 843, 82 Or. 657; Childers v. Brown, 158 P. 166; 81 Or. 1, Ann Cas. 1918D, 170.

[2] St. Louis Southwestern Ry. Co. of Texas v. Langston (Tex. Civ. App.) 125 S. W. 334.

[3] Stine Oil & Gas Co. v. English (Tex. Civ. App.) 185 S. W. 1009.

[4] Junction Min. Co. v. Ench, 111 Ill. App. 346.

[5] St. Louis, I. M. & S. R. Co. v. Thurman, 161 S. W. 1054, 110 Ark. 188.

[6] Birmingham Ry., Light & Power Co. v. Jackson, 73 So. 627, 198 Ala. 378.

[7] Huebner v. State, 111 N. W. 63, 131 Wis. 162.

[8] Stevens v. Beardsley, 96 N. W. 571, 134 Mich. 506.

the order of the jury's deliberations,[9] or as to the duty of the jury not to act arbitrarily.[10]

In a criminal case the court should avoid giving the jury the impression that the conviction of the guilty is of more importance than the acquittal of the innocent,[11] but it is not improper to tell the jury that they should neither convict the innocent nor acquit the guilty.[12] The question of granting mercy to the accused in case of a conviction not being for the jury, it is not error to so instruct them,[13] and it is proper to refuse to instruct that, if the evidence is evenly balanced, they should lean to the side of mercy.[14]

The general charge of the court in a criminal case should always include the direction that if the jury do not believe the defendant to be guilty they must acquit him.[15]

§ 367. Instructions as to province of court and jury

In civil cases, and in many jurisdictions in criminal cases as well, it is proper to instruct the jury that, while they are authorized to determine the facts, they must take the law governing the same from the court,[16] and that they are not to take the law from counsel,[17] and in some jurisdictions such an instruction must be given on request,[18] although it is not necessary to state such rule in every instruction.[19]

In jurisdictions where the court is required to instruct, on request, in a criminal case, that the jury may determine the law and the facts, it may nevertheless refuse to tell the jury that they can dis-

[9] Randall v. Sterling, D. & E. Electric Ry. Co., 158 Ill. App. 56; Louisville, N. A. & C. Ry. Co. v. Stevens, 87 Ind. 198.

[10] State v. Wilson, 141 N. W. 337, 157 Iowa, 698.

[11] Koenigstein v. State, 162 N. W. 879, 101 Neb. 229.

[12] Commonwealth v. Dennery, 102 A. 874, 259 Pa. 223.

[13] Avery v. State, 27 So. 505, 124 Ala. 20; Dinsmore v. State, 85 N. W. 445, 61 Neb. 418.

[14] Kirby v. State, 44 So. 38, 151 Ala. 66; Russell v. State (Ala.) 38 So. 291.

[15] Steagald v. State, 22 Tex. App. 464, 3 S. W. 771.

[16] Sharpless v. Pantages, 172 P. 384, 178 Cal. 122; Hill v. State, 97 S. E. 442, 148 Ga. 521; Council v. Teal, 49 S. E. 806, 122 Ga. 61; Akridge v. Nobile, 41 S. E. 78, 114 Ga. 949; Jefferson v. State, 158 S. W. 520, 71 Tex. Cr. R. 120.

Respective provinces of court and jury. An instruction that the jury is supreme in the realm of fact, and that the court is supreme in the realm of law, whether it correctly states it or not, is proper. White v. East Side Mill & Lumber Co., 164 P. 736, 84 Or. 224.

[17] Anderson v. State, 50 S. E. 51, 122 Ga. 175; Cohen v. City of Chicago, 197 Ill. App. 377; Hyde v. Town of Swanton, 47 A. 790, 72 Vt. 242.

[18] Chicago & E. I. R. Co. v. Burridge, 71 N. E. 838, 211 Ill. 9, reversing judgment 107 Ill. App. 23; Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543; Chicago & E. I. R. Co. v. Stonecipher, 90 Ill. App. 511.

[19] Chicago Union Traction Co. v. O'Brien, 117 Ill. App. 183, judgment affirmed 76 N. E. 341, 219 Ill. 303.

regard the law given to them by the court,[20] and after the court has informed the jury that they are the judges of the law as well as of the facts, it will be misleading and erroneous to tell them that common sense is their best guide, unless its application is limited to the value and weight of the evidence.[21] In the absence of a request therefor, the court need not instruct that the jury are the judges of the law and the facts.[22]

In most jurisdictions it is not improper, or at least it is not reversible error, to tell the jury that they are the exclusive or sole judges of the credibility of the witnesses and of the weight to be given to their testimony,[23] although they are not always so,[24] and

[20] Bridgewater v. State, 55 N. E. 737, 153 Ind. 560. See State v. Powell, 33 So. 748, 109 La. 727.

Instructions held proper. An instruction that it was for the jury to determine the facts of the case and to apply to such facts the law as stated in the instructions, and that the instructions given should be considered as an entire series, was not open to attack on the ground that it was against the plain language of the statute that the jury shall be the judges of the law as well as of the facts. People v. Mirabella, 128 N. E. 374, 294 Ill. 246.

[21] Wright v. State, 69 Ind. 163, 35 Am. Rep. 212.

[22] Webb v. State, 99 S. E. 630, 149 Ga. 211; Killian v. State, 92 S. E. 227, 19 Ga. App. 750; Williams v. State, 74 S. E. 902, 11 Ga. App. 151; Reddick v. State, 74 S. E. 901, 11 Ga. App. 150; Keyes v. State, 122 Ind. 527, 23 N. E. 1097.

[23] **Ala.** Brown v. State, 38 So. 268, 142 Ala. 287.

Cal. People v. Davis, 81 P. 716, 1 Cal. App. 8, transfer to Supreme Court denied 81 P. 718, 147 Cal. 346.

Fla. Glover v. State, 22 Fla. 493.

Ga. Central of Georgia Ry. Co. v. McGuire, 73 S. E. 702, 10 Ga. App. 483.

Ill. Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406, affirming 38 Ill. App. 33; Illinois Cent. R. Co. v. Smith, 111 Ill. App. 177.

Ind. Tucker v. Eastridge, 100 N. E. 113, 51 Ind. App. 632.

Iowa. State v. Dunn, 89 N. W. 984, 116 Iowa, 219.

Mo. State v. Maupin, 93 S. W. 379, 196 Mo. 164.

Neb. Parkins v. Missouri Pac. Ry. Co., 93 N. W. 197, 4 Neb. (Unof.) 1.

Tenn. East Tennessee, V. & G. R. Co. v. Fain, 12 Lea, 35.

Tex. International & G. N. R. Co. v. Phillips, 69 S. W. 107, 29 Tex. Civ. App. 336.

See State v. Kelly, 73 Mo. 608.

Flatly contradictory evidence. In the case of flatly contradictory evidence, the court may instruct the jury to judge for themselves the credibility of the witnesses; and if the liberty so given is abused by the jury, it will be remedied by the court in subsequently setting aside the verdict. Lanning v. Chicago, B. & Q. R. Co., 68 Iowa, 502, 27 N. W. 478.

Charge that jury are judges of what is in evidence. Though it is not accurate to charge the jury that they are the judges of what is in evidence, where the context shows that the meaning intended is that the jury are the judges of what the evidence proves, the verbal inaccuracy is not misleading. Chattanooga, R. & G. R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853.

Charge that jury are sole judges of every fact essential to proof of crime alleged. It was not error to refuse an instruction that the jury are the sole judges of the facts, and every fact essential to the proof of the crime alleged, since such instruction might have misled the jury into the belief that they were judges as to what were the essential facts to be proved by the state. State v. Simas, 62 P. 242, 25 Nev. 432.

[24] Denver Tramway Co. v. Owens, 20 Colo. 107, 36 P. 848.

in some jurisdictions the rule in criminal cases is that the court should so instruct on the request of the defendant.[25] The giving of such an instruction, in other jurisdictions, lies in the discretion of the court,[26] and in some jurisdictions it is held that, while such an instruction is not per se reversible error,[27] it is useless and may be prejudicial error, as the jury may take it as an intimation that some of the witnesses are not entitled to credit and that some of the testimony is without weight.[28]

In the federal courts in defining the respective provinces of the court and jury, the charge should state that in respect to the law of the case the instructions of the court are controlling and that upon matters of fact, the credibility of witnesses, the weight of evidence, and the like the jury, although it may be advised by the court, must finally exercise an independent judgment.[29]

§ 368. Duty of court to avoid coercing jury

There should be nothing in the intercourse of the court with the jury having the least appearance of duress or coercion,[30] and it has been held error to tell the jury that disobedience of the instructions of the court will expose them to punishment for contempt.[31] Where separate indictments against different defendants are tried together, an instruction that the jury may find all of the defendants guilty,

[25] **Minn.** State v. Sailor, 153 N. W. 271, 130 Minn. 84.

Tex. Taylor v. State, 100 S. W. 393, 50 Tex. Cr. R. 560; Wadhams v. State, 99 S. W. 1014, 50 Tex. Cr. R. 599; Binyon v. State (Tex. Cr. App.) 56 S. W. 339; Lensing v. State (Tex. Cr. App.) 45 S. W. 572; Barbee v. State, 23 Tex. App. 199, 4 S. W. 584; Jackson v. State, 22 Tex. App. 442, 3 S. W. 111.

Utah. People v. Chadwick, 7 Utah, 134, 25 P. 737.

Instructions sufficient within rule. A charge that the jury are the "exclusive judges of the facts of the case and the weight of the testimony" sufficiently instructs them that they are the exclusive judges of the credibility of the witnesses. Allison v. State, 14 Tex. App. 402.

Necessity of request. Failure to instruct that the jury are the exclusive judges of questions of fact is not ground for reversal in the absence of a request. State v. Sailor, 153 N. W. 271, 130 Minn. 84.

[26] People v. Boggs, 20 Cal. 432; Pittsburgh, C., C. & St. L. Ry. Co. v. Collins (Ind.) 80 N. E. 415.

Necessity of request for instructions. Where a party is apprehensive that the jury may be unduly influenced by the expression of the court in its instructions of its opinion of the facts, he should specially request the court to charge the jury that they, and not the court, are the exclusive judges of all questions of fact. Bonness v. Felsing, 106 N. W. 909, 97 Minn. 227, 114 Am. St. Rep. 707.

[27] Transatlantic Fire Ins. Co. v. Bamberger (Ky.) 11 S. W. 595; Peoples v. Commonwealth, 87 Ky. 487, 9 S. W. 810; Forman v. Commonwealth, 86 Ky. 605, 6 S. W. 579.

[28] Smith v. Commonwealth (Ky.) 8 S. W. 192.

[29] Mobile & O. R. Co. v. Wilson (C. C. A. Ill.) 76 F. 127, 22 C. C. A. 101.

[30] Price v. Carter, 22 So. 715, 39 Fla. 362; Green v. Telfair, 11 How. Prac. (N. Y.) 260.

[31] Price v. Carter, 22 So. 715. 39 Fla. 362.

or find some guilty and some not guilty, but they cannot find a verdict as to some and disagree as to others, is erroneous, as tending to coerce the jury. In such a case, if the jury cannot agree, an accused is entitled as of right to go before a new jury.[32]

On the other hand, in a criminal case an objection to instructions on the ground that they are calculated to coerce and intimidate the jury to the prejudice of the defendant does not lie merely because they call the attention of the jury to their plain duty, as where the jury are told that they dare not go outside of the jury box in considering the testimony;[33] nor are instructions objectionable on such ground because they say that the good order and welfare of the community are involved in the case,[34] nor because the jury is directed to receive the law as stated by the court, although they may believe that the court is wrong, or that the law should be otherwise,[35] nor because the jury are advised that a violation of certain proper directions by the court with respect to the conduct of the jury will be punished severely.[36]

The use of the words "should," "shall," or "will," in an instruction with respect to finding for one party or the other if the jury believe from the evidence certain things to exist, is not considered erroneous in some jurisdictions, as tending to coerce a verdict.[37]

§ 369. Urging agreement

In a civil action the jury may be urged to make an effort to agree, and to that end to reason with one another.[38] It is proper to charge as to the duty of a juror finding himself in the minority to consider whether he is more likely to be right than the majority,[39] and it is not improper to tell the jury to return a verdict as soon as they

[32] Bucklin v. United States, 159 U. S. 682, 16 Sup. Ct. 182, 40 L. Ed. 305.

[33] State v. Mills. 60 S. E. 664, 79 S. C. 187.

[34] State v. Tarlton, 118 N. W. 706, 22 S. D. 495.

[35] State v. Johnson, 149 N. W. 730, 34 S. D. 601.

[36] Villereal v. State (Tex. Cr. App.) 61 S. W. 715.

[37] **Ala.** Kiker v. Hitt, 66 So. 632, 189 Ala. 652.

Ill. Central Ry. Co. v. Bannister, 62 N. E. 864, 195 Ill. 48, affirming judgment 96 Ill. App. 332; North Chicago St. R. Co. v. Zeiger, 54 N. E. 1006, 182 Ill. 9, 74 Am. St. Rep. 157, affirming judgment 78 Ill. App. 463; Redfern v. McNaul. 79 Ill. App. 232, affirmed 53 N. E. 569, 179 Ill. 203.

Ind. Bader v. State, 94 N. E. 1009, 176 Ind. 268; Indianapolis St. Ry. Co. v. Johnson, 72 N. E. 571, 163 Ind. 518.

[38] J. L. Mott Iron Works v. Metropolitan Bank, 156 P. 864, 90 Wash. 655.

After two mistrials, trial judge was right at outset of charge to stress importance of agreeing upon jury, jurors not being instructed they might surrender opinions, but being charged they might reason together, that one might adopt view of another, etc. Nelson v. Atlantic, Gulf & Pacific Co., 92 S. E. 194, 107 S. C. 1.

[39] Boston & M. R. R. v. Stewart (C. C. A. N. H.) 254 F. 14, 165 C. C. A. 424.

can, consistently with due deliberation and with their consciences.[40]

In criminal cases, also, it is not improper to urge upon the jury the duty of trying to come to an agreement one way or the other,[41] so long as the court is careful not to suggest which way the verdict should be rendered.[42] Thus it is proper to charge that it is the duty of each juror to reason with his fellow jurors to the end of joining in a verdict,[43] or that no juror should refuse to agree from mere pride of opinion,[44] or that if a juror should find himself in a small minority he should ask himself whether the fact that the majority differ with him does not indicate that his own doubt is not a reasonable one or that his own conclusions one way or the other are not correct,[45] and telling the jury that it is a rule of the court to keep them together until they should agree upon a verdict, is not improper as tending to coercion.[46]

§ 370. Encouraging disagreement

The efficient conduct of a judicial controversy should result in an agreement by the jury one way or the other. The ends of justice

[40] Gleason v. Denson, 132 P. 530, 65 Or. 199.

Instructions held improper as calculated to lead jurors to surrender conscientious convictions. Southern Ins. Co. v. White, 24 S. W. 425, 58 Ark. 277; Highland Foundry Co. v. New York, N. H. & H. R. Co., 85 N. E. 437, 199 Mass. 403.

[41] Sigsbee v. State, 30 So. 816, 43 Fla. 524; (Sup.) State v. Lieberman, 79 A. 331, 80 N. J. Law, 506, judgment affirmed 82 A. 1134, 82 N. J. Law, 748; Territory v. Gonzales, 68 P. 925, 11 N. M. 301; People v. Becker, 109 N. E. 127, 215 N. Y. 126, Ann. Cas. 1917A, 600, rehearing denied 109 N. E. 1086, 215 N. Y. 721; State v. Hawkins, 18 Or. 476, 23 P. 475.

Instructions held proper within rule. An instruction telling the jury the effect of a disagreement at common law, and the mitigation of the rule in the United States, and remarking to them that they would have to remain together and could not separate until they agreed on a verdict, and brought it into court, is not error. State v. Saunders, 14 Or. 300, 12 P. 441. An instruction in a larceny prosecution, that the case was important to the people of the county and state, as well as to accused, and that if the jury could get together and render a verdict, it was the court's desire that they do so; that they ought to be able to decide the case; that it sometimes happened that disagreeing jurors became arbitrary and unreasonable, and failed to respect the opinion of the other jurors; that "I hope this is not true of this jury, and have no reason to believe that it is, so I want you to get together, if possible, and render a verdict;" that a retrial would result in considerable expense and trouble to accused and the county, and "I hope you will get together and render a verdict, but what the court has said to you will not influence your verdict one way or the other." Jackson v. State, 126 S. W. 843, 94 Ark. 169.

[42] Spick v. State, 121 N. W. 664, 140 Wis. 104.

[43] People v. Richards, 82 P. 691, 1 Cal. App. 566.

[44] Myers v. State, 31 So. 275, 43 Fla. 500.

[45] Commonwealth v. Tuey, 8 Cush. (Mass.) 1; State v. Egland, 121 N. W. 798, 23 S. D. 323, 139 Am. St. Rep. 1066.

[46] Ammerman v. U. S. (C. C. A. Neb.) 262 F. 124, certiorari denied 253 U. S. 495, 40 S. Ct. 587, 64 L. Ed. 1030.

are not ordinarily subserved by a disagreement. Therefore instructions which have a tendency to restrain jurors from agreeing on a verdict will ordinarily be erroneous, and are properly refused.[47]

§ 371. Charges that juror should not surrender his individual judgment or conscientious convictions

In some jurisdictions it is improper to instruct,[48] or it is proper to refuse to instruct,[49] that no juror should consent to a verdict which does not have the approval of his individual judgment and conscience, and that a juror should not surrender his deliberate and conscientious convictions for the sake of unanimity, or because the majority may happen to be against him;[50] this being upon the ground that such an instruction is an invitation to a disagreement, or presupposes that jurors will violate their oaths with respect to rendering a true verdict according to the evidence. Upon this question, however, as upon the question of the duty of the court to instruct that each juror must be convinced beyond a reasonable doubt, discussed in a preceding section (§ 274), there is a conflict of authority. In California, a defendant in a criminal case is entitled to an instruction that jurors are not required to surrender their honest convictions for the mere purpose of agreeing upon a verdict.[51] In Kansas it is proper to charge that each juror must ultimately act upon his individual judgment, although the refusal to so charge in a civil case is not reversible error where it does not appear that there is any special necessity for such an

[47] Chicago & E. I. R. Co. v. Rains, 67 N. E. 840, 203 Ill. 417; San Antonio & A. P. Ry. Co. v. Choate, 56 S. W. 214, 22 Tex. Civ. App. 618.

[48] People v. Le Morte (Ill.) 124 N. E. 301; Gehrig v. Chicago & A. R. Co., 201 Ill. App. 287; Souleyret v. O'Gara Coal Co., 161 Ill. App. 60.

[49] **Ill.** Casey v. Kelly-Atkinson Const. Co., 88 N. E. 982, 240 Ill. 416; City of Evanston v. Richards, 79 N. E. 673, 224 Ill. 444; Comorouski v. Spring Valley Coal Co., 203 Ill. App. 617; Springfield Consol. Ry. Co. v. Farrant, 121 Ill. App. 416; Chicago & A. Ry. Co. v. Kirkland, 120 Ill. App. 272.

Mass. See Commonwealth v. Hassan, 126 N. E. 287, 235 Mass. 26.

Okl. Tucker v. State (Cr. App.) 191 P. 201.

Propriety, where court has instructed that verdict should satisfy individual conscience. Where the jury had had some experience in court during the term at which the case was tried, and could be presumed to be acquainted with the ordinary duties of jurors, and the court charged them to engage in no discussion that would tend to prevent their agreeing, consider the evidence and the facts, and reach a verdict, if they could, such as should thereafter satisfy their individual consciences, it was not error to refuse a request that it was the duty of the jury to consider the testimony, and to reconcile their opinions if able to do so, but that no individual was required to surrender his individual opinion. Shaller v. Detroit United Ry., 102 N. W. 632, 139 Mich. 171.

[50] Addison v. People, 62 N. E. 235, 193 Ill. 405; State v. Howell, 66 P. 291, 26 Mont. 3.

[51] People v. Wong Lowng, 114 P. 829, 159 Cal. 520.

instruction or that any prejudice resulted from such refusal; it being held that the same strictness is not required in civil as in criminal cases.[52] In Indiana it seems to be proper to charge that a juror should yield a conviction only when in the full exercise of his independent and honest judgment he, as an individual juror, is persuaded of his error.[53]

§ 372. Instructions tending to increase feeling of responsibility by jury

Instructions which impartially direct the attention of the jury to the gravity of the issues involved or the importance of the case to the parties concerned, that it may receive their more careful consideration have been held not improper,[54] and it is not improper to instruct as to the importance of the case being tried as constituting a precedent.[55]

In a criminal case the court may properly speak of the duty of the jury to the state and the defendant,[56] and of the gravity of the issues involved,[57] where nothing is said to prejudice the rights of the accused,[58] or to impress the jury with the idea that it is more important to vindicate the law by conviction if the defendant is guilty than to acquit him if he is innocent.[59]

§ 373. Instructions objectionable or criticized as tending to lessen sense of responsibility of jurors

The court should not give instructions which have a tendency to lessen the sense of the jury's responsibility to arrive at a true and just decision upon the merits of the case being tried before them. This is particularly true in criminal cases. Thus an instruction which in effect informs the jury in a criminal case that it does

[52] Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370, 21 P. 276.

[53] Chicago & E. R. Co. v. Thomas (Ind.) 55 N. E. 861.

[54] Walker v. Walker, 65 S. E. 923, 151 N. C. 164; Rhodes v. Granby Cotton Mills, 68 S. E. 824, 87 S. C. 18.

[55] Anthony v. Cass County Home Telephone Co., 130 N. W. 659, 165 Mich. 388.

[56] State v. Wilson, 99 N. W. 1060, 124 Iowa, 264.

[57] Lyles v. State, 60 S. E. 578, 130 Ga. 294; Hoover v. State, 68 N. E. 591, 161 Ind. 348; Schwantes v. State, 106 N. W. 237, 127 Wis. 160.

Importance to both accused and state. Instructions which impress upon the jury the importance of the case to the state are not erroneous, where they are equally emphatic in stating its importance to defendant. State v. Mueller, 141 N. W. 1113, 122 Minn. 91. An instruction is not erroneous which calls the jury's attention to the importance of having the laws properly executed, and of a careful consideration of the evidence and the law, so that they may reach a result which will be "just to both sides, regardless of what may be the consequences." People v. Hawes, 98 Cal. 648, 33 P. 791.

[58] Brannon v. State, 80 S. E. 7, 140 Ga. 787.

[59] Weldon v. State, 94 S. E. 326, 21 Ga. App. 330.

not matter whether their verdict is for acquittal or conviction is erroneous,[60] as is an instruction that the oath taken by a juror imposes no more obligation upon him to doubt than if no oath had been administered,[61] or an instruction which suggests the possibility that the court will discharge the defendant.[62]

It is proper, however, in a criminal case, to tell the jury that the law does not require that they be absolutely certain of the correctness of their verdict,[63] and that they are not responsible for the consequences of their verdict,[64] but only for its truth.[65] So it is proper to say that the jury should not be controlled by any fear as to what the punishment may be,[66] and an instruction that the jury should not be concerned with the matter of punishment in case of a conviction is not error as an invitation to convict,[67] and it has been held not improper for the court to suggest to the jury that error in acquitting the defendant cannot be remedied, but that error in convicting him can be corrected by the appellate court,[68] or to charge in effect that the appellate court stands ready to protect the defendant, should errors be committed in the lower court,[69] particularly where the trial court expressly charges that the jury must perform their duties without regard to the statutory provision by which an appeal may be taken.[70]

§ 374. Obligation of oath

It is proper to instruct that each juror should bear in mind the obligation of his oath and should follow the guidance of his conscience.[71]

[60] State v. Ah Tong, 7 Nev. 148.

[61] Adams v. State, 135 Ind. 571, 34 N. E. 956, following Siberry v. Same, 133 Ind. 677, 33 N. E. 681.

[62] People v. Harris, 77 Mich. 568, 43 N. W. 1060.

[63] State v. Tedder, 65 S. E. 449, 83 S. C. 437.

[64] Morgan v. State, 48 S. E. 238, 120 Ga. 499; State v. Way, 38 S. C. 333, 17 S. E. 39.

[65] Griggs v. State, 86 S. E. 726, 17 Ga. App. 301.

[66] Brantley v. State, 87 Ga. 149, 13 S. E. 257.

[67] People v. Singer, 140 N. W. 522, 174 Mich. 361; State v. Inks, 37 S. W. 942, 135 Mo. 678.

[68] United States v. Adams, 2 Dak. 305, 9 N. W. 718.

Contra, Hodges v. State, 15 Ga. 117.

[69] Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; State v. Hannibal, 37 La. Ann. 619; State v. Benner, 64 Me. 267; State v. Petsch, 43 S. C. 132, 20 S. E. 993.

In Georgia, however, it is error for the presiding judge to remind the jury of the existence of the supreme court, to which the defendant could carry his case up, if evidence offered in his behalf had been improperly rejected; such remark, however well-intentioned, being calculated to lessen their sense of their own responsibility, and, at the same time, to convey the idea that the proof already before them was not sufficient to acquit the defendant. Monroe v. State, 5 Ga. 85.

[70] People v. Ferone, 105 N. Y. S. 448, 120 App. Div. 323, judgment affirmed 89 N. E. 454, 196 N. Y. 522.

[71] Wimberly v. State, 77 S. E. 879, 12 Ga. App. 540.

§ 375. Duty to look to the whole evidence

It is an invasion of the province of the jury to instruct that they must consider the evidence bearing on an issue in its entirety,[72] or that their determination of the case must be reached from the whole evidence,[73] if, by such an instruction, it is sought to require the jury to give evidentiary force to every part of the evidence,[74] since the jury have a right to accept a part and to reject the rest, if the circumstances justify such action.[75]

On the other hand, a charge should not intimate to the jury that a conclusion may be based upon the evidence of either party, or that the testimony of either side may be rejected, and a fact be established upon less than all the evidence introduced upon the trial;[76] and it is proper to instruct that the jury should take into consideration the whole of the evidence and all the facts and circumstances proved at the trial.[77]

The jury may be cautioned against allowing certain circumstances from preventing their looking to the whole evidence,[78] and an instruction that the jury should be careful and slow to reject any testimony is not improper,[79] while instructions which permit the jury to arbitrarily reject any evidence, or the testimony of any witness, are erroneous.[80] Where facts have been improperly

[72] Kansas City, M. & O. Ry. Co. of Texas v. Barnhart (Tex. Civ. App.) 145 S. W. 1049.

[73] Missouri, K. & T. Ry. Co. of Texas v. Barnes, 95 S. W. 714, 42 Tex. Civ. App. 626.

[74] Kansas City, M. & O. Ry. Co. of Texas v. Barnhart (Tex. Civ. App.) 145 S. W. 1049.

[75] Riddle v. Webb, 110 Ala. 599, 18 So. 323.

[76] **Ala.** Louisville & N. R. Co. v. Abernathy, 73 So. 103, 197 Ala. 512; King v. State, 72 So. 552, 15 Ala. App. 67; Roden v. State, 69 So. 366, 13 Ala. App. 105; Boswell v. State, 56 So. 21, 1 Ala. App. 178; Cheney v. State, 55 So. 801, 172 Ala. 368.

Tex. International & G. N. R. Co. v. Von Hoesen (Civ. App.) 91 S. W. 604, question certified answered by Supreme Court 92 S. W. 798, 99 Tex. 646, and judgment reversed on rehearing (Civ. App.) 97 S. W. 509.

[77] Carter v. Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669, affirming 37 Ill. App. 219; Semrau v. Calumet & S. C. Ry. Co., 185 Ill. App. 203.

Limiting jury to consideration of "circumstances." An instruction that the burden rests on plaintiff to establish his cause of action by a preponderance of the evidence, and, in determining upon which side the preponderance lies, the jury should pass upon the credibility of the witnesses, "in view of all the evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side is the preponderance of the evidence," is not misleading as tending to limit the jury to the consideration of "circumstances" as the basis for determining the preponderance of the evidence. Pfaffenback v. Lake Shore & M. S. Ry. Co., 142 Ind. 246, 41 N. E. 530.

[78] Anderson v. Martindale, 61 Tex. 188.

[79] Lyts v. Keevey, 5 Wash. 606, 32 P. 534.

[80] Drake v. Chicago, R. I. & P. Ry. Co., 70 Iowa, 59, 29 N. W. 804; Calisher v. Mathias (Tex. Civ. App.) 43 S. W. 265.

admitted in evidence upon a disputed issue, it is improper to tell the jury to determine such issue from all the facts or all the evidence.[81]

§ 376. Duty to reconcile conflicting evidence

The court may,[82] and should,[83] charge the jury that it is their duty to reconcile apparently conflicting evidence, if it is possible to do so, on the theory that witnesses at seeming variance with each other have sworn to the truth,[84] such an instruction, while considered superfluous in some jurisdictions, not being regarded as on the weight of evidence,[85] and an instruction is erroneous which prevents the jury from reconciling the discrepancies or contradictions in the testimony of witnesses.[86]

However, while seeming conflicts in the testimony may be shown not to exist, real conflicts can only be disposed of by discarding the testimony of one side or the other, and in case of an irreconcilable conflict in the testimony the jury should not be required to reconcile it if they can,[87] and it is not improper to instruct that, when the

[81] Lee v. Toledo, St. L. & W. R. Co., 184 Ill. App. 144; Stewart v. Swartz, 106 N. E. 719, 57 Ind. App. 249.

[82] **U. S.** Parulo v. Philadelphia & R. Ry. Co., 145 F. 664.

Ala. Steen v. Sanders, 22 So. 498, 116 Ala. 155.

Ga. Collum v. Georgia Ry. & Electric Co., 79 S. E. 475, 140 Ga. 573; Rogers v. King, 12 Ga. 229.

Neb. H. Hirschberg Optical Co. v. Michaelson, 95 N. W. 461, 1 Neb. (Unof.) 137.

Tex. Houston & T. Cent. R. Co. v. Bell (Civ. App.) 73 S. W. 56, judgment affirmed 75 S. W. 484, 97 Tex. 71; Howe v. O'Brien (Civ. App.) 45 S. W. 813; Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118.

Duty to harmonize evidence. It is not error to instruct the jury that, if they find the evidence apparently conflicting, it is their duty, if possible, to "harmonize" it, instead of telling them to "reconcile" it. Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265. An instruction that it is the duty of the jury to harmonize the conflict in evidence, and that the fact that one witness squarely contradicts another does not necessarily nullify the evidence on that point, is not ground for reversal; it being reasonable to assume that the jury knew what the trial court meant. Seckerson v. Sinclair, 140 N. W. 239, 24 N. D. 326, 625; Hawkins v. Sinclair, 140 N. W. 246, 24 N. D. 623; Burger v. Sinclair, 140 N. W. 246, 24 N. D. 624.

[83] Rickerson v. State, 78 Ga. 15, 1 S. E. 178; McGonnell v. Pittsburgh Rys. Co., 83 A. 282, 234 Pa. 396.

[84] Wright v. Carillo, 22 Cal. 595; Atlantic Coast Line R. Co. v. Beazley, 45 So. 761, 54 Fla. 311; Walters v. Philadelphia Traction Co., 161 Pa. 36, 28 A. 941.

[85] Means v. State, 10 Tex. App. 16, 38 Am. Rep. 640.

[86] Beers v. Metropolitan St. Ry. Co., 84 N. Y. S. 785, 88 App. Div. 9; Moore v. Kendall, 2 Pin (Wis.) 99, 1 Chand. (Wis.) 33, 52 Am. Dec. 145.

[87] Sherrill v. State, 35 So. 129, 138 Ala. 3; Houston & T. C. R. Co. v. Bell, 75 S. W. 484, 97 Tex. 71, affirming judgment (Civ. App.) 73 S. W. 56; Williamson v. D. M. Smith & Co. (Tex. Civ. App.) 79 S. W. 51; Houston, E. & W. T. Ry. Co. v. Richards, 49 S. W. 687, 20 Tex. Civ. App. 203.

See Hall v. Brown, 30 Conn. 551.

evidence is irreconcilably conflicting, the jury must reject that evidence which they believe to be false.[88]

An instruction as to the duty to reconcile conflicting evidence will be erroneous, if it is so framed as to intimate an opinion on a matter of fact.[89] Ordinarily the failure of the court to charge the jury as to their duty concerning the reconcilement of conflicting evidence will not be error, if no request is made for such an instruction.[90]

[88] Epps v. State, 102 Ind. 539, 1 N. E. 491; State v. Goforth, 37 S. W. 801, 136 Mo. 111.

[89] Hicks v. Critcher, 61 N. C. 353.

[90] Watts v. State, 92 S. E. 966, 20 Ga. App. 182; Moore v. State, 66 S. E. 377, 7 Ga. App. 77.

CHAPTER XXX

INSTRUCTIONS CONSIDERED WITH REFERENCE TO DUTY OF JURY TO FORM CONCLUSIONS SOLELY FROM THE EVIDENCE

§ 377. In general.
378. Instructions as to application of personal knowledge, experience, and observation of jurors.
379. Instructing jury to apply their common sense in weighing evidence.
380. Effect of view of premises.
381. Guarding against influence of public press.
382. Charges as to sympathy, bias, prejudice, or public opinion.
383. Appeals to sympathy or prejudice.
384. Instructions as to reaching verdict by lot or by the law of averages.

Confining jury to evidence on question of damages, see ante, § 353.

§ 377. In general

The jury must form their conclusions as to the facts solely from the evidence admitted at the trial.[1] The court may[2] therefore, and should,[3] give instructions directing the jury that their belief as to where the truth lies on disputed questions of fact should be based on the evidence so produced, and telling them that they have no right to indulge in speculations not supported by the evidence,[4] and instructions so framed as to be likely to lead the jury to infer a fact otherwise than from the evidence,[5] or which are calculated to make them think that they can determine the matters in controversy according to their own individual notions, with-

[1] Lundon v. City of Chicago, 83 Ill. App. 208.

[2] State v. Hamilton, 157 P. 796, 80 Or. 562; Peterson v. Bogner, 117 P. 805, 59 Or. 555; International Harvester Co. of America v. Campbell, 96 S. W. 93, 43 Tex. Civ. App. 421.

Duty not to consider previous disagreements. Where a murder case has been three times previously tried, and on each trial the jury disagreed, it is not error to charge the jury that they must in no sense consider such fact, but render a verdict according to the evidence in the case, and consider no other matters except the evidence and the instructions of the court. People v. Hawes, 98 Cal. 648, 33 P. 791.

[3] **Ill.** Dowdey v. Palmer, 122 N. E. 102, 287 Ill. 42; Staninger v. Tabor, 103 Ill. App. 330; Champion Iron Fence Co. v. Bradley, 10 Ill. App. 328.

Miss. Gordon v. State, 49 So. 609, 93 Miss. 543.

N. Y. Schappert v. Ringler, 45 N. Y. Super. Ct. 345.

Pa. McGonigal v. Pittsburgh Rys. Co., 89 A. 805, 243 Pa. 47.

S. C. State v. Cooler, 98 S. E. 845, 112 S. C. 95.

[4] Ramsey v. Burns, 69 P. 711, 27 Mont. 154.

[5] Mathews v. Hamilton, 23 Ill. 470; Goulding v. Phillips, 100 N. W. 516, 124 Iowa, 496; D'Arcy v. Catherine Lead Co., 133 S. W. 1191, 155 Mo. App. 266; Fruit Dispatch Co. v. F. Lisey & Co., 4 Ohio App. 300.

Instructions improper within rule. An instruction stating to the jury that they are the judges of the facts in the case is misleading, as leaving them free to consider facts not proved by the evidence, but of which they may have been informed

out regard to the evidence,[6] or which warrant the jury in discrediting and disregarding the evidence of a party, if for any reasons

in some other way. Chicago General Ry. Co. v. Noyacek, 94 Ill. App. 178. An instruction that the jury are to determine on which side the preponderance of the evidence lies from the "facts shown by the evidence and from all other facts and circumstances. Balenovic v. Ansick, 181 Ill. App. 660. In a criminal trial, it is error for the court to say to the jury that they may consider the fact that the public in a certain locality think the defendants guilty as corroborative of the particular facts proven in the case. State v. Whitehead, 54 A. 229. 69 N. J. Law, 63. A charge that the jury must acquit if they can reasonably reconcile the evidence with the fact that the state's witnesses are mistaken. Bryant v. State, 68 So. 704, 13 Ala. App. 206, certiorari denied 69 So. 1017, 193 Ala. 673. A charge, in a prosecution for homicide, that, though the jury might believe from the evidence that accused had intended to kill his wife, yet if between the time of forming such intent and the time of the killing "something" intervened which displaced such intent and was in itself the moving cause of the killing, the jury could not find defendant guilty of murder in the first degree, was properly refused, as calculated to mislead the jury to consider "something" outside the evidence. Thomas v. State, 43 So. 371, 150 Ala. 31.

Permitting consideration of documents merely offered in evidence. An instruction to the jury that, in determining what weight, if any, is to be given to any book of account or memoranda of account offered in evidence, the jury should consider every fact and circumstance in evidence showing the fairness or unfairness of the account or memoranda, etc., is erroneous, as only such books of account should have been considered by the jury as were admitted in evidence, not those which were merely offered. Schnellbacher v. Frank McLaughlin Plumbing Co., 108 Ill. App. 486.

Instructions not improper within rule. In a prosecution for theft, an instruction that, if the jury have a reasonable doubt as to whether defendant is the identical person who sold the stolen animals to a witness, they should acquit, is not objectionable as permitting the jury to arrive at a belief that defendant was such identical person from sources other than the evidence. Ellison v. State (Tex. Cr. App.) 72 S. W. 188. On an issue as to whether certain sales of intoxicating liquors were in violation of law, an instruction which, after enumerating certain facts to be considered in determining whether any of such sales were unlawful, directed the consideration of "all other matters throwing light thereon," was not erroneous, as authorizing the jury to believe that it might go outside of the evidence, where all such matters appearing in the evidence were not enumerated. State v. Skillicorn, 73 N. W. 503. 104 Iowa, 97. It is sufficient to apprise the jury that their verdict must be based upon the evidence in the case alone, that they were instructed that the law presumes the accused innocent, and that this presumption continues until his guilt is established by competent evidence beyond a reasonable doubt. Palin v. State, 38 Neb. 862, 57 N. W. 743. A charge, in a prosecution for rape, that if, after hearing all the evidence, jury were convinced beyond a reasonable doubt they should convict. Zinn v. State, 205 S. W. 704, 135 Ark. 342. A charge that it was the jury's duty to give the case a dispassionate consideration, and if they found the defendant guilty to convict him; but if, under the evidence and law, there was a reasonable doubt of his guilt, they should not hesitate to find him not guilty. Gebhardt v. State, 114 N. W. 290, 80 Neb. 363.

[6] Smith v. Bellrose, 200 Ill. App. 368; Chicago City Ry. Co. v. Schaefer, 121 Ill. App. 334; Hyde v. Shank, 77 Mich. 517, 43 N. W. 890.

"Discretion" of jury. An in-

known to themselves privately and personally they believe his testimony to be untrue,[7] or which tend to convey to the jury the impression that they are independent of the court and the law,[8] or which are so worded that the belief of the jury without regard to the evidence,[9] or without regard to any consideration save that of doing even-handed justice between the parties[10] may control and warrant a verdict, are erroneous. Thus it is error to tell the jury to find as they think right and proper between the parties,[11] or to charge generally that the jury may find any fact proven

struction that the jury, in its sound "discretion," may return a verdict, is objectionable, and the quoted word should be replaced by "judgment." Birmingham Ry., Light & Power Co. v. Smith, 69 So. 910, 14 Ala. App. 264.

Duty to follow conscience. An instruction that it was the jury's duty to follow their own consciences, irrespective of anything else in the case, was erroneous. Nilsson v. Martinson, 130 P. 106, 72 Wash. 286.

Instructions not improper within rule. A charge, "If you believe that the offense was committed in this county and state, and if you further believe that the defendant was the party committing the same, you will convict," is not objectionable in authorizing a conviction upon a belief other than that arising from the evidence. Miles v. State, 14 Tex. App. 436. An instruction that, in determining what facts are proven in the case, the jury should carefully consider all the evidence given before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence given in the case, although there may be no direct evidence of testimony as to such fact, is proper. North Chicago St. R. Co. v. Rodert, 105 Ill. App. 314, judgment affirmed 67 N. E. 812, 203 Ill. 413. An instruction to "consider the case fairly and candidly, and give the plaintiff such amount as you think reasonable and just under the circumstances." Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468. A charge, in an action against a physician for malpractice, where the testimony of experts was conflicting, that the jury were not bound to accept their statements or conclusions, but should determine the case upon the whole evidence. Sheldon v. Wright, 67 A. 807, 80 Vt. 298.

[7] Rylee v. State, 22 So. 890, 75 Miss. 352.

[8] North Chicago St. R. Co. v. Kaspers, 57 N. E. 849, 186 Ill. 246; Ludwig v. Suger, 84 Ill. 99.

Instructions not obnoxious to rule. An instruction that the court did not mean to give an opinion as to what were or were not the facts in the case, but that it was solely and exclusively for the jury to determine from the evidence, and having done so to apply to them the law as stated in the instructions. North Chicago St. R. Co. v. Kaspers, 57 N. E. 849, 186 Ill. 246, affirming judgment 85 Ill. App. 316. An instruction that the jury are to be guided by their own "judgment" in determining whether from all the facts and circumstances in a case, a party is guilty of the charge against him, is not erroneous as telling them that they may disregard the rules of law in coming to such determination. Timmis v. Wade, 5 Ind. App. 139, 31 N. E. 827.

[9] Jackson v. Johnson, 212 Ill. App. 61; People v. Peden, 109 Ill. App. 560; Pfirshing v. Heitner, 91 Ill. App. 407; Chicago, B. & Q. R. Co. v. Libey, 68 Ill. App. 144; Coles v. Nikirk, 57 P. 41, 8 Kan. App. 857.

[10] Chicago North Shore St. Ry. Co. v. Hebson, 93 Ill. App. 98.

[11] Ruckersville Bank v. Hemphill, 7 Ga. 396; Bailey v. Ormsby, 3 Mo. 580.

which they may think rightfully and reasonably inferable from the evidence.[12]

Under this principle instructions which, in either a civil[13] or a criminal case,[14] suggest to the jury the possible consequences of their verdict, are improper, and ordinarily such an instruction is properly refused.[15] Under this principle it is proper for the court to instruct the jury not to be influenced by such considerations as that the defendant has been in jail for a long time on account of the charge on which he is being tried,[16] or by any speculation as to the final judgment or sentence of the court in case they find the defendant guilty,[17] or by the consideration that the complaining witness may have a civil remedy against the defendant,[18] and cautionary instructions against considering certain acts of the court in rulings upon motions, etc., as indicating its opinion upon the facts may be sometimes necessary.[19]

Instructions will not be erroneous because they do not expressly restrict the jury to the evidence.[20] If, construing the instructions as a whole, they do not authorize the jury to base their verdict in whole or in part on matters outside of the evidence introduced at the trial and a reasonable understanding of them requires the jury to look only to such evidence they will be sufficient in this regard.[21] It is not necessary to repeat in each clause of an instruc-

[12] Henry v. Colorado Land & Water Co., 51 P. 90, 10 Colo. App. 14.

[13] Miller v. United States, 37 App. D. C. 138; Ray v. Patterson, 81 S. E. 773, 165 N. C. 512; Catasauqua Mfg. Co. v. Hopkins, 141 Pa. 30, 21 A. 638, 28 Wkly. Notes Cas. 146.

[14] State v. Crofford, 96 N. W. 889, 121 Iowa, 395; Menn v. State, 112 N. W. 38, 132 Wis. 61.

[15] Smith v. Ross, 31 App. D. C. 348; Schmohl v. Buscomi, 117 N. Y. S. 788, 133 App. Div. 20.

[16] Goss v. State, 81 S. E. 247, 14 Ga. App. 402; Foskey v. State, 45 S. E. 967, 119 Ga. 72.

[17] People v. Bernal, 180 P. 825, 40 Cal. App. 358; Nicholson v. State, 106 P. 929, 18 Wyo. 298.

[18] State v. Leonard, 144 P. 113, 78 Or. 451, rehearing denied 144 P. 681, 73 Or. 451.

[19] Meeteer v. Manhattan Ry. Co., 63 Hun, 533, 18 N. Y. S. 561.

[20] Isaacs v. McLean, 106 Mich. 79, 64 N. W. 2.

Request necessary. Failure to charge the jury to base its findings solely on the evidence is not fatal where complainant asked no instruction on the subject. Burr v. McCallum, 80 N. W. 1040, 59 Neb. 326, 80 Am. St. Rep. 677.

[21] **Ill.** Chicago City Ry. Co. v. Carroll, 68 N. E. 1087, 206 Ill. 318, affirming judgment 102 Ill. App. 202; Davis v. Northwestern El. Ry. Co., 48 N. E. 1058, 170 Ill. 595; Padfield v. People, 146 Ill. 660, 35 N. E. 469.

Ind. Golibart v. Sullivan, 66 N. E. 188, 30 Ind. App. 428; Eureka Block Coal Co. v. Wells, 61 N. E. 236, 29 Ind. App. 1, 94 Am. St. Rep. 259; Citizens' St. R. Co. v. Ballard, 52 N. E. 729, 22 Ind. App. 151.

Mo. Scharff v. Southern Illinois Const. Co., 92 S. W. 126, 115 Mo. App. 157.

Consideration of excluded evidence. An instruction "to consider all the evidence in the case" is not erroneous, as allowing the consideration of evidence that had been admitted and afterwards excluded by the

tion that the jury must base their belief as to the facts upon the evidence,[22] and it is held that the words "from the evidence" are implied in all instructions to find for one party or the other, if the jury find certain facts to be established;[23] nor is such formula required to be used where the charge is based upon undisputed evidence.[24]

The phrases "under the evidence and the instructions of the court" and "from the preponderance of the evidence in this case and under the instructions of the court" are held not to be misleading, and to be proper substitutes for the customary term "from the evidence."[25]

Where events, not a part of the trial, but having a tendency to affect the sympathies or emotions of the jury, occur in the courtroom, it is within the discretion of the trial judge to refuse to instruct that the jury shall not consider such occurrences.[26] A charge that in determining a disputed question of fact the jury must look to all the circumstances connected with the transaction is not objectionable, as authorizing them to look to matters not in evidence,[27] and an instruction that the jury should rely on their

court, where, in another instruction, they are directed to disregard any evidence that has been stricken out. Tedens v. Sanitary Dist. of Chicago, 149 Ill. 87, 36 N. E. 1033.

[22] Miller v. Balthasser, 78 Ill. 302; Durham v. Evans, 56 Ill. App. 513; Wear v. Duke, 23 Ill. App. 322; Ganz v. Metropolitan St. Ry. Co. (Mo.) 220 S. W. 490.

[23] Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730; Blumhardt v. Rohr, 70 Md. 328, 17 A. 266; Baker v. Kansas City, C. & S. Ry. Co., 52 Mo. App. 602.

"If the jury believe." An instruction dealing with conflicting evidence is not bad for failing to use the words "from the evidence" after the words "if the jury believe." Mansfield v. Morgan, 37 So. 393, 140 Ala. 567.

[24] Schmidt v. Pfau, 114 Ill. 494, 2 N. E. 522; Carpenter v. Hyman, 66 S. E. 1078, 67 W. Va. 4, 20 Ann. Cas. 1310.

[25] Chicago & W. I. R. Co. v. Newell, 113 Ill. App. 263.

[26] Chicago & E. R. Co. v. Meech, 45 N. E. 290, 163 Ill. 305.

[27] Walcott v. Brander, 10 Tex. 419.

"Facts and circumstances on the trial." An instruction that the jury are the exclusive judges of the credibility of the witnesses, and that they "should take into consideration the whole of the evidence, and all the facts and circumstances on the trial, giving to the several parts of the evidence such weight as they are entitled to," etc., is not objectionable as permitting the jury to consider matters outside the evidence, the clause "facts and circumstances on the trial" being limited by the instruction "to the several parts of the evidence." Fischer v. Coons, 26 Neb. 400, 42 N. W. 417. Instructions permitting jury to consider facts and circumstances in evidence, "or," in the disjunctive, other facts and circumstances observed during trial, was not erroneous as permitting jury to consider facts and circumstances observed during trial outside of those in evidence. Potter v. Womach, 162 P. 801, 63 Okl. 107. An instruction to the jury to find for the plaintiff if they should believe certain facts from the evidence "and all the circumstances proven in the case" could not have misled the jury. Bruen v. Grahn, 5 Ky. Law Rep. (abstract) 323.

own recollection and belief in preference to those of the attorneys is not improper.[28]

A particular instruction which fails to confine the jury to the evidence will not necessarily, or perhaps not ordinarily, constitute cause for reversal. Thus an instruction that if the jury find the issues for the plaintiff they may award him damages in such amount "as they believe" will compensate him, while erroneous, will not work a reversal where the court has also instructed that every element essential to a recovery must be established by a preponderance of the evidence.[29]

§ 378. Instructions as to application of personal knowledge, experience, and observation of jurors

The court may instruct,[30] and, on request, the jury should be instructed,[31] that the case is to be tried upon the evidence given at the trial, and not upon information that one or more jurors may have outside of the record. Instructions which permit the jury, not only to consider the evidence introduced before them, but their own special personal knowledge with regard to the facts in controversy, and draw conclusions therefrom are erroneous,[32] as are,

It has been held, however, that charges to the jury which instruct them that in coming to their conclusion they must "carefully consider the circumstances of the case" are misleading. Larkinsville Min. Co. v. Flippo, 30 So. 358, 130 Ala. 361.

[28] Meagher v. Fogarty, 152 N. W. 833, 129 Minn. 417.

[29] Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.

[30] Griggs v. State, 86 S. E. 726, 17 Ga. App. 301; State v. Gaymon, 44 S. C. 33, 22 S. E. 305, 31 L. R. A. 489, 51 Am. St. Rep. 861; State v. Jones, 29 S. C. 201, 7 S. E. 296.

Application of knowledge derived by some jurors from trial of previous cases. Where, on the trial of a criminal case, the jury, some of whom had at the same term tried other similar cases, during the trial of which law books had been read to the jury by permission of the court, were instructed that they might bring to their aid, in deciding on the evidence, any knowledge which they had acquired from any source equally open to them all, but not any particular knowledge as to the law or the facts communicated to a part of them only; and that they were to decide this case on the evidence introduced into it, and not on any evidence of the law or facts introduced into other cases, in which some of them did not sit; and that the jury were bound to consider the instructions of the court on the law of the case as evidence of the law; and that they must decide the case according to the evidence, it was held that the defendant had no ground of exception. Commonwealth v. Lawrence. 9 Gray (Mass.) 133.

[31] Doggett v. Jordan, 2 Fla. 541; Downing v. Farmers' Mut. Fire Ins. Co., 138 N. W. 917, 158 Iowa, 1; Citizens' St. R. Co. v. Burke, 40 S. W. 1085, 98 Tenn. 650.

[32] **Ga.** Gibson v. Carreker, 91 Ga. 617, 17 S. E. 965.

Ill. Ottawa Gas Light & Coke Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263.

Kan. Chicago, R. I. & P. Ry. Co. v. Spring Hill Cemetery Ass'n, 57 P. 252, 9 Kan. App. 882.

Me. Page v. Alexander, 84 Me. 83, 24 A. 584; Douglass v. Trask, 77 Me. 35; State v. Bartlett, 47 Me. 388.

in some jurisdictions, instructions authorizing them to view the evidence in the light of their own knowledge, observation, and experience in life, not limiting them to such knowledge, observation, and experience as they share in common with men generally,[33] and where a knowledge of certain facts in controversy is not common to persons generally it will be misleading and erroneous to charge that the jury may use their general knowledge in determining such facts.[34] Although there is some conflict in the cases, the rule supported by the weight of authority seems to be that it is error to instruct that the jurors can act upon their private and personal knowledge of the character of a witness in determining his credibility,[35] and it is proper to instruct that jurors should disregard any such personal knowledge, and not impart it to fellow jurors.[36]

It is not improper, however, in some jurisdictions, to charge in effect that the jurors are entitled to make use of their own knowledge and judgment in determining the weight of the evidence upon a disputed question of fact, if the jury cannot understand from the charge as a whole that they can act upon such knowledge, regardless of the evidence,[37] and, as indicated by the foregoing discussion, the jury, in determining questions of fact, may apply the knowledge and experience which they have in common with all men, and an instruction to that effect is proper;[38] it being said

Mich. Karrer v. City of Detroit, 106 N. W. 64, 142 Mich. 331; Burrows v. Delta Transp. Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468; Wood v. Barker, 49 Mich. 295, 13 N. W. 597.

N. Y. Reves v. Hyde, 11 N. Y. St. Rep. 681; Lenahan v. People, 5 Thomp. & C. 265, 3 Hun, 164, affirmed without opinion 62 N. Y. 623.

[33] Loveman v. Birmingham Ry., L. & P. Co., 43 So. 411, 149 Ala. 515; Sloss-Sheffield Steel & Iron Co. v. Hutchinson, 40 So. 114, 144 Ala. 221; Chicago, B. & Q. R. Co. v. Krayenbuhl, 91 N. W. 880, 65 Neb. 889, 59 L. R. A. 920.

[34] Waite v. Teeters, 36 Kan. 604, 14 Pac. 146.

[35] Collins v. State, 94 Ga. 394, 19 S. E. 243; Pettyjohn v. Liebscher, 92 Ga. 149, 17 S. E. 1007; Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853.

Contra, Howard v. State, 73 Ga. 83; Head v. Bridges, 67 Ga. 227; Anderson v. Tribble, 66 Ga. 584.

[36] Ross v. State, 170 S. W. 305, 75 Tex. Cr. R. 59.

[37] Ainslie v. Biggs, 211 Ill. App. 463; State v. Bjelkstrom, 104 N. W. 481, 20 S. D. 1; Lindquist v. Town of Bradley, 152 N. W. 827, 161 Wis. 175; Solberg v. Robbins Lumber Co., 133 N. W. 28, 147 Wis. 259, 37 L. R. A. (N. S.) 790; Neanow v. Uttech, 46 Wis. 581, 1 N. W. 221.

Directing jury to reject testimony not in accord with jury's knowledge. On an issue whether a wall was any less valuable because a little out of plumb, where some of the testimony was extravagant, a charge to reject any testimony that the wall was less safe than if built in line, if such testimony did not accord with the jury's knowledge of such matters, is proper. Stiles v. Neillsville Milling Co., 87 Wis. 266, 58 N. W. 411.

[38] **Ala.** Sloss-Sheffield Steel & Iron Co. v. Hutchinson, 40 So. 114, 144 Ala. 221; Rosenbaum v. State, 33 Ala. 354.

in one jurisdiction that the experience of the juror is the lamp of reason by which his judgment is controlled, and that he may consult and be governed by it in all cases in which the evidence is conflicting and not declared to be conclusive.[39] Such rule applies in determining the credibility of witnesses.[40]

§ 379. Instructing jury to apply their common sense in weighing evidence

The common sense of the jury, brought to bear upon the consideration of the testimony and in obedience to the rules laid down by the court, is the most valuable feature of the jury system, and has done more to preserve its popularity than any apprehension that a bench of judges will willfully misuse their power.[41] It is therefore proper to instruct the jury that there is nothing to prevent them from applying to the facts of the case the sound common sense which is supposed to characterize their daily transactions, and that they would apply to any other subject that came under their consideration and that demanded their judgment. Such an instruction does not authorize the jury to depart from the rules

Colo. Denver & R. G. R. Co. v. Warring, 86 P. 305, 37 Colo. 122.

Fla. Marshall v. State, 44 So. 742, 54 Fla. 66.

Ill. People v. Turner, 107 N. E. 162, 265 Ill. 594, Ann. Cas. 1916A, 1062.

Kan. Fisher v. O'Brien, 162 P. 317, 99 Kan. 621, L. R. A. 1917F, 610; Smith v. St. L. & S. F. R. Co., 148 P. 759, 95 Kan. 451; Sanford v. Gates, 38 Kan. 405, 16 P. 807; Missouri River R. R. Co. v. Richards, 8 Kan. 101.

Minn. Johnson v. Hillstrom, 87 Minn. 122, 33 N. W. 547.

Instructions not improper within rule. An instruction that, in considering the damages, the jury might consider the facts proved in connection with their own knowledge and experience, was not objectionable as not limiting the jury to such knowledge as men ordinarily possess, where such knowledge related to the value of the services, the expense of clothing, education, and support of a child alleged to have been wrongfully killed by defendant. Illinois Cent. R. Co. v. Warriner, 82 N. E. 246, 229 Ill. 91, affirming judgment 132 Ill. App. 301. An instruction in a criminal case that the jury might consider in ascertaining the truth the demeanor of a witness, etc., and "all other things that might be inferred from experience or which the jury may deem proper under the circumstances," is not open to objection that the jury might infer from their own experience what the verdict should be, and arrive at a conclusion not based on evidence. State v. Runyon, 107 A. 33, 93 N. J. Law, 16.

Knowledge of city ordinances. In an action for injuries to a street-car passenger, caused by collision with a locomotive at a crossing, it was proper to refuse to charge that the jury should not consider any knowledge they might possess of the city ordinances regulating the speed of trains, the ringing of the engine bell, or the placing of watchmen at crossings. Houston City St. Ry. Co. v. Ross (Tex. Civ. App.) 28 S. W. 254.

[39] Willis v. Lance, 28 Or. 371, 43 P. 384, 487.

[40] Jenney Electric Co. v. Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co. (Neb.) 179 N. W. 503.

[41] Dunlop v. United States, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

of evidence, or to decide the case upon abstract notions of their own, or from facts gathered outside of the testimony.[42] An instruction, however, which in effect tells the jury that their common sense is a better guide than the rules of law given to them by the court, is misleading, since such rules may themselves be said to be the concentrated common sense of many generations.[43]

§ 380. Effect of view of premises

In most jurisdictions the impressions made upon the minds of the jury by the examination of premises involved in the litigation, to which they have been sent for the purpose of a view, do not constitute a part of the evidence in the cause,[44] and an instruction which permits the jury to use as evidence what they saw or learned on such a view,[45] or which warrants the jury in finding a material fact upon their own judgment from what they saw, regardless of any of the sworn testimony,[46] is erroneous.

The intent of the statute allowing such view is to enable the jury to better understand and comprehend the testimony of the witnesses, and thereby the more intelligently to apply it to the issues on trial before them, and not to make them silent witnesses in the case,[47] and it may be necessary in some cases to instruct the jury to disregard knowledge obtained by a view.[48]

On the other hand, the court is not required to charge that, in determining the rights of the parties the jury should not consider anything they saw at the view, since obedience to such an instruction would defeat the object of the view,[49] and where, be-

[42] Dunlop v. United States, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

[43] Densmore v. State, 67 Ind. 306, 33 Am. Rep. 96.

[44] Heady v. Vevay, Mt. S. & V. Turnpike Co., 52 Ind. 117. Compare City of Topeka v. Martineau, 22 P. 419, 42 Kan. 387, 5 L. R. A. 775.

[45] Morrison v. Burlington, C. R. & N. Ry. Co., 84 Iowa, 663, 51 N. W. 75; Schultz v. Bower, 57 Minn. 493, 59 N. W. 631, 47 Am. St. Rep. 630.

In Louisiana, in eminent domain proceedings, the jury of freeholders are chosen as experts, and their view of the premises is made for the purpose of obtaining direct information; they may therefore be told that they may consider their own information and their own opinions acquired from a view as a part of the evidence in the case. City of Shreveport v. Youree, 38 So. 135, 114 La. 182, 3 Ann. Cas. 300.

[46] City of Junction City v. Blades, 1 Kan. App. 85, 41 P. 677.

In Wisconsin, it seems that, if witnesses testify to something which the jury know by the evidence of their senses on the view to be false, they may be told that they may disregard such testimony and find the facts as they know them to be, although no witness gives testimony in support of such finding. Washburn v. Milwaukee & L. W. R. Co., 18 N. W. 328, 59 Wis. 364.

[47] Wright v. Carpenter, 49 Cal. 609; Close v. Samm, 27 Iowa, 503.

[48] Lydstron v. Rockingham County Light & Power Co., 70 A. 385, 75 N. H. 23, 21 Ann. Cas. 1236.

[49] State v. Henry, 41 S. E. 439, 51 W. Va. 283; Fox v. Baltimore & O. R. Co., 34 W. Va. 466, 12 S. E. 757.

fore a view by the jury, they are cautioned not to consider their own observations as evidence, and are properly instructed as to the purposes of the view, an instruction in regard to the same matter need not be also given at the close of the trial.[50] An instruction which fairly indicates to the jury that the proper object of a view is to better enable the jury to understand the evidence, or that, where there is a conflict in the testimony, they may resort to the evidence of their senses on the view to determine the truth, and does not place such view on an equality with the evidence, is not improper.[51]

§ 381. Guarding against influence of public press

The refusal of an instruction warning the jury against being influenced by newspaper articles is not necessarily error,[52] but the case may be of such notoriety and public interest that it will be the duty of the court to so instruct the jury that they will not be likely to see newspapers commenting on the proceedings.[53]

§ 382. Charges as to sympathy, bias, prejudice, or public opinion

It is largely discretionary with the trial court whether to give, or to refuse to give, cautionary instructions to the jury against being influenced by sympathy, prejudice, or bias one way or the other.[54] It will ordinarily be proper to give such an instruction,[55] as where there is danger of racial prejudice entering into

[50] Cox v. Chicago & N. W. Ry. Co., 95 Iowa, 54, 63 N. W. 450.

[51] Murray v. Vandalia R. Co., 202 Ill. App. 362; City of Clay Center v. Jevons, 2 Kan. App. 568, 44 P. 745; Ham v. Delaware & H. Canal Co., 155 Pa. 548, 26 A. 757, 32 Wkly. Notes Cas. 335, 20 L. R. A. 682; Seattle & M. R. Co. v. Roeder, 70 P. 498, 30 Wash. 244, 94 Am. St. Rep. 864.

[52] Union Cent. Life Ins. Co. v. Skipper (C. C. A. Ark.) 115 F. 69, 52 C. C. A. 663; Beyer v. Martin, 120 Ill. App. 50.

[53] Ogren v. Rockford Star Printing Co., 123 N. E. 587, 288 Ill. 405.

[54] **Ala.** Snedecor v. Pope. 39 So. 318, 143 Ala. 275.

Ill. Birmingham Fire Ins. Co. v. Pulver, 27 Ill. App. 17, affirmed 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598.

Miss. Clark v. State, 59 So. 887, 102 Miss. 768.

Neb. Hoskovec v. Omaha St. Ry. Co., 123 N. W. 305, 85 Neb. 295.

Or. Nordin v. Lovegren Lumber Co., 156 P. 587, 80 Or. 140.

Va. Powhatan Lime Co. v. Whetzel's Adm'x, 86 S. E. 898, 118 Va. 161.

[55] **Ala.** Lunsford v. Walker, 93 Ala. 36, 8 So. 386.

Cal. People v. Bojorquez, 169 P. 922, 35 Cal. App. 350.

Fla. Lindsey v. State, 43 So. 87, 53 Fla. 56.

Ga. Jackson v. Seaboard Air Line Ry., 78 S. E. 1059, 140 Ga. 277; Atlantic & B. Ry. Co. v. Bowen, 54 S. E. 105, 125 Ga. 460.

Ill. People v. Duzan, 112 N. E. 315, 272 Ill. 478.

Minn. Bingham v. Bernard, 36 Minn. 114, 30 N. W. 404.

N. C. State v. Fulkerson, 61 N. C. 233.

Wash. Wheeler v. Hotel Stevens Co., 127 P. 840, 71 Wash. 142, Ann. Cas. 1914C, 576.

Instructions proper within rule. An instruction that it is jury's duty to follow the law, and the instructions

the deliberations of the jury,[56] or where a corporation is a party.[57] An instruction, in an action against a corporation, to consider the evidence with the same fairness that the jury would show to a private individual, is a cautionary instruction, and not objectionable as on the weight of the evidence.[58]

In criminal cases it is proper to caution the jury against being biased or influenced by sympathy for the accused or his relatives, or by public opinion or prejudice,[59] and such an instruction is not prejudicial to the accused, as requiring the jury to determine the case, freed from any of the mental processes by which men usually arrive at conclusions.[60]

On the other hand, the refusal of the trial court to caution the jury against the influence of sympathy or prejudice or public sentiment will not usually be cause for reversing a judgment;[61] jurors being presumed to be of sufficient intelligence to know their duties in this regard.[62] Thus the court need not, as a general rule, admonish the jury not to entertain a bias for the plantiff because the defendant is a corporation, or charge that a corporation is entitled to the same protection under the law as individual liti-

given by the court, and they were bound to decide a case without any feeling, sympathy, or prejudice for or against plaintiff and the other defendants, and on its merits, as between two individuals, was proper. Hoag v. Washington-Oregon Corporation, 147 P. 756, 75 Or. 588, modifying judgment on rehearing 144 P. 574, 75 Or. 588. In an action against a coal mining company at the time of the labor troubles, it was proper to instruct the jury not to be influenced by sympathy or prejudice, and that a disregard of such instruction would lead to the setting aside of the verdict. Bachert v. Lehigh Coal & Navigation Co., 57 A. 765, 208 Pa. 362.

[56] People v. Taylor, 87 P. 215, 4 Cal. App. 31; Summerford v. State, 49 S. E. 268, 121 Ga. 390; McLaurin v. Williams, 95 S. E. 559, 175 N. C. 291; State v. Barwick, 71 S. E. 838, 89 S. C. 153.

[57] Cornell v. Manistee & N. E. R. Co., 75 N. W. 472, 117 Mich. 238; Huss v. Heydt Bakery Co., 108 S. W. 63, 210 Mo. 44; Davis v. Atlanta & C. A. L. Ry. Co., 41 S. E. 892, 63 S. C. 577; Id., 41 S. E. 468, 63 S. C. 370; N. & C. R. R. v. Smith, 11 Heisk. (Tenn.) 455.

[58] Lecklieder v. Chicago City Ry. Co., 172 Ill. App. 557.

[59] Day v. State, 44 So. 715, 54 Fla. 25; McTyier v. State, 91 Ga. 254, 18 S. E. 140; People v. Beecher, 154 Ill. App. 229; State v. Trapp, 109 P. 1094, 56 Or. 588.

[60] State v. Harsted, 119 P. 24, 66 Wash. 158.

[61] People v. Feld, 86 P. 1100, 149 Cal. 464; Chicago Union Traction Co. v. Goulding, 81 N. E. 833, 228 Ill. 164; Doyle v. Dobson, 74 Mich. 562, 42 N. W. 137; Cloherty v. Griffiths, 144 P. 912, 82 Wash. 634.

Charge not to disregard proof which harmonizes with sympathies. A charge to the jury "that they have no right to act upon their sympathies without proof, but are not to disregard the proof, because it happens to concur with their sympathies, but are to be governed by it," is not error. Sheahan v. Barry, 27 Mich. 217.

[62] Grand Rapids & I. R. Co. v. Horn, 41 Ind. 479; P. Lorillard Co. v. Clay, 104 S. E. 384, 127 Va. 734.

gants.[63] It is only under exceptional circumstances, or when something has transpired to indicate that the jurors are unmindful of their sworn duty, that a party will be entitled to such an instruction.[64]

As indicated by the foregoing statement the circumstances may be such that the ends of justice will be best served by cautioning the jury against allowing any considerations of sympathy or prejudice to enter their deliberations, in which case the court should give an appropriate instruction.[65] So such instructions may sometimes be required in actions for personal injuries,[66] and in criminal cases the court should, when the circumstances so require, caution the jury against convictions from prejudice or upon insufficient evidence,[67] as where there is a strong prejudice in the county against the defendant.[68]

§ 383. Appeals to sympathy or prejudice

The court should not in its instructions use language calculated to cause the jury to be swayed by their sympathies[69] or their prej-

[63] St. Louis, I. M. & S. Ry. Co. v. Lyman, 57 Ark. 512, 22 S. W. 170; Same v. Paup (Ark.) 22 S. W. 213; Spear v. United Railroads of San Francisco, 117 P. 956, 16 Cal. App. 637; Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370, 21 P. 276; Turner v. Southwest Missouri R. Co., 120 S. W. 128, 138 Mo. App. 143.

[64] Johnson v. St. Louis & S. Ry. Co., 73 S. W. 173, 173 Mo. 307; Copeland v. Omaha & C. B. St. R. Co., 151 N. W. 947, 98 Neb. 42.

[65] People v. Turner, 107 N. E. 162, 265 Ill. 594, Ann. Cas. 1916A, 1062; Smith v. Sanitary Dist. of Chicago, 103 N. E. 254, 260 Ill. 453; Chapman v. Pfarr, 123 N. W. 992, 145 Iowa, 196; Shanks v. Oregon-Washington R. & Nav. Co., 167 P. 1074, 98 Wash. 509.

Caution against popular prejudice. Where the court discovers a popular prejudice against a party, it should state the law so clearly and unequivocally as to leave the jury no escape from their duty. Quinby v. Railway Co., 2 Del. Co. Ct. R. (Pa.) 285.

[66] Jones & Adams Co. v. George, 81 N. E. 4, 227 Ill. 64, 10 Ann. Cas. 285, reversing judgment 125 Ill. App. 503.

[67] Cook v. State, 35 So. 665, 46 Fla. 20; Doyle v. State, 22 So. 272, 39 Fla. 155, 63 Am. St. Rep. 159.

[68] State v. Barton, 142 P. 348, 70 Or. 470.

[69] People v. Williams, 17 Cal. 142; Amend v. Smith, 87 Ill. 198; National Council of Knights and Ladies of Security v. O'Brien, 112 Ill. App. 40; Robertson v. Brown, 76 N. W. 891, 56 Neb. 390; Hoag v. Washington-Oregon Corporation, 147 P. 756, 75 Or. 588, modifying judgment on rehearing 144 P. 574, 75 Or. 588.

Instructions erroneous within rule. Where, in an action against an insurance company by the widow and child of the insured, the court opened his charge by stating that, when women and children were connected with a case, he made it a rule to say as little as possible to the jury, because his sympathies frequently got the better of his judgment, and he subsequently said that, while he always tried to close his eyes to the fact that a woman and child had an interest in a suit, he could not always do it, and did not suppose the jury could and proceeded: "It is not expected. If a man can do that, he is no better than a brute. He is as bad as the heathen is supposed to be, and worse than the horse thief is thought to be. If he could close his eyes to that fact, lose all sense of decency and self-respect, he would not be fit for a ju-

udices[70] rather than the evidence, and instructions containing language of this description are properly refused.[71] But not every instruction which embodies matter that might conceivably make an appeal to the emotional side of a juror will be cause for reversing a judgment.[72] Such matter will not render an instruction objectionable, if it is proper for the jury to consider,[73] and an instruction which, while telling the jury that it is natural and proper for them to feel sympathy, also cautions them that they

ror"—it was held that this was ground for reversal of a judgment in favor of plaintiffs. Northwestern Mut. Life Ins. Co. v. Stevens (C. C. A. Neb.) 71 F. 258, 18 C. C. A. 107.

[70] Jones v. State, 25 So. 25, 120 Ala. 383; Muhlig v. Rebhan (Sup.) 105 N. Y. S. 110, 55 Misc. Rep. 305. See McGaughey v. State, 169 S. W. 287, 74 Tex. Cr. R. 529.

Instructions held objectionable within rule. On a prosecution for larceny of a bond, it was error, after charging at defendant's request that, if the taking of the bond was not unlawful, defendant's failure to return the bond on demand was not sufficient to constitute the offense, to add that, if the taking was wrongful, the failure to return the bond on demand was simply a recurrence of the wrong, adding insult to injury. State v. English, 62 Minn. 402, 64 N. W. 1136.

Reference to people attending trial as a lobby. Instructions which characterize the people in attendance at a trial as a lobby, who have packed the courtroom with intent to influence the jury to decide the case without regard to evidence, are properly refused, as calculated to prejudice the jury. Lynch v. Bates, 139 Ind. 206, 38 N. E. 806.

[71] Starling v. Selma Cotton Mills, 88 S. E. 242, 171 N. C. 222; Supreme Council of American Legion of Honor v. Anderson, 61 Tex. 296.

[72] People v. Pool, 27 Cal. 572; State v. McCarter, 98 N. C. 637, 4 S. E. 553; Duprel v. Collins, 146 N. W. 592, 33 S. D. 365; Texas & N. O. R. Co. v. Walker, 125 S. W. 99, 58 Tex. Civ. App. 615; Peltier v. Chicago, St. P., M. & O. Ry. Co., 88 Wis. 521, 60 N. W. 250.

Instructions held not improper within rule. An instruction that the jury might consider the reasonable or unreasonableness of testimony given by deposition as to declarations by a person since deceased, and might also consider that the lips of declarant were closed by death, so that the testimony could not be contradicted. Bohen v. North American Life Ins. Co. of Chicago, 177 N. W. 706, 188 Iowa, 1349. Where the court instructs the jury that the issue is not whether the defendants' business was a cheat, but whether it was a lottery, the fact that the charge also states that the defendants' business was a cheat no better than highway robbery is not ground for reversal. MacDonald v. United States (C. C. A. Ill.) 12 C. C. A. 339, 63 Fed. 426. Where the character of the homicide is not in issue, the only controversy being as to whether defendants committed the homicide, an instruction reciting the theory of the state as to the circumstances, and stating that, "if this is true, this crime, in its sickening and horrible details, is without parallel in the history of crime in this state," and then warning the jury not to be influenced by the indignation the recital of the crime may have aroused, is not ground for reversal. State v. Green, 26 S. E. 234, 48 S. C. 136. There was no error in instructing the jury that the offense with which defendant was charged was a very serious one, which should not escape punishment, where they were also instructed that, because of the seriousness of the charge, the prisoner should not be convicted on slight evidence. Commonwealth v. Harris, 168 Pa. 619, 32 A. 92, 36 Wkly. Notes Cas. 343.

[73] Lomax v. Holbine, 90 N. W. 1122, 65 Neb. 270.

must render a verdict according to the law and the evidence, uninfluenced by their sympathy, is not reversible error.[74]

§ 384. Instructions as to reaching verdict by lot or by the law of averages

Cautionary instructions as to the manner in which the jury shall reach their verdict are in the discretion of the trial court.[75] It is not error to tell the jury that a quotient verdict,[76] or a verdict decided by lot,[77] is illegal and improper; and, on the other hand, the refusal of the court to caution the jury against determining their verdict by lot,[78] or by the law of averages,[79] will not constitute reversible error. It is improper, however, for the court to give instructions which tend to, or expressly sanction, a verdict founded on compromise or the law of averages.[80]

Where the court undertakes to caution the jury in a criminal case not to find their verdict by lot or chance, it should admonish them that they must first ascertain the fact that the defendant is guilty.[81]

[74] Robbins v. Magoon & Kimball Co., 159 N. W. 323, 193 Mich. 200; Citizens' St. Ry. Co. v. Dan, 52 S. W. 177, 102 Tenn. 320.

[75] Carson v. Southern Ry. Co., 46 S. E. 525, 68 S. C. 55, judgment affirmed Southern Ry. Co. v. Carson, 24 S. Ct. 609, 194 U. S. 136, 48 L. Ed. 907.

[76] Sharp v. Kansas City Cable Ry. Co., 114 Mo. 94, 20 S. W. 93.

[77] Lankster v. State (Tex. Cr. App.) 72 S. W. 388; Driver v. State, 38 S. W. 1020, 37 Tex. Cr. R. 160.

[78] Benjamin v. Metropolitan St. Ry. Co., 133 Mo. 274, 34 S. W. 590.

[79] Sherwood v. Grand Ave. Ry. Co., 132 Mo. 339, 33 S. W. 774; Woodman v. Town of Northwood, 36 A. 255, 67 N. H. 307.

[80] Richardson v. Coleman, 131 Ind. 210, 29 N. E. 909, 31 Am. St. Rep. 429; Goodsell v. Seeley, 10 N. W. 44, 46 Mich. 623, 41 Am. Rep. 183; Edens v. Hannibal & St. J. R. Co., 72 Mo. 212; Boden v. Irwin, 92 Pa. 345; Gulf, C. & S. F. Ry. Co. v. Johnson, 90 S. W. 164, 99 Tex. 337, reversing judgment Gulf, C. & S. F. Ry. Co. v. Rogers, 82 S. W. 822, 37 Tex. Civ. App. 99.

While a quotient verdict will not necessarily be set aside, yet the trial court ought not to suggest to the jury, if the witnesses differ as to values, that they ascertain what the average of the estimates are first, and then afterwards decide whether such an average is fair or full value. Kansas City, W. & N. W. R. Co. v. Ryan, 49 Kan. 1, 30 P. 108.

Instructions tending to induce quotient verdict. An instruction that, if the jury find for the plaintiff, they must not assess damages by adding the amounts they individually think should be awarded and dividing the amount so obtained by the number of jurors, unless they thereafter agree upon such amount as a just sum under the evidence, is erroneous, as tending to induce the jury to reach a verdict in the manner censured by the instruction. West Chicago St. R. Co. v. Dougherty, 89 Ill. App. 362.

[81] Winfrey v. State, 209 S. W. 151, 84 Tex. Cr. R. 579.

CHAPTER XXXI

NECESSITY AND PROPRIETY OF INSTRUCTIONS WITH REFERENCE TO ARGUMENTS OF COUNSEL

§ 385. Influence and effect of arguments of counsel.
386. Improper arguments.

§ 385. Influence and effect of arguments of counsel

The court cannot, in advance of the arguments of counsel, be required to instruct the jury on the province of counsel in arguing the cause.[1] Counsel have a right to address the jury, such right being conferred by statute in some jurisdictions, and the court cannot properly instruct the jury to disregard the arguments of counsel,[2] or give instructions tending to limit the influence of legitimate

[1] Parrish v. Parrish, 72 P. 844, 67 Kan. 323.

[2] **Ala.** Tucker v. State, 52 So. 464, 167 Ala. 1.

Ill. People v. Ambach, 93 N. E. 310. 247 Ill. 451.

Minn. Svensson v. Lindgren, 145 N. W. 116, 124 Minn. 386, Ann. Cas. 1915B, 734.

N. D. State v. Gutterman, 128 N. W. 307, 20 N. D. 432, Ann. Cas. 1912C, 816.

Tex. Chapman v. State, 147 S. W. 580, 66 Tex. Cr. R. 489; Reeves v. State, 34 Tex. Cr. R. 483, 31 S. W. 382.

Instructions erroneous within rule. A charge that the jury are not to try the case by the arguments of counsel, who, by "the study of a lifetime, * * * learn how to distort, change color and discolor facts, in order that they may use them to the advantage of their clients." Gibson v. State, 26 Fla. 109, 7 So. 376.

Instructions not erroneous within rule. An instruction that if in putting in the evidence or in argument counsel has made any statement not based upon the evidence, the jury should wholly disregard such statement, is not objectionable for failure to distinctly say that the statements of counsel referred to were statements in reference to the facts in the case. North Chicago St. R. Co. v. Wellner, 69 N. E. 6, 206 Ill. 272, affirming judgment 105 Ill. App. 652. Charge that neither court nor jury could surrender judgment to control of counsel on either side, though they might be of assistance in determining the truth, that it is the right and duty of counsel to fairly maintain their cause, and they may emphasize the law and evidence sustaining their contentions, but the jury are to determine the facts. State v. Price, 160 N. W. 677, 135 Minn. 159. Instruction that remarks of counsel are not evidence, and that verdict must be founded solely on evidence and laws given by court. State v. Moss, 172 P. 199, 24 N. M. 59. An instruction that the jury must try the case by what they hear from the witness stand and from the law applicable thereto, "using the argument of counsel to assist you in understanding the law as applicable to the evidence," is not erroneous as leading the jury to understand that they must reject any impressions of fact made on their minds by a full discussion of the evidence by counsel. Mann v. State, 53 S. E. 324, 124 Ga. 760, 4 L. R. A. (N. S.) 934. An instruction that the verdict must be based on the evidence, and the law as given by the court, and that extraneous statements should be discarded. State v. Butts, 78 N. W. 687, 107 Iowa, 653. A charge that where court and counsel differ as to the law the jury should take and ap-

statements and arguments of counsel,[3] and it is ordinarily improper for the court to comment unfavorably upon the arguments of counsel.[4] It has been held not error to charge that as a general rule it is the fairest and best way for a jury to decide cases mainly upon the grounds taken and discussed by counsel in their argument,[5] and it is proper for the court to recapitulate fairly such contentions of counsel as illustrate the bearing of the evidence on the issues.[6]

The giving of an instruction which otherwise might be improper is sometimes justified by the comments of counsel made in argument,[7] and the court may tell the jury that the statements

ply the law from the court was not prejudicial error, in that it destroyed the wholesome effect of argument of counsel for plaintiff in error, where there was no actual difference as to applicable law. Williams v. State, 99 S. E. 711, 24 Ga. App. 53. Where the court in a criminal trial charged the jury that the trial was not an oratorical contest between the eloquent counsel, and that the jurors were not sitting to determine which made the most eloquent speech or emitted the largest volume of sound, there was no error. State v. Evans, 92 N. W. 976, 88 Minn. 262. Instructions that reference had been made in the argument to the punishment that might be inflicted, and stating that the jury had nothing to do with that, and telling the jury to disregard statements in argument not supported by evidence, and to decide the case on the evidence alone, guided by the instructions, were abstractly correct, and, if not justified by the arguments were not prejudicial to accused. State v. Wilson, 99 N. W. 1060, 124 Iowa, 264. An instruction that the jury should not regard the remarks of counsel as evidence, but that the verdict must be based solely on the evidence. Miera v. Territory, 81 P. 586, 13 N. M. 192. An instruction that the jury must try the case on the evidence and the law as given by the court, disregard all statements of counsel on either side, unless supported by the testimony, and draw no inferences from questions propounded by counsel and excluded. State v. Burton, 67 P. 1097, 27 Wash. 528.

Failure to except. Under statute providing that a charge, if clearly erroneous, is ground for reversal though not objected to until appeal, if it relates to a material matter, and is calculated to prejudice defendant, a charge, not excepted to, to disregard the arguments of counsel and try the case by the law given in the charge and the testimony admitted, " and allow nothing else to influence you in finding your verdict," is not a deprivation of the right to be heard by counsel, so as to be cause for reversal. Roe v. State, 25 Tex. App. 33, 8 S. W. 463.

[3] People v. Hite, 8 Utah, 461, 33 P. 254. See Moss v. Mosley, 41 So. 1012, 148 Ala. 168.

Instructions not objectionable within rule. In prosecution for assault with intent to rape, a charge that in determining defendant's guilt or innocence the opinion of counsel in case would not control jury, and that it was not province of counsel to express any opinion as to what jury's conclusions ought to be, was not erroneous, as curtailing the right of argument of counsel for movant, in violation of a constitutional provision giving right to defend in person or by attorney. Washington v. State (Ga. App.) 103 S. E. 854.

[4] Commonwealth v. Maddocks, 93 N. E. 253, 207 Mass. 152.

[5] Melvin v. Bullard, 35 Vt. 268.

[6] Clark v. Wilmington & W. R. Co., 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749.

[7] Stephens v. Neilson, 154 Ill. App. 67; Sawyer v. State, 35 Ind. 80; State v. West, 43 La. Ann. 1006, 10 So. 364.

Instructions proper within rule.

of counsel as to the facts in the case are not to be regarded, if such statements are at variance with the record or with the jury's recollection of the evidence,[8] or that the attorneys are not supposed to be impartial, and that the jury are to take their statements both as to the law and the facts guardedly,[9] or that the assertion of counsel as to the opinion they entertain of the effect of the evidence, however strongly made, is not evidence,[10] and the prosecuting attorney in a criminal case may express his opinion of the guilt of the accused in such terms as to entitle the defendant to a charge that the jury must not consider the belief of the prosecuting attorney or his impression of the testimony.[11] Where counsel, in the course of their argument, read extracts from law books, it is proper for the court to say to the jury that such extracts are not to be accepted as law, and that the jury must receive the law only from the court.[12]

§ 386. Improper arguments

Where counsel make improper assertions, misstate propositions of law, indulge in fallacious argument, appeal to prejudice, or com-

Where, on a trial for murder, defendant's counsel alluded in argument to a higher law, which he claimed the Bible sustained, it was not error for the court to refer to the Bible, in his charge, to justify the laws of the state on the subject of murder and manslaughter. State v. Workman, 39 S. C. 151, 17 S. E. 694.

[8] Szczech v. Chicago City Ry. Co., 157 Ill. App. 150; Meagher v. Fogarty, 152 N. W. 833, 129 Minn. 417; City of Tacoma v. Wetherby, 106 P. 903, 57 Wash. 295; Mullen v. Reinig, 72 Wis. 388, 39 N. W. 861.

[9] State v. Jones, 29 S. C. 201, 7 S. E. 296.

[10] McRae v. State, 52 Ga. 290.

Instructions held proper within rule. Where counsel for defendant stated in argument to the jury that defendant impressed him in his statement there, and before, that he was innocent, and that he conscientiously did not believe defendant was guilty, there was no error in charging that "what counsel said in their argument, and what they believe," was to have no influence with the jury; it clearly appearing that the judge referred solely to the statement by counsel as to his belief in defendant's innocence. Smith v. State, 95 Ga. 472, 20 S. E. 291.

[11] People v. McGuire, 89 Mich. 64, 50 N. W. 786.

Discretion of court. A request to charge that expression of belief in guilt of accused by state's attorney and filing of an information by him, should not influence jury belonged to the class of requests which ordinarily may be given to the jury or not, according as judgment of trier may determine. State v. Greenberg, 103 A. 897, 92 Conn. 657.

[12] Chamberlain v. Masterson, 26 Ala. 371; Morehouse v. Remson, 59 Conn. 392, 22 A. 427.

Reading from text-books or legal decisions. If the prosecuting attorney, in his argument in a capital case, is permitted to read extracts from medical works, or testimony of professors of chemistry from the criminal reports of another state, it is the duty of the court to instruct the jury that they are not evidence. Yoe v. People. 49 Ill. 410.

ment on matters not in evidence, the court may,[13] and should [14] on request, give instructions for the purpose of nullifying any prejudicial effect that might be produced by such argument, and the failure to object to such argument at the time it is made will not justify the court in subsequently refusing to give such an instruction.[15]

The remarks of the prosecuting attorney in a criminal case may be of such a character as to entitle the defendant to a charge that they be disregarded,[16] and it is proper in a criminal case to tell

[13] **Ala.** Williams v. State, 30 So. 484, 130 Ala. 107.

Cal. Kellner v. Travelers' Ins. Co., Hartford, Conn., 181 P. 61, 180 Cal. 326.

Conn. State v. Gannon, 52 A. 727, 75 Conn. 206.

Del. State v. Lapista (Gen. Sess.) 105 A. 676, 7 Boyce, 260.

Ga. Brooks v. State, 90 S. E. 989, 19 Ga. App. 3; Cole v. State, 48 S. E. 156, 120 Ga. 485; Rucker v. State, 39 S. E. 902, 114 Ga. 13; Matthews v. Poythress, 4 Ga. 287.

Ind. Blizzard v. Applegate, 77 Ind. 516.

N. J. State v. Clark, 64 A. 984, 74 N. J. Law, 33.

N. D. State v. Dodson, 136 N. W. 789, 23 N. D. 305.

Or. State v. Richie, 108 P. 134, 56 Or. 169; State v. McGinnis, 108 P. 132, 56 Or. 163.

Pa. Randal v. Gould, 73 A. 986, 225 Pa. 42; Manchester v. Reserve Tp., 4 Pa. 35.

R. I. Brown v. Rhode Island Co., 102 A. 965.

Tex. Norton v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 1044; Willis v. State, 90 S. W. 1100, 49 Tex. Cr. R. 139; Barkman v. State, 52 S. W. 73, 41 Tex. Cr. R. 105.

Instructions held proper within rule. Where, on a prosecution for murder, the court instructed: "You need not be afraid of seeing spooks either now or when you come to die, if you have been honest and decided conscientiously, as the only spook that a juror ever sees is the spook of a murdered conscience—a conscience murdered by consenting to an unrighteous verdict"—it was held that the language was not erroneous, it having been called forth by an appeal made to the jury by defendant's attorney, and having been merely intended to admonish the jury not to render a verdict on sentimental grounds. State v. Malloy, 60 S. E. 228, 79 S. C. 76.

[14] **Ark.** Briggs v. Jones, 201 S. W. 118, 132 Ark. 455; Boone v. Holder, 112 S. W. 1081, 87 Ark. 461, 15 Ann. Cas. 735.

Ill. Illinois Cent. R. Co. v. Borders, 61 Ill. App. 55.

Ind. Jackson v. State, 116 Ind. 464, 19 N. E. 330; Conaway v. Shelton, 3 Ind. 334.

Iowa. State v. McCartney, 65 Iowa, 522, 22 N. W. 658.

Kan. State v. Francis, 68 P. 66, 64 Kan. 664.

Ky. Louisville & N. R. Co. v. Smith, 84 S. W. 755, 27 Ky. Law Rep. 257.

Mass. Taft v. Fiske, 140 Mass. 250, 5 N. E. 621, 54 Am. Rep. 459.

Mo. Drumm-Flato Commission Co. v. Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503.

Tex. Seals v. State (Cr. App.) 38 S. W. 1006; Cooksie v. State, 26 Tex. App. 72, 9 S. W. 58.

Wash. Farnandis v. Great Northern Ry. Co., 84 P. 18, 41 Wash. 486, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027.

[15] Todd v. Todd, 77 N. E. 680, 221 Ill. 410.

Contra, Louisville & N. R. Co. v. Seibert's Adm'r, 55 S. W. 892, 21 Ky. Law Rep. 1603.

[16] Magnuson v. State, 41 N. E. 545, 13 Ind. App. 303; State v. King, 74 S. W. 627, 174 Mo. 647; People v. Rose,

the jury to disregard arguments of counsel which are not based upon the evidence.[17] The district attorney may be estopped or precluded by his own stipulations or admissions from arguing along certain lines, and if he does so argue the defendant will be entitled to an instruction to counteract the effect of such argument.[18]

In some jurisdictions, however, charges asked in a criminal prosecution for no other purpose than to respond to or offset the arguments made before the jury by the prosecuting attorney are properly refused;[19] the remedy being, if such arguments are improper, or based on matters not in evidence, to object when the argument is uttered.[20]

52 Hun, 33, 4 N. Y. S. 787; Young v. State, 55 S. W. 331. 41 Tex. Cr. R. 442; Goldstein v. State (Tex. Cr. App.) 35 S. W. 289.

[17] Brewer v. State, 49 So. 336. 160 Ala. 66; Bowen v. State, 84 S. E. 793. 16 Ga. App. 179; Commonwealth v. Nye, 87 A. 585. 240 Pa. 359; Hart v. State, 121 S. W. 508, 57 Tex. Cr. R. 21; State v. Lance, 162 P. 574, 94 Wash. 484.

[18] State v. Wilson, 49 So. 986, 124 La. 82.

[19] Earle v. State, 56 So. 32, 1 Ala. App. 183; Anderson v. State, 49 So. 460, 160 Ala. 79; Hill v. State, 46 So. 864, 156 Ala. 3; Ward v. State, 45 So. 221, 153 Ala. 9; Bluett v. State, 44 So. 84, 151 Ala. 41; Thomas v. State, 43 So. 371, 150 Ala. 31; Brown v. State, 43 So. 194, 150 Ala. 25; Neville v. State, 41 So. 1011, 148 Ala. 681; Whatley v. State, 39 So. 1014, 144 Ala. 68.

[20] Hill v. State, 50 So. 41, 161 Ala. 67.

CHAPTER XXXII

DIRECTIONS AS TO FORM OF VERDICT

§ 387. Form of verdict in civil cases.
388. Form of verdict in criminal cases.
389. Duty, on convicting of one offense, to acquit of another.

§ 387. Form of verdict in civil cases

Where the trial judge instructs the jury as to how to answer a certain issue upon a given state of facts if found for the plaintiff, he should also instruct them as to how to answer such issue if they should find for the defendant.[1] Where an issue in abatement and an issue on the merits of an action are both submitted, the court should direct the jury to find separately upon them,[2] or that if they find for defendant on the issue in abatement they need not consider issues on the merits.[3]

It is improper to require the jury, in the event of a finding for the plaintiff, to state the grounds of their verdict.[4] Usually it will not be reversible error to fail to give to the jury a form of verdict, in the absence of any request for such an instruction.[5]

§ 388. Form of verdict in criminal cases

In a criminal case it is proper to submit a form of verdict to be found in case of acquittal or conviction,[6] although, in the absence

[1] Jarrett v. High Point Trunk & Bag Co., 56 S. E. 937, 144 N. C. 299.

[2] Gardner v. Clark, 21 N. Y. 399.

[3] Robertson v. Ephraim, 18 Tex. 118.

[4] Gulf, C. & S. F. Ry. Co. v. Harriett, 80 Tex. 73, 15 S. W. 556.

[5] Triggs v. McIntyre, 115 Ill. App. 257, judgment affirmed 74 N. E. 400, 215 Ill. 369; McCrary v. Missouri, K. & T. Ry. Co., 74 S. W. 2, 99 Mo. App. 518.

[6] People v. Chaves, 54 P. 596, 122 Cal. 134; Keigans v. State, 41 So. 886, 52 Fla. 57; Loyd v. State (Ga. App.) 106 S. E. 601; State v. Butler, 173 N. W. 239, 186 Iowa, 1247; Commonwealth v. Kloss, 38 Pa. Super. Ct. 307.

Instructions held proper. An instruction that if the jury should find defendant guilty of murder they should write in their verdict the word, "Guilty;" if guilty of manslaughter, "Guilty of manslaughter"—is correct. State v. Owens, 44 S. C. 324, 22 S. E. 244, following State v. Faile, 43 S. C. 52, 20 S. E. 798. Where the court instructed that if the jury found defendant charged with assault to kill guilty "of this charge" the form of the verdict would be, etc., was proper as distinguishing the form from that to be used if he was found guilty of less offense. Turner v. State, 92 S. E. 975, 20 Ga. App. 165. In a trial for violating the local option law, involving two counts alleging two sales on the same day, instructions that each separate sale constitutes a separate offense, that if accused made a sale on the same day as the sale charged in the first count, but at a different time, he should be convicted on the second count, and that if he made the sales charged in both counts a separate verdict should be returned

of any statutory requirement to that effect, it is not error to fail to furnish such a form.[7]

Where a form of verdict is submitted to the jury, it should be so comprehensive as to include every kind of verdict the jury would be warranted in returning,[8] although it is held that it is not error for the court to fail to give a form for acquittal in the absence of a request therefor.[9] Where the defendant pleads not guilty and former acquittal, the jury should be instructed to render a verdict on both pleas.[10]

Where the defense of insanity is set up, the court should charge that, if the defendant is acquitted on that ground, the jury should so state in their verdict, in order that appropriate action may be taken by the court under statutory provisions relating to the disposition of the prisoner in that event,[11] and the court should also

on each count, were not objectionable as omitting to authorize acquittal on one count and conviction on another, or acquittal on both. State v. Woods, 138 S. W. 681, 157 Mo. App. 550. Where, in a prosecution of two defendants for burglary, the court charged what was essential for conviction, and that if the jury believed from the evidence beyond a reasonable doubt they should find defendants guilty as charged, but should acquit if they did not find each of such facts to be established, and if they so found such facts as against one defendant, but not as against the other, they should convict the former and acquit the latter, and if they found defendants, or either of them, guilty, they should assess their or his punishment at confinement for not less than 2 nor more than 12 years, and, if they convicted both, they might assess the same or a different punishment as to each, it was held that the charge was sufficient to enable the jury to properly formulate their verdict if they should convict either, neither, or both of the defendants. Ragsdale v. State, 134 S. W. 234, 61 Tex. Cr. R. 145.

[7] Territory v. McFarlane, 7 N. M. 421, 37 Pac. 1111.

[8] People v. Doras, 125 N. E. 2, 290 Ill. 188; Cronin v. State (Ind.) 128 N. E. 606; State v. Miller, 157 N. W. 131, 175 Iowa, 210; Commonwealth v. Mandela, 48 Pa. Super. Ct. 56; Oates v. State, 103 S. W. 859, 51 Tex. Cr. R. 449.

Form for attempt to commit crime. Where whatever attempt to commit the offense there was on the part of defendant culminated in a complete crime, the court did not err in refusing to submit a form of verdict authorizing conviction for an attempt. State v. Aker, 103 P. 420, 54 Wash. 342, 18 Ann. Cas. 972.

Alternative form in case of acquittal. A charge, in a murder trial, that if the jury found accused guilty they would assess his punishment at ——— years, and if they found him not guilty they would simply say so in their verdict, is not objectionable as giving no alternative form of a verdict in case of acquittal, and thus leaving the jury without option to acquit. Beard v. State, 53 S. W. 348, 41 Tex. Cr. R. 173.

[9] Clemons v. State, 37 So. 647, 48 Fla. 9; Green v. State, 24 So. 537, 40 Fla. 474; Long v. State, 95 Ind. 481.

[10] State v. Gutke, 139 P. 346, 25 Idaho, 737.

[11] Thomson v. State, 83 So. 291, 78 Fla. 400; Scott v. State, 60 So. 355, 64 Fla. 490; State v. Crowe, 102 P. 579, 39 Mont. 174, 18 Ann. Cas. 643.

Form embodying finding that there was reasonable doubt of sanity. The Wisconsin statute providing that if the jury shall find on a special issue of insanity that ac-

provide, on request, a form of verdict of not guilty, independent of the question of insanity.[12]

Instructions submitting forms of verdict should speak of the necessity that any verdict returned must be based upon the belief of the jury from the evidence,[13] although an instruction submitting a form of verdict to be used in case the jury find the defendant guilty is not erroneous, as tending to mislead the jury into the belief that they are directed to convict the defendant, where other instructions require his guilt to be established beyond a reasonable doubt.[14]

Where the evidence shows that the defendant is guilty of the highest degree of the offense charged, if guilty at all, it is not error to refuse to submit a form of verdict for a lower degree.[15]

It will ordinarily be improper to submit a form of verdict designating the particular prison in which the accused shall be incarcerated in case of conviction.[16]

As has already been indicated, the general rule is that, if the defendant in a criminal case desires that a particular form of verdict be submitted to the jury, he should request an instruction embodying such form.[17]

§ 389. Duty, on convicting of one offense, to acquit of another

An instruction on included offenses should inform the jury that, if they should find the defendant guilty of some minor degree of the offense charged they should expressly declare him to be not

cused was insane, or that there is a reasonable doubt of his sanity at the time of the commission of the alleged offense, they shall also find him not guilty of such offense for that reason, only requires that the question of insanity or reasonable doubt of sanity be submitted to the jury in some form, and does not require submission of a form of verdict on such issue to the effect that there was reasonable doubt of defendant's sanity at the time of the commission of the alleged offense. Steward v. State, 102 N. W. 1079, 124 Wis. 623, 4 Ann. Cas. 389. Where, on an issue of accused's insanity, the jury was fully instructed on the question of burden of proof and reasonable doubt, and three proper forms of verdict were submitted, one on behalf of the state and two on behalf of defendant, it was not error for the court to refuse to submit a form to the effect that there was a reasonable doubt of defendant's sanity at the time of the commission of the offense. Steward v. State, 102 N. W. 1079, 124 Wis. 623, 4 Ann. Cas. 389.

[12] Territory v. Kennedy, 110 P. 854, 15 N. M. 556.

[13] State v. Clifford, 52 S. E. 981, 59 W. Va. 1.

[14] State v. Davis, 92 S. W. 484, 194 Mo. 485, 4 L. R. A. (N. S.) 1023, 5 Ann. Cas. 1000.

[15] People v. Hagenow, 86 N. E. 370, 236 Ill. 514; State v. Clough, 79 P. 117, 70 Kan. 510.

[16] People v. Stein, 137 P. 271, 23 Cal. App. 108.

[17] **Fla.** Kelly v. State, 33 So. 235, 44 Fla. 441.

Ill. People v. Foster, 123 N. E. 534, 288 Ill. 371; Montag v. People, 141 Ill. 75, 30 N. E. 337; Spies v. Peo-

guilty of the higher degree, but only of the lower, and the omission of such an instruction, when followed by a general verdict of guilty, is ground for reversal.[18] So where, under statutory provision, the jury are authorized to return a verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, the court, in charging under such statute, should tell the jury that they cannot legally convict of an attempt, without finding that the defendant is not guilty of the offense laid against him in the indictment.[19]

ple, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Dacey v. People, 116 Ill. 555, 6 N. E. 165.

Ind. Long v. State, 95 Ind. 481; Hodge v. State, 85 Ind. 561.

S. C. State v. Hendrix, 68 S. E. 129, 86 S. C. 64.

[18] Kilkelly v. State, 43 Wis. 604.

[19] Marley v. State, 88 A. 208, 58 N. J. Law, 207.

CHAPTER XXXIII

FORMAL MATTERS CONNECTED WITH GIVING OF INSTRUCTIONS

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A. Form and Arrangement of Instructions in General

§ 390. Preliminary statement

The court is not required, prior to charging as to the law of the case, to make a preliminary statement of the issues raised by the pleadings, where the issues are sufficiently pointed out in the course of the charge.[1]

§ 391. Logical arrangement

So long as all the instructions proper and needful in a case are given, and so long as they embody correct statements of the propositions of law involved and cannot mislead the jury, it is immaterial in what precise form the charge is made, or that it is lacking in orderly or logical arrangement.[2]

§ 392. Matters which may be included in single instruction

The discussion of what matters must be included in a single instruction is deferred to a subsequent chapter.[3]

Two or more correct propositions of law may be stated in the same instruction, if the jury will not be confused thereby.[4] The respective theories of the parties need not be presented in separate instructions,[5] and where there is nothing special or individual to distinguish the defenses of two or more persons joined as defendants, it is within the discretion of the trial court to give particular instructions as to each defendant, or to so modify one set of instructions as to make them applicable to all the defendants.[6]

An instruction, however, is objectionable which involves wholly unrelated subjects,[7] and may properly be refused.[8] It is the duty

1 Galveston, H. & S. A. Ry. Co. v. Hitzfelder, 66 S. W. 707, 24 Tex. Civ. App. 318.

2 **Kan.** Atchison, T. & S. F. R. Co. v. Calvert, 52 Kan. 547, 34 P. 976.

Minn. Guerin v. Hunt, 6 Minn. 375 (Gil. 260).

Neb. Gigley v. National Fidelity & Casualty Co., 144 N. W. 810, 94 Neb. 813, 50 L. R. A. (N. S.) 1040.

N. H. Piper v. Boston & M. R. R., 72 A. 1024, 75 N. H. 228; Walcott v. Keith, 22 N. H. 196.

Vt. Holbrook v. Hyde, 1 Vt. 286.

Wash. Hutchins v. School Dist. No. 81 of Spokane County, 195 P. 1020.

W. Va. McClintic v. Ocheltree, 4 W. Va. 249.

3 Post, §§ 533–539.

4 Gemmill v. Brown, 56 N. E. 691, 25 Ind. App. 6; Louisville & N. R. Co. v. Veach, 46 S. W. 493, 20 Ky. Law Rep. 403; Abernathy v. Emporia Mfg. Co., 95 S. E. 418, 122 Va. 406.

5 Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617, rehearing denied 101 P. 111, 1 Okl. Cr. 617; Toone v. J. P. O'Neill Const. Co., 121 P. 10, 40 Utah, 265.

6 Hitchcock v. Corn Exch. Bank, 40 Ill. App. 414.

7 Holbrook v. Seagrave, 116 N. E. 889, 228 Mass. 26.

8 Beam Motor Car Co. v. Loewer, 102 A. 908, 131 Md. 552.

of the court to separate and definitely state the issues of fact made by the pleadings, and to give such instructions as to each issue as the nature of the case requires.[9]

§ 393. Reference to other instructions

There is no necessity for qualifying each instruction by express reference to the others,[10] but the court in one instruction may refer to another for certain matters,[11] and it is not necessary that the instructions so referred to should be repeated,[12] although they should be designated with reasonable particularity.[13]

An instruction referring to an instruction given by the court in a former case to the jurors on the same panel and restating such instruction is not objectionable.[14]

§ 394. Submissions of matters conjunctively or disjunctively

Where a party is entitled to a verdict if any one of several facts has been established, it is error to present all the facts in the conjunctive, thus, in effect, telling the jury to return a verdict for said party only in case the combination of facts has been es-

[9] Jones v. People's Bank Co., 116 N. E. 34, 95 Ohio St. 253.

Illustration of necessity of separately stating issues of fact. In an action by a pedestrian injured by an automobile, contention of plaintiff being that collision took place on crossing, and contention of defendant being that it occurred at the intersection, the court, although the pedestrian had the right of way at both places under a city ordinance, should have instructed separately as to the reciprocal duties and rights of pedestrians and vehicles at street crossings and intersections thus enabling the jury to apply the instructions to the case as they found the facts to be as to the exact location of the collision. Schwalen v. W. P. Fuller & Co., 182 P. 592, 107 Wash. 476, 10 A. L. R. 296.

[10] Scott-Force Hat Co. v. Sturgeon, 127 Mo. 392, 30 S. W. 183.

[11] People v. Laures, 124 N. E. 585, 289 Ill. 490; German Fire Ins. Co. v. Grunert, 112 Ill. 68, 1 N. E. 113; Carter v. Howard, 11 Ky. Law Rep. (abstract) 443; State v. Solon, 153 S. W. 1023, 247 Mo. 672.

Instructions proper within rule. An instruction that if the jury failed to find a verdict according to law as declared in instruction No. 2, but find that defendant feloniously, premeditatedly, on purpose, and with malice aforethought, with a deadly weapon, shot and killed deceased, he was guilty of murder in the second degree, was not bad, as depending on another instruction. State v. Haines, 61 S. W. 621, 160 Mo. 555. An instruction which informs the jury that if, under the evidence and instructions, they believe the defendant liable, then they shall assess the damages, is not erroneous, because of its reference to the other instructions. Chicago, M. & St. P. R. Co. v. Kendall, 49 Ill. App. 398. An instruction that if the jury, "from the evidence, and under the instructions of the court," find the issue for plaintiff, etc., is not error. Norton v. Volzke, 54 Ill. App. 545.

[12] O'Leary v. German American Ins. Co. of New York, 69 N. W. 686, 100 Iowa, 390.

[13] Harvey v. State, 73 So. 200, 15 Ala. App. 311; McBeth-Evans Glass Co. v. Brunson (Ind. App.) 122 N. E. 439; Carrington v. Graves, 89 A. 237, 121 Md. 567; Drumm-Flato Commission Co. v. Gerlack Bank, 92 Mo. App. 326.

[14] Di Maio v. Yolen Bottling Works, 107 A. 497, 93 Conn. 597.

tablished,[15] and where a defendant pleads several defenses, an instruction grouping them together conjunctively, and requiring the jury to believe that there is evidence sufficient to support all of them before they can find for the defendant, is error.[16] It is held, however, that, in the absence of a request to submit several matters of defense disjunctively, their submission conjunctively, so that the jury is seemingly required to believe all of them to have been established in order to find for the defendant, while not good practice, is not reversible error,[17] where it does not appear that the jury were misled.[18]

B. Language, Manner, and Tone of Instructions

§ 395. Definiteness and simplicity of language

The terms and expressions used in an instruction to the jury should not be obscure, vague, or indefinite,[19] or susceptible of a double meaning,[20] but, on the other hand, should be technically accurate[21] and couched in as simple, plain, everyday language as it is possible to use.[22] Simplicity of language may be said to be one of the hall-marks of a good instruction.[23] The model instruc-

[15] Langhan v. City of Louisville, 216 S. W. 1082, 186 Ky. 438; Tuepker v. Sovereign Camp. W. O. W. (Mo. App.) 226 S. W. 1002; Crow v. Citizens' Ry. Co., 78 S. W. 13, 34 Tex. Civ. App. 8; Bell v. Beazley, 45 S. W. 401, 18 Tex. Civ. App. 639.

[16] Jones v. People's Bank Co., 116 N. E. 34, 95 Ohio St. 253; Kersher v. Lotimer (Tex. Civ. App.) 64 S. W. 237.

[17] Oar v. Davis (Tex. Civ. App.) 135 S. W. 710; Texas & P. Ry. Co. v. Patterson, 102 S. W. 138, 46 Tex. Civ. App. 292; Texas Cent. R. Co. v. Waldie (Tex. Civ. App.) 101 S. W. 517.

Facts pleaded conjunctively. Where the facts constituting the alleged contributory negligence are pleaded conjunctively, no affirmative error will arise in submitting the issues in that form. Ft. Worth & R. G. Ry. Co. v. Keith (Tex. Com. App.) 208 S. W. 891, affirming judgment (Civ. App.) 163 S. W. 142.

[18] Gulf, C. & S. F. Ry. Co. v. Hill, 69 S. W. 136, 95 Tex. 629.

[19] Riley v. Fletcher, 64 So. 85, 185 Ala. 570; Chicago City Ry. Co. v. Sandusky, 99 Ill. App. 164, affirmed 64 N. E. 990, 198 Ill. 400; Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255.

Charge held too general. In an action for the price of a livery stable, where the defense was sale of goodwill also, and breach of the contract, a charge, requested by defendants, that, "if there was a sale of goodwill, plaintiff would be responsible for breach of the contract," without specifying how, or in what amount, is too general, and was properly refused. Chambers v. Walker, 80 Ga. 642, 6 S. E. 165.

[20] Fuller v. Stevens (Ala.) 39 So. 623; Fitts v. Southern Pac. Co., 86 P. 710, 149 Cal. 310, 117 Am. St. Rep. 130.

[21] Illinois Steel Co. v. McFadden, 63 N. E. 671, 196 Ill. 344, 89 Am. St. Rep. 319, affirming judgment 98 Ill. App. 296; Fowlie v. Cruse, 157 P. 958, 52 Mont. 222.

[22] Kein v. Gilmore & P. R. Co., 131 P. 656, 23 Idaho, 511; Aikin v. Weckerly, 19 Mich. 482.

[23] Hegberg v. St. Louis & S. F. R. Co., 147 S. W. 192, 164 Mo. App. 514; Morris v. Morris, 28 Mo. 114.

tion is a simple, impartial, clear, concise statement of the law applicable to the evidence in the case on trial,[24] and an instruction which states the law correctly, but which uses language such as is not apt to be comprehended by the average juror, is erroneous,[25] and should be refused.[26]

Pursuant to the above rule the court should avoid the use of technical or Latin terms,[27] and employ instead words which are generally used and concerning the meaning of which the jury can have no doubt.[28] It is not error, however, for the court to make use of technical phrases, if the jury are not misled thereby,[29] nor is it error to use Latin words, or words of Latin derivation which have become a part of the English language.[30]

§ 396. Latitude allowed to court in tone or manner of expressing its ideas

A certain latitude as to the form and expression of a charge is necessarily left to the trial court, so long as the determination of the issues of fact is left to the jury,[31] and the tone or manner of a charge,[32] the vehemence or eloquence of certain passages therein,[33] or the fact that the court does not use language best suited to convey the ideas sought to be expressed, or that certain words or phrases are inaccurate, or that unnecessary words are employed,[34] will not be cause for a reversal of the judgment of the

[24] Gottlieb v. Commonwealth, 101 S. E. 872, 126 Va. 807.

[25] Maryland Casualty Co. v. Finch (C. C. A. Minn.) 147 F. 388, 77 C. C. A. 566, 8 L. R. A. (N. S.) 308; Harvey v. Miles, 16 Ill. App. 533; Watkins v. Wallace, 19 Mich. 57.

[26] Russell v. Oregon R. & Nav. Co., 102 P. 619, 54 Or. 128.

[27] Indianapolis Traction & Terminal Co. v. Thornburg (Ind. App.) 125 N. E. 57; State v. Helm, 61 N. W. 248, 92 Iowa, 540; Fletcher v. Milburn Mfg. Co., 35 Mo. App. 321. See Owens, Lane & Dyer Mach. Co. v. Pierce, 5 Mo. App. 576.

Presumption of fraud. An instruction that fraud will not be presumed from slight circumstances, but the proof must be clear and conclusive, is erroneous, as being stated in too technical language. Watkins v. Wallace, 19 Mich. 57.

[28] Dunn v. Land (Tex. Civ. App.) 193 S. W. 698.

[29] Gano v. Samuel, 14 Ohio, 593.

[30] Thiessen v. City of Belle Plaine, 81 Iowa, 118, 46 N. W. 854; In re Convey's Will, 52 Iowa, 197, 2 N. W. 1084; Owens, Lane & Dyer Mach. Co. v. Pierce, 5 Mo. App. 575; Schwartz v. State, 83 S. W. 195, 47 Tex. Cr. R. 213, 11 Ann. Cas. 620.

[31] Mawich v. Elsey, 10 N. W. 57, 47 Mich. 10; Flick v. Ellis-Hall Co., 165 N. W. 135, 138 Minn. 364.

[32] Bishop v. Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119; Fath v. Thompson, 58 N. J. Law, 180, 33 A. 391; Briffitt v. State, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621.

[33] Page v. Town of Sumpter, 53 Wis. 652, 11 N. W. 60.

[34] **U. S.** (Sup.) Rogers v. Marshal, 1 Wall. 644, 17 L. Ed. 714; (C. C. A. Pa.) Mowles v. Lorimer, 212 F. 155, 129 C. C. A. 11.

Ark. Fourche River Valley & I. T. Ry. Co. v. Tippett, 142 S. W. 520, 101 Ark. 376.

Ga. City of Rome v. Ford, 79 S. E. 243, 13 Ga. App. 386; James v.

trial court, if the instructions as a whole are correct, if their meaning is clear, and if the jury have not been misled by the

Hamil, 78 S. E. 721, 140 Ga. 168; Orr v. Planters' Phosphate & Fertilizer Co., 68 S. E. 779, 8 Ga. App. 59; Coweta County v. Central of Georgia Ry. Co., 60 S. E. 1018, 4 Ga. App. 94.

Ill. Coulter v. Illinois Cent. R. Co., 106 N. E. 258, 264 Ill. 414, affirming judgment 184 Ill. App. 208.

Ind. Southern Ry. Co. v. Hazlewood, 90 N. E. 18, 45 Ind. App. 478, denying rehearing 88 N. E. 636, 45 Ind. App. 478.

Iowa. First Nat. Bank of Marcus v. Wise, 151 N. W. 495, 172 Iowa, 24.

Ky. St. Louis, I. M. & S. R. Co. v. McWhirter, 140 S. W. 672, 145 Ky. 427.

Md. Weant v. Southern Trust & Deposit Co., 77 A. 289, 112 Md. 463.

Mich. Davidson v. Kolb, 55 N. W. 373, 95 Mich. 469.

Mo. Sparks v. Harvey (App.) 214 S. W. 249; Millirons v. Missouri & K. I. Ry. Co., 162 S. W. 1069, 176 Mo. App. 39; Stubblefield v. Smith, 129 S. W. 1027, 146 Mo. App. 316; Torreyson v. United Rys. Co. of St. Louis, 129 S. W. 409, 144 Mo. App. 626; Sherer v. Rischert, 23 Mo. App. 275.

Neb. Stull v. Stull, 96 N. W. 196, 1 Neb. (Unof.) 380, 389; Thayer County Bank v. Huddleson, 95 N. W. 471, 1 Neb. (Unof.) 261; Langdon v. Wintersteen, 78 N. W. 501, 58 Neb. 278.

N. J. Redhing v. Central R. Co., 54 A. 431, 68 N. J. Law, 641.

N. Y. Raynor v. Timerson, 51 Barb. 517.

S. D. M. E. Smith & Co. v. Kimble, 162 N. W. 162, 38 S. D. 511.

Tex. Mutual Life Ins. Co. of New York v. Hodnette (Civ. App.) 147 S. W. 615; St. Louis Southwestern Ry. Co. of Texas v. Wilbanks (Civ. App.) 113 S. W. 318; Texas & P. Ry. Co. v. Johnson, 106 S. W. 773, 48 Tex. Civ. App. 135; Houston & T. C. R. Co. v. Anglin, 99 S. W. 897, 45 Tex. Civ. App. 41.

Utah. Musgrave v. Studebaker Bros. Co. of Utah, 160 P. 117, 48 Utah, 410.

Vt. Coolidge v. Taylor, 80 A. 1038, 85 Vt. 39.

Wash. Peterson v. Arland, 141 P. 63, 79 Wash. 679.

W. Va. Webb v. Ritter, 54 S. E. 484, 60 W. Va. 193.

Omission of a prefix. A charge that the jury are not bound to accept the opinions of doctors, but may give such opinions the weight to which they deem them entitled, or altogether disregard them in so far as they may deem them "reasonable," being correct in every respect, except the obvious omission of the prefix "un" before the word "reasonable" is not fatally erroneous. Day v. Emery-Bird-Thayer Dry Goods Co., 89 S. W. 903, 114 Mo. App. 479.

Inappropriate use of words. That the court, in reference to an alteration in a written contract which would render the agreement invalid, if inserted without the knowledge or consent of one of the parties to the contract, used the word "forgery," was immaterial, though, technically speaking, such criminal act could not be committed by such alteration. Swindells v. Dupont, 92 N. W. 468, 88 Minn. 9. An instruction that the creation of an agency carries with it the power to do all those things which are necessary, proper, and usual to be done in order to effectuate the purpose of the agency, and embraces all the "approximate" means necessary to accomplish the desired ends, is not erroneous, because of the use of the word "approximate" instead of "appropriate." Riverview Land Co. v. Dance, 35 S. E. 720, 98 Va. 239. Under a statute making it a misdemeanor to leave open a hole or shaft and imposing penalty of double value of stock injured or killed by falling into the shaft, there was no error in an instruction referring to a hole as an "excavation," when it was nine feet long, six feet wide, and six feet deep, and clearly came within the statute, although an excavation may or may not be prohibited by statute. Jonesboro, L. C. & E. R. Co. v. Kirksey, 204

manner of expression of the court. It is not improper to use the masculine gender in referring to a person of the female sex.[35]

S. W. 208, 135 Ark. 617. In an action for injury to a pedestrian who fell into a coalhole, error cannot be predicated on the use by the court in an instruction of the word "slipped," instead of the word "tilted," as used in the petition, where the evidence on the nature of the injury was clear, and no prejudice could have resulted. Young Men's Christian Ass'n v. Jasse (Tex. Civ. App.) 183 S. W. 867.

Use of "proof" and "evidence" interchangeably. "Proof" in a strictly accurate and technical sense is the result or effect of evidence, while "evidence" is the medium or means by which a fact is proved or disproved, but the words "proof" and "evidence" may be used interchangeably and synonymously in court's charge especially where attention of court is not specially called to the real difference in meaning (citing Words and Phrases, Evidence; Proof). Walker v. State, 212 S. W. 319, 138 Ark. 517.

Use of "approximately" instead of "proximately." An instruction on contributory negligence, in an action for death at an interurban railway crossing, was not defective in the use of the word "approximately," instead of "proximately"; the two words being so closely allied in meaning that the use of the former, in a clause requiring such negligence to have "approximately" contributed to the injury, could not have misled the jury. Brooks v. Muncie & P. Traction Co., 95 N. E. 1006, 176 Ind. 298. Where, in an action for injuries to an employé, the court defined proximate cause and used in its instructions the word "proximate" several times, the use of the word "approximately" for "proximately" in a charge relating to proximate cause was not erroneous. Choctaw, O. & T. Ry. Co. v. McLaughlin, 96 S. W. 1091, 43 Tex. Civ. App. 523.

Use of "culvert" instead of "drain." In an action against a railroad company for injuries to plaintiff's adjoining property by a change in the grade of a street interfering with a natural drain, an instruction that in the construction of defendant's approaches to a viaduct defendant was bound to construct culverts through the embankment was not objectionable in the use of the word culvert; the openings having been referred to in other instructions as drains or channels. Shrader v. Cleveland, C., C. & St. L. Ry. Co., 89 N. E. 997, 242 Ill. 227, 26 L. R. A. (N. S.) 226, affirming judgment 147 Ill. App. 252.

Use of "defendant" instead of "plaintiff." A charge exonerating defendant from liability, if "defendant" was guilty of contributory negligence by failing to exercise ordinary [care] in his shipment, is not rendered misleading by the use of the word "defendant" instead of "plaintiff," and the omission of the word "care." Galveston, H. & S. A. Ry. Co. v. Word (Tex. Civ. App.) 124 S. W. 478.

"Disaster" instead of "accident." In an action for injuries to a child, caused by defendant's negligently leaving a live wire in a public place unguarded, an instruction stating that defendant was bound to exercise the highest skill in the maintenance of the entire plant, consistent with the proper conduct of the business according to the best known methods of the state of its art, prior to the disaster, was not erroneous for using the word "disaster" instead of "accident," or some other similar term. Colorado Springs Electric Co. v. Soper, 88 P. 161, 38 Colo. 126.

Use of word "result" instead of "cause." Where the court, in an action for injuries to a servant, in response to a suggestion charged: "I did not tell you, if there was negligence on the part of the plaintiff, it had to be the 'proximate result' of the injuries to bar his recovery. The same rule applies to both sides. If

[35] Hightower v. State, 80 S. E. 684, 14 Ga. App. 246; Marek v. State, 94 S. W. 469, 49 Tex. Cr. R. 428; Magruder v. State, 84 S. W. 587, 47 Tex. Cr. R. 465.

§ 397. Inadvertent errors or omissions

As a general rule, error is not properly predicable upon the inadvertent use of a wrong word in an instruction, or the unintentional omission therefrom of a word or phrase which it is apparent would have been corrected if attention had been called thereto,[86] and where it is clear that the jury has not been misled, and a correct result has been reached,[87] or where to hold, in view of the charge as a whole, that the jury could have been misled by a slip

one side was guilty of negligence, it must proximately result in injury, or he would not be entitled to recover. I mean, if plaintiff was guilty of negligence, to bar recovery, it must be the proximate result of his injury," it was held that the use of the word "result," instead of "cause," did not render the instruction erroneous, since, if the injury must be the proximate result of the negligence, then the negligence must have proximately caused the injury. Sloss-Sheffield Steel & Iron Co. v. Stewart, 55 So. 785, 172 Ala. 516.

"Sue" instead of "recover." An instruction in an action for enticing an employé to break his contract with plaintiff that plaintiff cannot "sue" on any other contract except the one alleged in the complaint is not misleading in the use of the word "sue," instead of the word "recover." Burgess v. Tucker, 77 S. E. 1016, 94 S. C. 309.

Use of word "just." Instruction that plaintiff, in action for personal injury, has burden of proving by preponderance of evidence that his claim is just, and that he is entitled to recover, was erroneous, as a just claim is not always a legal claim that may be compensated for in damages, and as "just" may apply in nearly all its senses to either ethics or law, denoting something which is normally right and fair, and sometimes that which is right and fair according to positive law. Lake Hancock & C. R. Co. v. Stinson, 81 So. 512, 77 Fla. 333.

Use of "etc." The use of the abbreviation "etc." in a charge on damages is not to be commended, as the court should specify what things he means. Dallas Consol. Electric St. Ry. Co. v. Chambers, 118 S. W. 851, 55 Tex. Cr. R. 331.

Use of the singular instead of the plural number. An instruction that the burden of proof is on the plaintiff to prove his case by a preponderance of evidence, and if he has failed to make such proof the jury should find the issue for the "defendant," is not misleading, though there were two defendants. Peirce v. Sholtey, 190 Ill. App. 341. The use of the word "plaintiff" in an instruction where there are two plaintiffs to the action is not misleading, where a jury of average intelligence would understand that the court meant the parties suing. Citizens' Gas & Oil Min. Co. v. Whipple, 69 N. E. 557, 32 Ind. App. 203.

Failure to use word "feloniously." An instruction authorizing conviction of the accused if he committed certain acts was not erroneous for failure to use the word "feloniously." State v. Miller, 89 S. W. 377, 190 Mo. 449. An instruction that if the killing was not done in self-defense, but was done in sudden heat or passion, etc., the jury should find defendant guilty of voluntary manslaughter, was not bad for failing to use the word "feloniously." Cook v. Commonwealth, 72 S. W. 283, 24 Ky. Law Rep. 1731. Instruction as to what should be found to warrant conviction of robbery may in place of the word "feloniously" use other words, the equivalent thereof. State v. Johnson, 53 P. 667, 19 Wash. 410.

[86] Gilroy v. Loftus (Sup.) 48 N. Y. S. 532, 22 Misc. Rep. 105; Holt v. State, 100 S. W. 156, 51 Tex. Cr. R. 15; State v. Carter, 15 Wash. 121, 45 P. 745.

[87] **Ga.** Allen v. State, 88 S. E. 100, 18 Ga. App. 1; Solomon v. State, 58 S. E. 381, 2 Ga. App. 92; City of At-

of the tongue or pen would impute such want of ordinary capacity to the jury as to make them unfit for service,[38] slight verbal inaccuracies or clerical errors will be disregarded.

The above rule has been applied to the omission of the phrase "from the evidence,"[39] to the use of the word "testimony" instead

lanta v. Champe, 66 Ga. 659; Carter v. Buchanan, 9 Ga. 539.

Ill. Nichols v. Mercer, 44 Ill. 250;

Ind. Coppage v. Gregg, 1 Ind. App. 112, 27 N. E. 570; Rollins v. State, 62 Ind. 46.

Iowa. Clifton v. Granger, 86 Iowa, 573, 53 N. W. 316.

Kan. State v. Miller, 35 Kan. 328, 10 P. 865.

Ky. Day v. Commonwealth, 96 S. W. 510, 29 Ky. Law Rep. 816.

Miss. Palmer v. State, 18 So. 269; Oliver v. State, 39 Miss. 526.

Mont. Neill v. Jordan, 15 Mont. 47, 38 P. 223.

Neb. Carroll v. State, 73 N. W. 939, 53 Neb. 431; Stein v. Vannice, 44 Neb. 132, 62 N. W. 464.

Or. State v. Porter, 49 P. 964, 32 Or. 135.

Tex. Hill v. State (Cr. App.) 77 S. W. 808; Hutcherson v. State (Cr. App.) 35 S. W. 376; Callicoatte v. State (Cr. App.) 22 S. W. 1041; Arrington v. State (Cr. App.) 20 S. W. 927; Rand v. C. R. Johns & Sons (App.) 15 S. W. 200.

Wis. Schultz v. Culbertson, 49 Wis. 122, 4 N. W. 1070.

Inadvertent use of "not." Where, in an action on an insurance policy, it was uncontroverted that certain articles claimed as lost, in the proof of loss, were in fact saved, it was held that inadvertent error in instructing that, though the jury may "not" believe that articles named as lost were actually saved, that fact alone would not constitute a defense, is not ground for reversal. Bokien v. State Ins. Co. of Oregon, 14 Wash. 39, 44 P. 110.

Making mere fact of injury standard of liability. In an action for personal injuries, the fact that the judge in one part of his charge inadvertently makes injury to plaintiff, and not negligence, the standard of liability, is not ground for reversal when he gives the true guide repeatedly, before, in immediate connection with, and after the sentence complained of, rehearsing the evidence of defendant in denial of negligence, and closes his charge by telling the jury that they must first consider whether there was any negligence on the part of defendant. McCloskey v. Bell's Gap R. R., 156 Pa. 254, 27 A. 246.

Direction of verdict. Where, in the course of a charge which covers three printed pages the court states and reiterates that the jury are the sole judges of the facts and states what facts must be found before a verdict can be given for plaintiff, but afterwards, at plaintiff's request, gives a charge that "your verdict should be for the plaintiff in this action for such damages as you shall assess," it will be presumed that this language was inadvertently used, and that the jury did not understand it as a direction to find for plaintiff. Klimple v. Boelter, 44 Minn. 172, 46 N. W. 306.

[38] **Ala.** Stewart v. State, 34 So. 818, 137 Ala. 33.

Conn. Smith v. King, 62 Conn. 515, 26 A. 1059.

Ga. Newman v. State, 87 S. E. 398, 144 Ga. 494; Huffman v. State, 95 Ga. 469, 20 S. E. 216.

Ind. Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433.

Iowa. State v. Christopher, 149 N. W. 40, 167 Iowa, 109.

Mo. State v. Taylor, 168 S. W. 1191, 261 Mo. 210.

Tex. McWhirter v. State, 146 S. W. 189, 66 Tex. Cr. R. 188; Spencer v. State, 34 Tex. Cr. R. 65, 29 S. W. 159; Hill v. State, 11 Tex. App. 456.

Vt. State v. Bolton, 102 A. 489, 92 Vt. 157.

[39] Milligan v. Chicago, B. & Q. R. Co., 79 Mo. App. 393; Rogers v. Warren, 75 Mo. App. 271.

of "evidence," or vice versa,[40] to the employment of the word "testimony" in place of the word "facts," [41] to the use of the word "defendant" for the word "witness," [42] to the use of the word "plaintiff" instead of "defendant," or vice versa,[43] to the use of "and" in place of "or," or vice versa,[44] to the use of "may" instead of "must," or vice versa,[45] and to the use of "yes," instead of

[40] **Cal.** People v. Hubert, 51 P. 329, 119 Cal. 216, 63 Am. St. Rep. 72; Mann v. Higgins, 83 Cal. 66, 23 P. 206.

Ill. Fitzgerald v. Benner, 76 N. E. 709, 219 Ill. 485, affirming judgment 120 Ill. App. 447; Jones v. Gregory, 48 Ill. App. 228; Welch v. Miller, 32 Ill. App. 110.

S. C. Dial v. Gardner, 89 S. E. 396, 104 S. C. 456.

Tex. Black v. Brooks, 129 S. W. 177, 60 Tex. Civ. App. 533; Goodwin v. Mortsen, 128 S. W. 1182, 60 Tex. Civ. App. 287; Houston & T. C. R. Co. v. Craig, 92 S. W. 1033, 42 Tex. Civ. App. 486.

Wash. Jones v. City of Seattle, 98 P. 743, 51 Wash. 245; Noyes v. Pugin, 2 Wash. 653, 27 P. 548.

[41] Clark v. State, 63 S. E. 606, 5 Ga. App. 605.

[42] Turner v. Commonwealth, 215 S. W. 76, 185 Ky. 382.

[43] **Ga.** Southern Bell Telegraph & Telephone Co. v. Jordan, 87 Ga. 69, 13 S. E. 202.

Ill. McKenzie v. Remington, 79 Ill. 388.

Ind. Wilson v. Trafalgar & B. C. Gravel Road Co., 93 Ind. 287.

Iowa. Reupke v. D. H. Stuhr & Son Grain Co., 102 N. W. 509, 126 Iowa, 632; Shipley v. Reasoner, 87 Iowa, 555, 54 N. W. 470.

Mo. Suttie v. Aloe, 39 Mo. App. 38.

N. C. Pittman v. Weeks, 43 S. E. 582, 132 N. C. 81.

Tex. Central Texas & N. W. Ry. Co. v. Bush, 12 Tex. Civ. App. 291, 34 S. W. 133; Galveston, H. & S. A. Ry. Co. v. Porfert, 72 Tex. 344, 10 S. W. 207.

See, also, post, § 424, note 51.

Use of "plaintiff" instead of name of infant for whom plaintiff sues. In an action by a father individually, and as next friend for injuries to his infant son, an instruction to find for plaintiff, if the jury found certain facts, unless they found "plaintiff" guilty of contributory negligence, being evidently a clerical mistake in the use of the word "plaintiff," instead of the name of the infant, was not ground for reversal. Pecos & N. T. Ry. Co. v. Trower, 130 S. W. 588, 61 Tex. Civ. App. 53.

Use of "defendant" instead of "garnishee." Where the issues in garnishment proceedings are only those between plaintiff and the garnishee, an instruction calling the garnishee "defendant" is harmless error. Citizens' State Bank v. Council Bluffs Fuel Co., 89 Iowa, 618, 57 N. W. 444.

[44] O'Connor v. Langdon, 3 Idaho (Hasb.) 61, 26 P. 659; Citizens' Gaslight & Heating Co. v. O'Brien, 118 Ill. 174, 8 N. E. 310; State v. Minneapolis & St. L. Ry. Co., 88 Iowa, 689, 56 N. W. 400; Wachovia Loan & Trust Co. v. Forbes, 27 S. E. 43, 120 N. C. 355; O'Neal v. State, 100 S. W. 919, 51 Tex. Cr. R. 100.

Instructions held not objectionable within rule. In an action for injuries to a servant, where the complaint alleged negligence in not furnishing plaintiff with safe machinery and a safe place to work, in that a belt which broke and injured him was old, unsafe, defective and worn out, thereby causing it to break easily, an instruction that the burden was on plaintiff to prove that the place at which he was put to work was not safe and suitable, "and" that the belt was old, unsafe, and defective, was not objectionable for using the conjunctive instead of the disjunctive; there being in effect only one specification of negligence. Dover v. Lockhart Mills, 68 S. E. 525, 86 S. C. 229.

[45] Wilson v. State, 160 S. W. 83, 71 Tex. Cr. R. 399; State v. Wilson, 9 Wash. 16, 36 P. 967.

Use of "ought" instead of "must." On a trial for murder, a charge that the jury "ought" to con-

"no."[46] The possibility that the jury were misled by the use of the indefinite article "a" instead of the definite article "the," or vice versa, before the phrase "proximate cause," may be so remote, in view of other instructions given, that the reviewing court will decline to reverse for this reason.[47]

An inaccurate statement of the pleadings will not constitute ground for reversal, where the mistake is as to an immaterial matter,[48] or the court has plainly stated to the jury the questions at issue.[49] Objections to instructions having for their basis mistakes in punctuation are treated with scant courtesy by the courts,[50] and the omission of a comma will not be erroneous, if the jury are not misled.[51]

Where, however, an inadvertent error in the use of words, names, or dates, or in the omission of words or phrases, is calculated to mislead the jury, it will be cause for reversal.[52] Thus an inadvertent error in the use of the word "not" in an instruction,

sider the circumstances of the case from the standpoint of defendant as it appeared at the time of the killing is not objectionable because the court did not use the word "must," since any ordinary jury would understand that the charge was mandatory. Jackson v. State, 32 Tex. Cr. R. 192, 22 S. W. 831.

[46] In re Spencer, 96 Cal. 448, 31 P. 453.

[47] Freiburg v. Israel (Cal. App.) 187 P. 130; Squier v. Davis Standard Bread Co. (Cal.) 185 P. 391.

[48] Kimble v. Seal, 92 Ind. 276.

[49] Young v. Clegg, 93 Ind. 371.

[50] Jarvis v. Flint & P. M. R. Co., 87 N. W. 136, 128 Mich. 61; Ft. Worth & D. C. Ry. Co. v. Poteet, 115 S. W. 883, 53 Tex. Cr. R. 44.

[51] Pagels v. Meyer, 61 N. E. 1111, 193 Ill. 172, reversing judgment 88 Ill. App. 169; Painter v. People, 147 Ill. 444, 35 N. E. 64; E. I. Du Pont de Nemours & Co. v. Snead's Adm'r, 97 S. E. 812, 124 Va. 177.

[52] **Ga.** Wright v. State, 101 S. E. 591, 24 Ga. App. 543; Wellborn v. Rogers, 24 Ga. 558.

Ill. Hoffman v. Boomer, 40 Ill. App. 231; Illinois Cent. R. Co. v. Zang, 10 Ill. App. (10 Bradw.) 594.

Mich. Detroit Electric Light & Power Co. v. Applebaum, 94 N. W. 12, 132 Mich. 555.

Tex. Pickett v. State, 12 Tex. App. 86.

Improper use of adjective. The use of the word "greatly," in instructions, by calling attention to the injury by the repeated expressions "greatly injured," "greatly wounded," and "suffered greatly," is error, either to mislead the jury to understand there could be no recovery unless the injury was great, or to give them the impression that the trial judge considered the injury great. Louisville & N. R. Co. v. Lynch, 126 S. W. 362, 137 Ky. 696.

Inadvertment inclusion of element of damage. In an action by a minor servant against a master for personal injuries resulting from dangerous machinery, the inclusion by the judge through oversight of damages sustained and loss of earning power during plaintiff's minority was reversible error. Clark Mile-End Spool Cotton Co. v. Shaffery, 33 A. 284, 58 N. J. Law, 229.

Omission of word. An instruction that, if the jury believe from the evidence that any one has testified "willfully false" to a material fact, they may disregard "the entire evidence," is erroneous, since it is not clear whether the "entire evidence of the witness" or the "entire evidence in the case" is meant. City of Hiawatha v. Warren, 55 P. 484, 8 Kan. App. 209.

or in its omission therefrom, may be of such a character that the jury would not be likely to detect the error, in which case, unless the jury is clearly shown not to have been misled, the error will work a reversal.[53] So a clerical error in the use of the word "plaintiff" for "defendant," or vice versa, may constitute reversible error,[54] and an inadvertence of the court in attributing the testimony of a witness to another witness may constitute ground for reversal, if such error, because of a difference in the age or character of the witnesses, may affect the credibility of the testimony with the jury,[55] and where the trial court, as the result of a clerical error in a criminal case, tells the jury to acquit if the crime charged is proven, and to convict if it is not proven, it cannot be presumed that the jury were not misled, and such an error will work a reversal.[56]

§ 398. Use of illustrations

Within proper limits the use of illustrations by the court is not erroneous, and may sometimes be helpful.[57]

§ 399. Use by court of own language or that of another

The court may charge the law of the case in its own language,[58] but it is the safer practice for the trial court, in stating a rule of law, to follow the expression of the same rule by the appellate court.[59] It should be borne in mind in this connection, however, as has elsewhere been stated,[60] that appellate courts, in discussing facts, frequently make use of language which, though embodying sound principles of law, is not intended to be adjusted to the requirements and proprieties of a charge to be given to juries.[61]

It is not improper for the court to adopt as its main charge a charge prepared by the counsel of one of the parties,[62] and in an

[53] Carleton Min. & Mill. Co. v. Ryan, 68 P. 279, 29 Colo. 401; Southwestern Telegraph & Telephone Co. v. Newman (Tex. Civ. App.) 34 S. W. 661.

[54] Mathews v. Granger, 71 Ill. App. 467; Alter v. Holliday, 9 Ky. Law Rep. (abstract) 972.

[55] Collins v. Leafey, 124 Pa. 203, 16 A. 765, 23 Wkly. Notes Cas. 264.

[56] Cummings v. State, 69 N. W. 756, 50 Neb. 274.

[57] Neel v. Powell, 61 S. E. 729, 130 Ga. 756; Draper v. Cotting, 120 N. E. 365, 231 Mass. 51; Wellington v. City of Cambridge, 107 N. E. 976, 220 Mass. 312.

[58] Joyner v. Atlantic Coast Line R. Co., 74 S. E. 825, 91 S. C. 104.

[59] Anderson v. Horlick's Malted Milk Co., 119 N. W. 342, 137 Wis. 569; Grotjan v. Rice, 102 N. W. 551, 124 Wis. 253.

[60] Post, § 411.

[61] Central of Georgia Ry. Co. v. Hartley (Ga. App.) 103 S. E. 259; Southern Cotton Oil Co. v. Skipper, 54 S. E. 110, 125 Ga. 368; Atlanta & W. P. R. Co. v. Hudson, 51 S. E. 29, 123 Ga. 108.

[62] Kansas City, M. & O. Ry. Co. of Texas v. Harral (Tex. Civ. App.) 199 S. W. 659.

action based on a statute instructions following its language are generally good.[63]

§ 400. Interlineations

Where a statute forbidding interlineations and erasures in instructions is directory merely, an interlineation will not be presumed to be improper.[64]

§ 401. Underscoring and capitalizing

It is not improper for the court to underscore words which are usually italicized in legal treatises,[65] but the practice of capitalizing a part of the instruction should be avoided.[66]

§ 402. Addressing jurors individually

The court is not required to address its instructions to each one of the jury as individuals;[67] it being the better practice to address instructions to the jury as a whole.[68]

C. Setting out Pleadings and Propriety of Practice of Referring Jury to Pleadings

1. *Rule in Civil Cases*

§ 403. Setting out pleadings

It is not error to embrace the pleadings in the instructions[69] although it is not good practice to set out the pleadings at length in an instruction,[70] and it is advisable to avoid setting out a complaint which contains much surplusage or many repetitions, and which, in stating the facts constituting the cause of action, greatly exaggerates them.[71] It is sufficient if the instructions contain the substance of the pleadings,[72] and they should not be incumbered by the recital of immaterial pleadings.[73]

[63] Beaver Creek School Land Ditch Co. v. Elling, 148 P. 273, 27 Colo. App. 252; Mertens v. Southern Coal & Mining Co., 85 N. E. 743, 235 Ill. 540, affirming judgment Mertins v. Same, 140 Ill. App. 190; Reisch v. People, 82 N. E. 321, 229 Ill. 574.

[64] Daly v. Bernstein, 6 N. M. 380, 28 P. 764.

[65] Philpot v. Lucas, 70 N. W. 625, 101 Iowa, 478; Crockett v. Miller, 96 N. W. 491, 2 Neb. (Unof.) 292.

[66] Elwood v. Chicago City Ry. Co., 90 Ill. App. 397; Weck v. Reno Traction Co., 149 P. 65, 38 Nev. 285.

[67] State v. Armstrong, 79 P. 490, 37 Wash. 51; State v. Williams, 13 Wash. 335, 43 Pac. 15.

[68] Shepard v. United States (C. C. A. Utah) 160 F. 584, 87 C. C. A. 486, certiorari denied 29 S. Ct. 682, 212 U. S. 571, 53 L. Ed. 655.

[69] Vandalia Coal Co. v. Moore, 121 N. E. 685, 69 Ind. App. 311.

[70] Evansville Gas & Electric Light Co. v. Robertson, 100 N. E. 689, 55 Ind. App. 353; Spieler v. Lincoln Traction Co., 171 N. W. 896, 103 Neb. 339; Home Savings Bank v. Stewart, 110 N. W. 947, 78 Neb. 624.

[71] City of Indianapolis v. Moss (Ind. App.) 128 N. E. 857.

[72] Mosslander v. Armstrong, 134 N. W. 922, 90 Neb. 774.

[73] Lang v. Omaha & C. B. St. R. Co., 148 N. W. 964, 96 Neb. 740.

§ 404. Reference to pleadings for issues

As one court has said, much confusion arises from the practice of allowing the jury to take the pleadings into the jury room, or of reading them aloud in the court room; juries not being learned in legal verbiage and rarely centering their attention on a particular point or paragraph involved.[74] The general rule, therefore, is that the court should evolve from the pleadings a plain statement of the issues of fact and submit it to the jury,[75] and that a presentation of the issues merely by copying the pleadings in the instructions,[76] or by simply referring the jury to the pleadings to determine for themselves what the issues are,[77] is erroneous, or at

[74] Branthover v. Monarch Elevator Co., 156 N. W. 927, 33 N. D. 454.

[75] **Fla.** Seaboard Air Line Ry. Co. v. Kay, 74 So. 523, 73 Fla. 554.

Ga. McLean v. Clark, 47 Ga. 24.

Ill. Dickson v. George B. Swift Co., 87 N. E. 59, 238 Ill. 62, affirming 142 Ill. App. 655; Chicago City Ry. Co. v. Mauger, 105 Ill. App. 579.

Ky. Taylor v. Armstrong, 5 Ky. Law Rep. (abstract) 251.

Mo. Sinnamon v. Moore, 142 S. W. 494, 161 Mo. App. 168; Jaffi v. Missouri Pac. Ry. Co., 103 S. W. 1026, 205 Mo. 450.

Neb. Plath v. Brunken, 167 N. W. 567, 102 Neb. 467.

Ohio. Russell v. Weiler, 28 Ohio Cir. Ct. R. 176.

Tex. Panhandle & S. F. Ry. Co. v. Morrison (Civ. App.) 191 S. W. 138.

Where pleadings contain matters of evidence, rather than ultimate facts, the court sufficiently states the issues by stating tersely the ultimate facts pleaded. Murphey v. Virgin, 47 Neb. 692, 66 N. W. 652.

[76] **Iowa.** Black v. Miller, 138 N. W. 535, 158 Iowa, 293; Shebek v. National Cracker Co., 94 N. W. 930, 120 Iowa, 414; Erb v. German-American Ins. Co. of New York, 83 N. W. 1053, 112 Iowa, 357; West v. Averill Grocery Co., 80 N. W. 555, 109 Iowa, 488; Hankins v. Hankins, 79 N. W. 278; Robinson & Co. v. Berkey, 69 N. W. 434, 100 Iowa, 136, 62 Am. St. Rep. 549.

Neb. Parkins v. Missouri Pac. Ry. Co., 93 N. W. 197, 4 Neb. (Unof.) 1.

Tenn. Nashville, C. & St. L. Ry. v. Anderson, 185 S. W. 677, 134 Tenn. 666, L. R. A. 1918C, 1115, Ann. Cas. 1917D, 902.

Utah. Davis v. Heiner, 181 P. 587, 54 Utah, 428.

Submitting to the jury in detail all the allegations disclosed in the pleadings, whether or not they are finally for its determination, is unnecessary and improper. Ft. Lyon Canal Co. v. Bennett, 156 P. 604, 61 Colo. 111.

In Indiana it is held that, although the court may in its charge read the pleadings to the jury (Clouser v. Ruckman, 104 Ind. 588, 4 N. E. 202), it is the better practice for the court to advise or instruct the jury as to the issues in the case (Blair-Baker Horse Co. v. First Nat. Bank, 72 N. E. 1027, 164 Ind. 77; Angola Ry. & Power Co. v. Butz, 98 N. E. 818, 52 Ind. App. 420; Woodruff v. Hensley, 60 N. E. 312, 26 Ind. App. 592).

[77] **Ala.** Louisville & N. R. Co. v. Laney, 69 So. 993, 14 Ala. App. 287; Pennsylvania Fire Ins. Co. v. Draper, 65 So. 923, 187 Ala. 103; Birmingham Ry., Light & Power Co. v. Adkins, 62 So. 367, 8 Ala. App. 555, judgment reversed Ex parte Birmingham Ry., Light & Power Co., 64 So. 70, 184 Ala. 580; Birmingham Ry., Light & Power Co. v. Fox, 56 So. 1013, 174 Ala. 657; Lewy Art Co. v. Agricola, 53 So. 145, 169 Ala. 60.

Ill. Bernier v. Illinois Cent. R. Co., 129 N. E. 747, 296 Ill. 464; Schlauder v. Chicago & Southern Traction Co., 97 N. E. 233, 253 Ill. 154, reversing judgment 160 Ill. App. 309; Pittsburgh, C., C. & St. L. R. Co. v. Kinnare, 67 N. E. 826, 203 Ill. 388, af-

least not good practice, unless the pleadings contain a clear statement of the issues intelligently presenting the very matters to be

firming judgment 105 Ill. App. 566; Latham v. Cleveland, C., C. & St. L. R. Co., 179 Ill. App. 324.

Iowa. Trott v. Chicago, R. I. & P. R. Co., 86 N. W. 33, 115 Iowa, 80, rehearing denied 87 N. W. 722, 115 Iowa, 80; Lindsay v. City of Des Moines, 68 Iowa, 368, 27 N. W. 283; Bryan v. Chicago, R. I. & P. R. Co., 63 Iowa, 464, 19 N. W. 295; Porter v. Knight, 63 Iowa, 365, 19 N. W. 282; Fitzgerald v. McCarty, 55 Iowa, 702, 8 N. W. 646.

Mo. Williams v. Tucker (App.) 224 S. W. 21; Byrne v. News Corp., 190 S. W. 933, 195 Mo. App. 265; Boomshaft v. Klauber, 190 S. W. 616, 196 Mo. App. 222; State ex rel. and to Use of Macke v. Randolph (App.) 186 S. W. 590; Smith v. Means, 155 S. W. 454, 170 Mo. App. 158; Birch Tree State Bank v. Dowler, 145 S. W. 843, 163 Mo. App. 65.

Neb. Larson v. Chicago & N. W. R. Co., 131 N. W. 201, 89 Neb. 247; Murray v. Burd, 91 N. W. 278, 65 Neb. 427.

Ohio. Baltimore & O. R. Co. v. Lockwood, 74 N. E. 1071, 72 Ohio, 586.

Tenn. East Tennessee, V. & G. Ry. Co. v. Lee, 90 Tenn. 570, 18 S. W. 268.

Tex. Adams & Washam v. Southern Traction Co. (Civ. App.) 188 S. W. 275; Missouri, K. & T. Ry. Co. of Texas v. Graves, 122 S. W. 458, 57 Tex. Civ. App. 395; Texas & N. O. R. Co. v. Mortensen, 66 S. W. 99, 27 Tex. Civ. App. 106; San Antonio & A. P. Ry. Co. v. De Ham (Civ. App.) 54 S. W. 395.

Va. Jones' Adm'r v. City of Richmond, 88 S. E. 82, 118 Va. 612.

See Galveston, H. & S. A. Ry. Co. v. Parvin, 64 S. W. 1008, 27 Tex. Civ. App. 60.

Refusal of instructions. It is not improper to refuse an instruction which refers the jury to the declaration for the issues. Rosinski v. Burton, 163 Ill. App. 162; Shewbridge v. Chicago City Ry. Co., 188 Ill. App. 454.

Matters not violating rule. It is not error, in itself, to give the issues to the jury by stating to them the substance of the pleadings in the order in which they were filed. City of Ft. Madison v. Moore, 80 N. W. 527, 109 Iowa, 476. In an action for rent, where defendants counterclaimed for trespass of plaintiff's animals, an instruction, relating to the form of the verdict, directing the jury to make a finding on both the petition and counterclaim, and that the amount conceded due plaintiff should be deducted from the amount, if any, found on the counterclaim, and that whether defendants were entitled to recover on their counterclaim was a matter to be determined from the evidence, was not objectionable as referring the jury to the pleadings for the issues. Barnard v. Weaver (Mo. App.) 224 S. W. 152.

Instructions held not objectionable as authorizing or requiring the jury to determine the material allegations of the complaint. An instruction authorizing the jury to render a verdict for plaintiffs if the jury believe, from a preponderance of the evidence, that plaintiffs had made out their case "as laid in the declaration." Fraternal Army of America v. Evans, 74 N. E. 689, 215 Ill. 629, affirming judgment 114 Ill. App. 578. Where, in an action for injuries to a passenger, the jury were not informed as to the material allegations of the declaration, an instruction that, if the evidence was equally balanced on any point material to plaintiff's case, or if the evidence preponderated in defendant's favor on any point material to plaintiff's case, the verdict must be for defendant, and that plaintiff was required to prove the truth of the material allegations of his declaration, or some count thereof, by a preponderance of the evidence, and if he failed so to do the jury should find defendant not guilty, was not misleading to plaintiff's prejudice, as requiring the jury as a matter of law to ascertain what were the material allegations in the declaration. Judgment 116 Ill. App.

tried,[78] and while a reference of the jury to the pleadings for the issues will not necessarily, or perhaps not ordinarily, be cause for a reversal,[79] since the rule is that, before a party will be allowed to disturb the judgment of the lower court for such a cause, he must show prejudice resulting therefrom,[80] such reference will constitute ground for reversal, if the jury are misled thereby, or the pleadings are so involved as to render it doubtful whether the jury can understand the issues raised.[81] Where defenses are pleaded, but abandoned, it is bad practice to read the answer to the jury, or to refer specifically thereto in the instructions; the better practice being to merely instruct the jury what the sole and only defenses are.[82] However, where the parties consent thereto, and the pleadings are clear and concise, and state the exact issues, it is not error to refer the jury to the pleadings for the issues in the case,[83] and where the court fully states the contentions

507, affirmed. Harvey v. Chicago & A. Ry. Co., 77 N. E. 569, 221 Ill. 242, affirming judgment 123 Ill. App. 442.

[78] Canfield v. Chicago, R. I. & P. Ry. Co., 121 N. W. 186, 142 Iowa, 658; Swanson v. Allen, 79 N. W. 132, 108 Iowa, 419.

[79] **Ill.** Thorne v. Southern Illinois Ry. & Power Co., 206 Ill. App. 372.

Ind. Ohio & M. Ry. Co. v. Smith, 5 Ind. App. 560, 32 N. E. 809.

Iowa. Sutton v. Greiner, 159 N. W. 268, 177 Iowa, 532; McDonald v. Bice, 84 N. W. 985, 113 Iowa, 44.

Neb. Forrest v. Koehn, 156 N. W. 1046, 99 Neb. 441.

Tex. Houston Electric Co. v. Nelson, 77 S. W. 978, 34 Tex. Civ. App. 72.

Utah. Smith v. Columbus Buggy Co., 123 P. 580, 40 Utah, 580.

[80] Savino v. Griffin Wheel Co., 136 N. W. 876, 118 Minn. 290; Tobler v. Union Stockyards Co., 123 N. W. 461, 85 Neb. 413.

[81] Kansas City, Ft. S. & M. R. Co. v. Dalton, 72 P. 209, 66 Kan. 799; Stevens v. Maxwell, 70 P. 873, 65 Kan. 835; Bering Mfg. Co. v. Femelat, 79 S. W. 869, 35 Tex. Civ. App. 36.

Instructions improper within rule. Where no part of the charge contained a statement of the issues, and the statement in the petition was such as to involve complicated questions as to the defendant's liability, a paragraph of the charge, directing the jury to the petition for the "particular statement of fact upon which the plaintiff must recover, if he is entitled to recover at all," was prejudicial error. Keatley v. Illinois Cent. Ry. Co., 94 Iowa, 685, 63 N. W. 560. Reading the separate answer of one defendant to the jury as a part of the instructions is error, where it contains allegations which may influence the jury as to the liability of another defendant. Nupen v. Pearce (C. C. A. N. D.) 235 F. 497, 149 C. C. A. 43.

[82] Elliott Supply Co. v. Green, 160 N. W. 1002, 35 N. D. 641.

[83] **Iowa.** Stephens v. Brill, 140 N. W. 809, 159 Iowa, 620; McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689; Dean v. Carpenter, 111 N. W. 815, 134 Iowa, 275; Trumble v. Happy, 87 N. W. 678, 114 Iowa, 624; Graybill v. Chicago, M. & St. P. Ry. Co., 84 N. W. 946, 112 Iowa, 738; Crawford v. Nolan, 72 Iowa, 673, 34 N. W. 754.

While it is the duty of a judge to state the contentions of the litigants, an instruction that the jury will find the contentions of the parties in the petition and answer, which are so clearly set out and so frequently referred to by counsel that the court does not deem it necessary to again state them, sufficiently meets the requirement, unless the special

of the parties, or the substance of them, to the jury, the fact that it also refers them to the pleadings to determine the issues, or for further particulars, does not constitute reversible error.[84]

An instruction that correctly states a certain defense is not erroneous merely because it designates such defense by reference to a certain count in the answer,[85] and in stating the contentions of the parties it is not improper to use the language of the pleadings, if the court would otherwise be required to resort to equivalent phraseology.[86] As a general rule, a party who would avail himself on appeal of the failure of the trial court to state the issues to the jury must request such a statement.[87]

§ 405. Reference for other purposes than determination of issues

In some jurisdictions it is not improper, or at least not reversible error, for the court to refer the jury to the pleadings for a state-

facts of the case demand a more formal summary to prevent possible misapprehensions. Jones v. McElroy, 68 S. E. 729, 134 Ga. 857, 137 Am. St. Rep. 276.

[84] **Ga.** Woodward v. Fuller, 88 S. E. 974, 145 Ga. 252; Brewer v. Barnett Nat. Bank, 85 S. E. 928, 16 Ga. App. 593; Macon Consol. St. R. Co. v. Barnes, 38 S. E. 756, 113 Ga. 212.

Iowa. Hankins v. Hankins, 79 N. W. 278; Keatley v. Illinois Cent. R. Co., 63 N. W. 560, 94 Iowa, 685; Morrison v. Burlington, C. R. & N. Ry. Co., 84 Iowa, 663, 51 N. W. 75; Drake v. Chicago, R. I. & P. Ry. Co., 70 Iowa, 59, 29 N. W. 804.

Neb. Bloomfield v. Pinn, 121 N. W. 716, 84 Neb. 472.

S. C. Franklin v. Atlanta & C. Air Line Ry. Co., 54 S. E. 578, 74 S. C. 322.

Tex. Missouri, K. & T. Ry. Co. of Texas v. Swift (Civ. App.) 128 S. W. 450.

Instructions held proper within rule. The inclusion in instructions of certain allegations of the complaint is not erroneous if the issues raised are correctly stated. Union Gold Min. Co. v. Crawford, 69 P. 600, 29 Colo. 511. Where the court simply sets out the pleadings, but follows this with instructions clearly stating the facts necessary for the plaintiff to prove to entitle him to recover, it is a sufficient statement of the issues. Dorr v. Simerson, 73 Iowa, 89, 34 N. W. 752. An instruction which sets out all the facts necessary for plaintiff to recover, and refers the jury to the petition by adding, "as stated in the petition," is not error. Hartpence v. Rodgers, 45 S. W. 650, 143 Mo. 623. Where the only reference to the pleadings in the instructions is found in plaintiff's first instruction, where it was entirely harmless, and merely made for the purpose of shortening a description, there could be no reversal of the judgment on the ground that the instructions referred the jury to the pleadings to ascertain the issues, especially as the other instructions fully told the jury what facts were necessary to be found. Brown v. Missouri, K. & T. R. Co., 104 Mo. App. 691, 78 S. W. 273. A charge stating the issues, which substantially conforms to the allegations in the petition, and refers the jury to the petition for a full statement of the cause of action, is sufficient. Missouri, K. & T. Ry. Co. of Texas v. Gilbert, 131 S. W. 1145, 61 Tex. Civ. App. 478.

[85] Paddock v. Bartlett, 68 Iowa, 16, 25 N. W. 906.

[86] Earl v. San Francisco Bridge Co., 160 P. 570, 31 Cal. App. 339; Georgia, F. & A. Ry. Co. v. Spivey, 80 S. E. 678, 14 Ga. App. 157.

[87] Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser, 78 N. E. 1033, 168 Ind. 438; Barney v. Pinkham, 37 Neb. 664, 56 N. W. 323.

ment or description of the facts on which a party relies,[88] while in other jurisdictions such an instruction is improper,[89] especially where the pleading referred to is a very long one,[90] and is properly refused.[91] In any event a reference to the pleadings for certain facts does not constitute reversible error, where no prejudice to the party complaining results therefrom,[92] as where the facts are undisputed,[93] or where the instructions also set out the facts for which reference is made.[94] An instruction referring to the pleadings for the purpose of identifying a thing about which an issue is

[88] **Ill.** United States Brewing Co. v. Stoltenberg, 71 N. E. 1081, 211 Ill. 531, affirming judgment, 113 Ill. App. 435; Illinois Terminal R. Co. v. Thompson, 71 N. E. 328, 210 Ill. 226, affirming 112 Ill. App. 463; Chicago City Ry. Co. v. Carroll, 68 N. E. 1087, 206 Ill. 318, affirming judgment 102 Ill. App. 202; Illinois Cent. R. Co. v. Jernigan, 65 N. E. 88, 198 Ill. 297, affirming judgment 101 Ill. App. 1; Suburban R. Co. v. Balkwill, 63 N. E. 389, 195 Ill. 535, affirming judgment 94 Ill. App. 454; Central Ry. Co. v. Bannister, 62 N. E. 864, 195 Ill. 48, affirming judgment 96 Ill. App. 332; Hoffman v. Chicago Rys. Co., 204 Ill. App. 414; Sandor v. Verhovey Aid Ass'n, 199 Ill. App. 199; Powers v. Chicago, B. & Q. Ry. Co., 142 Ill. App. 515; Chicago & A. R. Co. v. Harrington, 90 Ill. App. 638, affirmed 61 N. E. 622, 192 Ill. 9; North Chicago City Ry. Co. v. Gastka, 27 Ill. App. 518, affirmed 128 Ill. 613, 21 N. E. 522, 4 L. R. A. 481.

Ind. Toledo, St. L. & W. R. Co. v. Miller, 88 N. E. 968, 44 Ind. App. 227.

Iowa. Marion v. Chicago, R. I. & P. Ry. Co., 66 Iowa, 585, 24 N. W. 39; Id., 64 Iowa, 568, 21 N. W. 86.

Kan. Union Pac. Ry. Co. v. Sternberger, 54 P. 1101, 8 Kan. App. 131.

Tex. Andrews v. Wilding (Civ. App.) 193 S. W. 192; Freeman v. McElroy (Civ. App.) 149 S. W. 428; St. Louis Southwestern Ry. Co. v. Harrison, 73 S. W. 38, 32 Tex. Civ. App. 368.

Where the court referred the jury to the petition for the terms of a contract alleged to have been violated, and for certain statements alleged to have been made by the defendant, designating where each might be found in the petition by pencil marks, but the construction of the pleadings and the determination of the issues were not left to the jury, it was held that there was no prejudicial error. Myer v. Moon, 45 Kan. 580, 26 P. 40.

[89] Rouse v. St. Paul Fire & Marine Ins. Co., 219 S. W. 688, 203 Mo. App. 603; Pollard v. Carlisle (Mo. App.) 218 S. W. 921; Bean v. Lucht, 145 S. W. 1171, 165 Mo. App. 173; Webb v. Carter, 98 S. W. 776, 121 Mo. App. 147.

[90] Curtis & Shumway v. Williams, (Va.) 86 S. E. 848.

[91] Wilks v. St. Louis & S. F. R. Co., 141 S. W. 910, 159 Mo. App. 711.

[92] Helt v. Smith, 74 Iowa, 667, 39 N. W. 81.

[93] Butcher v. Bell (Mo. App.) 198 S. W. 1123; Britton v. City of St. Louis, 120 Mo. 437, 25 S. W. 366.

[94] Chicago & A. R. Co. v. Harrington, 61 N. E. 622, 192 Ill. 9, affirming judgment 90 Ill. App. 638; Malott v. Hood, 66 N. E. 247, 201 Ill. 202, affirming judgment 99 Ill. App. 360; Lake Shore & M. S. Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476.

Reference for facts admitted by pleadings. A direction to render a verdict for plaintiff if the jury found certain facts from admissions of the pleadings and evidence did not impose on the jury the responsibility of construing the pleadings when the court had already informed the jury what facts were admitted therein. Piluso v. Spencer, 172 P. 412, 36 Cal. App. 416.

raised is not objectionable as a reference to determine what the issues are.[95]

In some jurisdictions it is not error to refer the jury to the pleadings to determine whether the evidence proves the allegations and charges therein,[96] and where this rule prevails it is proper to instruct that, if the plaintiff proves his case as alleged in his complaint, the jury may find for him if the complaint contains all the necessary allegations for recovery.[97] In other jurisdictions the rule is that the jury should not be required to carefully scrutinize the pleadings, and compare the averments therein with the evidence as heard by them, and then determine which averments have or have not been proven;[98] it being held that the jury is entitled to have the law of the case as given by the court written out in full in the instructions, and that to require the jury to resort to the pleadings to patch up and piece out the instructions is calculated to confuse and mislead them.[99]

In one jurisdiction it is held proper to refer to the pleadings to determine whether the allegations of the complaint are to be taken as prima facie true because of the failure of defendant to answer them.[1]

After giving the items of damage claimed by the plaintiff, the court may refer to the petition for a fuller statement.[2]

2. *Reference to Indictment or Information*

§ 406. Reference for elements of offense charged

In a criminal prosecution it is the duty of the court, in charging the jury, to define the offense of which the defendant is accused in plain and concise language, and tell them the essential facts necessary to a conviction, rather than to refer them to the indict-

[95] Ekstan v. Herrington (Mo. App.) 204 S. W. 409; Big River Lead Co. v. St. Louis, I. M. & S. R. Co., 101 S. W. 636, 123 Mo. App. 394; Dwyer v. St. Louis Transit Co., 83 S. W. 303, 108 Mo. App. 152.

[96] McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476, affirming judgment 212 Ill. App. 664; Donk Bros. Coal & Coke Co. v. Thil, 81 N. E. 857, 228 Ill. 233, affirming judgment 128 Ill. App. 249; Boyd v. Kimmel, 161 Ill. App. 206; Illinois Cent. R. Co. v. Jernigan, 101 Ill. App. 1, judgment affirmed 65 N. E. 88, 198 Ill. 297.

[97] Cromer v. Borders Coal Co., 92 N. E. 926, 246 Ill. 451, reversing judgment 152 Ill. App. 555; Waschow v. Kelly Coal Co., 92 N. E. 303, 245 Ill. 516; Annen v. W. F. McLaughlin & Co., 189 Ill. App. 261.

[98] Alabama Great Southern R. Co. v. McWhorter, 47 So. 84, 156 Ala. 269.

[99] Southern Ry. Co. v. Ganong, 55 So. 355, 99 Miss. 540.

[1] Almand v. Thomas, 96 S. E. 962, 148 Ga. 369.

[2] Lanning v. Chicago, etc., Ry. Co., 27 N. W. 478, 68 Iowa, 502.

ment to determine what they must find in order to convict.[3] But a reference to the indictment or information is not erroneous, if such reference is not necessary to enable the jury to perform their duties,[4] and a defendant, asking an instruction containing such a reference, cannot complain of it.[5] An instruction which states what facts are to be found in order to convict is not, because of the inclusion of the words "as charged in the indictment," objectionable as referring the jury to the indictment to ascertain the issues.[6]

D. Reading, Quoting, or Citing Statutes

§ 407. Necessity, propriety, and method of presenting statutes to jury

In a criminal prosecution the court is not bound to read or state to the jury the substance of the statute under which the defendant is being tried;[7] it being sufficient if the acts necessary to constitute the crime charged are clearly specified in the instructions.[8] The court may, however, properly, as a part of its charge, read or quote from, or give to the jury in substance, a statute on which a suit is based or a criminal prosecution founded, or which may throw some light on the points in controversy and aid in understanding the rights of the parties.[9]

[3] **Mo.** State v. Herring, 188 S. W. 169, 268 Mo. 514; State v. Constitino (Sup.) 181 S. W. 1155; State v. Marion, 138 S. W. 491, 235 Mo. 359; State v. McCaskey, 104 Mo. 644, 16 S. W. 511; State v. Brown, 104 Mo. 365, 16 S. W. 406.

N. M. State v. McKnight, 153 P. 76, 21 N. M. 14; Territory v. Baca, 71 P. 460, 11 N. M. 559.

[4] State v. Dooley, 89 Iowa, 584, 57 N. W. 414; State v. Byrd, 213 S. W. 35, 278 Mo. 426; State v. Burgess (Mo.) 193 S. W. 821.

Reference not misleading. Where an indictment for murder contained two counts, one charging the killing to have been done with a knife, and the other charging that the killing was done in some manner to the grand jurors unknown, an instruction that if the defendant killed deceased "in some of the modes or by some of the means specified, defined, and described in the indictment" was not misleading. State v. Murray, 91 Mo. 95, 3 S. W. 397.

[5] Christie v. People, 69 N. E. 33, 206 Ill. 337.

[6] State v. Scott, 109 Mo. 226, 19 S. W. 89.

[7] Yancey v. State, 58 S. E. 546, 2 Ga. App. 400; Commonwealth v. Burns, 167 Mass. 374, 45 N. E. 755; Gentry v. State, 136 S. W. 50, 61 Tex. Cr. R. 619.

[8] State v. Johnson, 149 N. W. 730, 34 S. D. 601.

[9] **Ala.** Frazier v. State, 49 So. 245, 159 Ala. 1.

Ark. Pennewell v. State, 150 S. W. 114, 105 Ark. 32; Van Valkinburgh v. State, 142 S. W. 843, 102 Ark. 16; Mitchell v. State, 83 S. W. 1050, 73 Ark. 291.

Cal. People v. Lima, 172 P. 762, 36 Cal. App. 553; People v. Crane, 87 P. 239, 4 Cal. App. 142.

Ga. Holland v. Bell, 96 S. E. 419, 148 Ga. 277; McNulty v. State, 95 S. E. 304, 21 Ga. App. 783; Howell v. State, 88 S. E. 592, 17 Ga. App. 802; Georgia & F. Ry. Co. v. Tapley, 87 S. E. 473, 144 Ga. 453, L. R. A.

Where the question is one of statutory duty, it may be sufficient for the court to read the statute defining the duty,[10] without interpreting it,[11] where only one construction thereof is contended for at the trial. Where, however, there is a sharp conflict at the trial as to the interpretation of a statute so read, it will be error not to accompany such reading with a proper explanation.[12]

§ 408. Statutes containing irrelevant provisions

The court may in its charge give a section of a statute, some phases of which are applicable to the case, although the section contains phases and defines acts not involved.[13] At least the reading of a statute which covers matters in relation to other subjects than those in issue, or which are not strictly applicable to the case, is not reversible error, if the jury is not misled thereby.[14] But

1916C, 1020; City of Sparta v. Smith, 84 S. E. 151, 15 Ga. App. 656; McDonald v. State, 59 S. E. 242, 129 Ga. 452; McNatt v. McRea, 45 S. E. 248, 117 Ga. 898; Cochran v. Jones, 85 Ga. 678, 11 S. E. 811.

Ill. People v. Crawford, 115 N. E. 901, 278 Ill. 134; Wagner v. Chicago, R. I. & P. Ry. Co., 200 Ill. App. 305, judgment affirmed 115 N. E. 201, 277 Ill. 114; Renner v. St. Louis, I. M. & S. Ry. Co., 197 Ill. App. 11; People v. Carter, 188 Ill. App. 22; Vetrovec v. Meyers, 158 Ill. App. 391; Mertins v. Southern Coal & Mining Co., 140 Ill. App. 190, judgment affirmed Mertens v. Same, 85 N. E. 743, 235 Ill. 540.

Ind. Vandalia Coal Co. v. Moore, 121 N. E. 685, 69 Ind. App. 311; Sellers v. City of Greencastle, 34 N. E. 534, 134 Ind. 645.

Iowa. Kitteringham v. Dance, 58 Iowa, 632, 12 N. W. 612.

Me. State v. Stickney, 90 A. 705, 111 Me. 590.

Mo. State v. Powell, 66 Mo. App. 598.

Neb. Lord v. Roberts, 165 N. W. 892, 102 Neb. 49; Shumway v. State, 117 N. W. 407, 82 Neb. 152, judgment affirmed on rehearing 119 N. W. 517, 82 Neb. 166.

N. J. Chiapparine v. Public Service Ry. Co., 108 A. 180.

N. Y. People v. Scanlon, 117 N. Y. S. 57, 132 App. Div. 528.

Ohio. Toledo Consol. St. Ry. Co. v. Mammet, 6 O. C. D. 244, 13 Ohio Cir. Ct. R. 591.

S. C. State v. Brown, 101 S. E. 847, 113 S. C. 513; State v. Blackstone, 101 S. E. 845, 113 S. C. 528; Gossett v. Western Union Telegraph Co., 79 S. E. 309, 95 S. C. 397.

S. D. State v. Fullerton Lumber Co., 152 N. W. 708, 35 S. D. 410.

Tex. Walker v. State, 181 S. W. 191, 78 Tex. Cr. R. 237; International & G. N. Ry. Co. v. Bandy (Civ. App.) 163 S. W. 341; Hobbs v. State, 7 Tex. App. 117.

[10] Sommer v. Carbon Hill Coal Co. (C. C. A. Wash.) 107 F. 230, 46 C. C. A. 255; Keel v. Seaboard Air Line Ry., 95 S. E. 64, 108 S. C. 390.

[11] Louisiana & A. Ry. Co. v. Woodson, 192 S. W. 174, 127 Ark. 323; St. Louis, I. M. & S. Ry. Co. v. Elrod, 173 S. W. 836, 116 Ark. 514; Maffi v. Stephens, 108 S. W. 1008, 49 Tex. Civ. App. 354.

[12] Kansas City, Ft. S. & M. Ry. Co. v. Becker, 39 S. W. 358, 63 Ark. 477.

[13] People v. Bernard, 130 P. 1063, 21 Cal. App. 56; Keefer v. Amicone, 100 P. 594, 45 Colo. 110; Price v. Clover Lead Coal Mining Co., 188 Ill. App. 27; Eaton v. Marion County Coal Co., 173 Ill. App. 444, judgment affirmed 101 N. E. 58, 257 Ill. 567.

[14] **Ariz.** Lee v. State, 145 P. 244, 16 Ariz. 291, Ann. Cas. 1917B, 131.

Ga. Pope v. Pope, 95 Ga. 87, 22 S. E. 245.

Ill. Daly v. New Staunton Coal

where the statute quoted covers matters not involved in the case on trial, the court should point out what part is applicable.[15]

§ 409. Using exact language of statute

It is ordinarily not error, in an action based on a statute, to give an instruction in the exact language of the statute,[16] although a construction has been given to the statute quoted not entirely in accordance with the popular acceptation of the terms employed, if it is thereafter fully explained in conformity to such construction,[17] and usually, where an instruction is given with reference to the provisions of a particular statute, it is better that it contain the language of the statute.[18] On the other hand, instructions which correctly set forth a rule of law embodied in a statute are not erroneous, because they do not use its exact language.[19]

§ 410. Reference to statutes

An instruction merely referring the jury to a statute by its title or chapter and section numbers is properly refused,[20] and such a reference while not necessarily reversible error,[21] may be a ground for reversal.[22]

Co., 203 Ill. App. 164, judgment affirmed 117 N. E. 413, 280 Ill. 175.

Mo. Hollenbeck v. Missouri Pac. Ry. Co., 34 S. W. 494.

Neb. McMartin v. State, 145 N. W. 695, 95 Neb. 292; Henkel v. Boudreau, 130 N. W. 753, 88 Neb. 784.

[15] Central of Georgia Ry. Co. v. De Loach, 89 S. E. 433, 18 Ga. App. 362.

[16] **Ark.** Kansas City Southern Ry. Co. v. Whitley, 213 S. W. 369, 139 Ark. 255.

Fla. Florida Ry. Co. v. Dorsey, 52 So. 963, 59 Fla. 260.

Ill. Greene v. L. Fish Furniture Co., 111 N. E. 725, 272 Ill. 148; Mt. Olive & S. Coal Co. v. Rademacher, 60 N. E. 888, 190 Ill. 538, affirming judgment 92 Ill. App. 442; Warren v. Jackson, 204 Ill. App. 576; McCormick v. Decker, 204 Ill. App. 554; Halladay v. Murphysboro Supply Co., 203 Ill. App. 142; Watson v. Kammeier, 203 Ill. App. 31; Adams v. Jurich, 160 Ill. App. 522; Wells v. Baltimore & O. S. W. R. Co., 153 Ill. App. 23; Heffernan v. Bail, 109 Ill. App. 231; Consolidated Coal Co. v. Dombroski, 106 Ill. App. 641.

Mo. Kippenbrock v. Wabash R. Co., 194 S. W. 50, 270 Mo. 479.

[17] Western Union Telegraph Co. v. Harris, 64 S. E. 1123, 6 Ga. App. 260.

[18] Atlantic Coast Line R. Co. v. Canty, 77 S. E. 659, 12 Ga. App. 411; McDonald v. Jacobs, 10 Mo. 160; Jacobs v. McDonald, 8 Mo. 565; Hoag v. Washington-Oregon Corporation, 147 P. 756, 75 Or. 588, modifying judgment on rehearing 144 P. 574, 75 Or. 588.

[19] Hines v. Green, 101 S. E. 757, 24 Ga. App. 575; Alfriend v. Fox, 52 S. E. 925, 124 Ga. 563; Devine v. L. Fish Furniture Co., 189 Ill. App. 136; Haines v. M. S. Welker & Co., 165 N. W. 1027, 182 Iowa, 431; Lindell v. Stone, 94 A. 963, 77 N. H. 582.

[20] Wallis v. Heard, 86 S. E. 391, 16 Ga. App. 802.

[21] Lane v. Chicago, R. I. & P. Ry. Co., 35 Mo. App. 567.

[22] Butler v. Gill, 127 P. 439, 34 Okl. 814.

E. Reading, Quoting, or Citing Judicial Decisions or Text-Books

§ 411. Propriety of instructions quoting from judicial decisions or text-books

Although it is not improper for the court to refuse to embody the language of an elementary writer in a charge to the jury,[23] the court may read the law to the jury from a text-book,[24] and it is not error in a proper case for the trial court to read from the reports, as a part of its charge on the law, the opinion of the appellate court on a former appeal in the same case,[25] or the decisions of the courts in other cases,[26] or to quote from the opinion of the highest court of another state,[27] provided the quotations from such judicial reports correctly state the law.[28]

However, such a practice is one not to be encouraged.[29] A mere

[23] People v. Wayman, 128 N. Y. 585, 27 N. E. 1070.

[24] United States v. Neverson, 1 Mackey (D. C.) 152; Lett v. Horner, 5 Blackf. (Ind.) 296; Magill v. Southern Ry. Co., 78 S. E. 1033, 95 S. C. 306.

[25] Richmond & D. R. Co. v. Hissong, 97 Ala. 187, 13 So. 209; Riggins' Ex'rs v. Brown, 12 Ga. 271; Power v. Harlow, 23 N. W. 606, 57 Mich. 107; Panama R. Co. v. Johnson, 63 Hun, 629, 17 N. Y. S. 777.

[26] **D. C.** Johnson v. Baltimore & P. R. Co., 6 Mackey, 232.

Ga. Wright v. State, 18 Ga. 383.

Ind. Bronnenburg v. Charman, 80 Ind. 475.

Mass. Rothwell v. New York, N. H. & H. R. Co., 112 N. E. 231, 223 Mass. 550; Commonwealth v. Dow, 105 N. E. 995, 217 Mass. 473; Post v. Leland, 69 N. E. 361, 184 Mass. 601.

Mich. People v. Bowkus, 109 Mich. 360, 67 N. W. 319; People v. Niles, 7 N. W. 192, 44 Mich. 606.

N. Y. People v. Breen, 74 N. E. 483, 181 N. Y. 493; People v. Minnaugh, 131 N. Y. 563, 29 N. E. 750; McManus v. Woolverton (Com. Pl.) 19 N. Y. S. 545, judgment affirmed 138 N. Y. 648, 34 N. E. 513.

N. C. State v. Cameron, 81 S. E. 748, 166 N. C. 379.

Pa. Henry v. Klopfer, 147 Pa. 178, 23 A. 337, 338, 29 Wkly. Notes Cas. 331.

R. I. McCoart v. Rhode Island Co., 108 A. 585.

Quoting opinion in case distinguishable as to its facts. Where the facts relating to insanity, in a suit to set aside a will, and those on a trial for assault with intent to kill, in which insanity was alleged as a defense, were clearly distinguishable, extracts from the opinion of the Supreme Court in the will case regarding insanity, which were liable to mislead the jury, should not have been read as a part of the charge. Lowe v. State, 96 N. W. 417, 118 Wis. 641.

Argumentative instructions. An instruction on dying declarations, although literally quoted from an opinion of Supreme Court, was properly refused as argumentative. Harper v. State, 75 So. 829, 16 Ala. App. 153.

[27] Cousins v. Partridge, 79 Cal. 224, 21 P. 745.

[28] In re Spencer's Estate, 96 Cal. 448, 31 P. 453.

[29] Karnopp v. Ft. Smith Light & Traction Co., 178 S. W. 302, 119 Ark. 295.

Reading from dictionary. The practice of the court of reading to the jury, in its charge, definitions of a word given in dictionaries is not to be commended. State v. Rivers, 78 A. 786, 84 Vt. 154.

incidental statement in an opinion in another case, not laid down as a proposition of law, should not be given to the jury,[30] and the mere fact that certain language has been used by an appellate judge in an opinion is not of itself sufficient to justify the use of the same language by a trial court in an instruction in a similar case,[31] since language used by an appellate court in discussing the facts of a case is often inappropriate for use by a trial judge in instructing a jury.[32]

The court should not give as an instruction a paragraph from a book containing matters hard to be understood and calculated to confuse and mislead.[33] The facts of another case may be referred to for the purpose of illustration.[34]

§ 412. Quoting entire opinion or extracts therefrom

It will ordinarily be error for the court to read to the jury the full text of a reported case,[35] and then state to the jury that the court adopts the decision of such reported case as the law on the subject in the case on trial.[36] A court, in instructing as to the meaning of a word should not mislead and confuse the jury by reading a whole opinion of the appellate court, whose main point is not analogous to the case at bar, although it contains a correct definition of the word, but should cull that part which is to the point,[37] and the giving of an instruction by reading the entire headnote of a reported case is erroneous, as likely to mislead, where the facts of such case are very different from those of the case on trial.[38]

It is equally error to instruct the jury by reading an extract from a published opinion of the Supreme Court, if such extract, apart

[30] Jones v. State, 65 Ga. 506.

[31] Jones v. F. S. Royster Guano Co., 65 S. E. 361, 6 Ga. App. 506; Abernathy v. Emporia Mfg. Co., 95 S. E. 418, 122 Va. 406.

Adopting instructions approved by appellate court. It is not safe for trial courts to instruct in the language of opinions or to adopt instructions appearing therein, as instructions are approved only with reference to exceptions urged. Liddle v. Salter, 163 N. W. 447, 180 Iowa, 840.

[32] Central of Georgia R. Co. v. Hartley (Ga. App.) 103 S. E. 259; Southern Cotton Oil Co. v. Skipper, 54 S. E. 110, 125 Ga. 368; Atlanta & W. P. R. Co. v. Hudson, 51 S. E. 29, 123 Ga. 108.

Argumentative discussion. An instruction consisting of an argumentative discussion by the Supreme Court of the law of qualified privilege as a defense to libel, taken from an opinion in another case, was improper. Davis v. Hearst, 116 P. 530, 160 Cal. 143.

[33] Nicholas v. Kershner, 20 W. Va. 251.

[34] McGuffin v. State, 59 So. 635, 178 Ala. 40; State v. Chiles, 36 S. E. 496, 58 S. C. 47.

[35] Lendberg v. Brotherton Iron Min. Co., 75 Mich. 84, 42 N. W. 675.

[36] Frank v. Williams, 36 Fla. 136, 18 So. 351.

[37] Stewart v. Hunter, 16 Or. 62, 16 Pac. 876, 8 Am. St. Rep. 267.

[38] Stucke v. Milwaukee & M. R. Co., 9 Wis. 202.

from the context, appears likely to mislead the jury,[39] or states a different proposition from that contained in the entire opinion.[40]

§ 413. Citing authorities

While the practice of noting authorities and citations of cases on the margin of instructions in support thereof is not commended,[41] and is regarded as improper in some jurisdictions,[42] such notation is considered not to be prejudicial error.[43]

F. Repetition of Instructions

Repetition as constituting argument, see post, § 420.

§ 414. Necessity and propriety of repetition

Repetition of instructions on reasonable doubt, see ante, § 278.

Where ideas or propositions of law are correctly set out in one instruction, it is not ordinarily required that they should be repeated in other instructions,[44] this rule applying in criminal cases.[45] One

[39] Talmage v. Davenport, 31 N. J. Law (2 Vroom) 561.

[40] Laidlaw v. Sage, 80 Hun, 550, 30 N. Y. S. 496.

[41] Herzog v. Campbell, 47 Neb. 370, 66 N. W. 424.

[42] State v. Sage, 126 P. 403, 22 Idaho, 489, Ann. Cas. 1914B, 251; Springer v. Orr, 82 Ill. App. 558.

[43] In re Goldthorp's Estate, 88 N. W. 944, 115 Iowa, 430; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724.

[44] **Ark.** St. Louis, I. M. & S. Ry. Co. v. Blaylock, 175 S. W. 1170, 117 Ark. 504, Ann. Cas. 1917A, 563.

Cal. Weaver v. Carter, 152 P. 323, 28 Cal. App. 241.

Ga. Millen & S. W. R. Co. v. Allen, 61 S. E. 541, 130 Ga. 656.

Ill. Village of Altamont v. Carter, 63 N. E. 613, 196 Ill. 286, affirming judgment 97 Ill. App. 196; Graybeal v. Gardner, 146 Ill. 337, 34 N. E. 528, affirming 48 Ill. App. 305; Kopf v. Yordy, 208 Ill. App. 580; Dwyer v. Chicago City Ry. Co., 153 Ill. App. 463.

Ind. Vandalia Coal Co. v. Yemm, 92 N. E. 49, 175 Ind. 524; Surber v. Mayfield, 60 N. E. 7, 156 Ind. 375.

Iowa. Scovel v. Monaghan, 164 N. W. 783, 183 Iowa, 581; Doran v. Waterloo, C. F. & N. Ry. Co., 147 N. W. 1100; Lillie v. Brotherhood of Railway Trainmen, 86 N. W. 279, 114 Iowa, 252.

Minn. Brown v. Duluth, S. S. & A. Ry. Co., 179 N. W. 1003.

Mo. Cunningham v. Elvins (App.) 194 S. W. 515.

Neb. Nebraska Nat. Bank v. Burke, 44 Neb. 234, 62 N. W. 452.

N. H. Osgood v. Maxwell, 95 A. 954, 78 N. H. 35.

Okl. Flohr v. Territory, 78 P. 565, 14 Okl. 477.

Tex. Anderson v. Crow (Civ. App.) 151 S. W. 1080.

Utah. Smith v. Columbus Buggy Co., 123 P. 580, 40 Utah, 580.

Vt. White v. Central Vermont Ry. Co., 89 A. 618, 87 Vt. 330.

Va. E. I. Du Pont de Nemours & Co. v. Snead's Adm'r, 97 S. E. 812, 124 Va. 177.

Wis. Jones v. Monson, 119 N. W. 179, 137 Wis. 478, 129 Am. St. Rep. 1082.

[45] **Cal.** People v. Cornell, 155 P. 1026, 29 Cal. App. 430; People v. Stevens, 114 P. 800, 15 Cal. App. 294; People v. Smith, 84 P. 449, 3 Cal. App. 62.

Conn. State v. Weiner, 80 A. 198, 84 Conn. 411; State v. Kritchman, 79 A. 75, 84 Conn. 152.

Ga. Brundage v. State, 67 S. E.

clear pointed statement to the jury of each proposition advanced is sufficient.[46] Instructions involving such a repetition are properly refused,[47] since the practice of multiplying instructions announcing in effect the same legal principles or embodying the same ideas is discouraged by the courts,[48] as having a tendency to mislead or confuse the jury.[49]

Thus, where instructions have been given covering the subject of contributory negligence,[50] comparative negligence,[51] doctrine of

1051, 7 Ga. App. 726; Hall v. State, 66 S. E. 486, 7 Ga. App. 186.

Ind. Kennedy v. State, 6 N. E. 305, 107 Ind. 144, 57 Am. Rep. 99.

Kan. State v. Buffington, 81 P. 465, 71 Kan. 804, 4 L. R. A. (N. S.) 154; State v. Kearley, 26 Kan. 77.

Mo. State v. Dipley, 147 S. W. 111, 242 Mo. 461.

Mont. State v. Connors, 94 P. 199, 37 Mont. 15.

Tex. Cauthern v. State (Cr. App.) 65 S. W. 96.

W. Va. State v. Cooper, 82 S. E. 358, 74 W. Va. 472, Ann. Cas. 1917D, 453; State v. Prater, 43 S. E. 230, 52 W. Va. 132.

Illustrations of repetitions held unnecessary. Where, on a prosecution for aiding and abetting a third party in killing decedent, the court charged the jury that they must believe from all the evidence, to the exclusion of a reasonable doubt, that such third party did feloniously kill decedent, it was not necessary in another part of the same instruction, relating to the charge against defendant of aiding and abetting such third party in the killing of decedent, to add the words "if he did kill him." Fuqua v. Commonwealth, 73 S. W. 782, 24 Ky. Law Rep. 2204.

[46] Carr v. State, 23 Neb. 749, 37 N. W. 630; Olive v. State, 11 Neb. 1, 7 N. W. 444.

[47] **Ill.** Burke v. Toledo, P. & W. Ry. Co., 109 N. E. 691, 268 Ill. 614, affirming judgment 190 Ill. App. 419; Mattoon Heat, Light & Power Co. v. Walker, 134 Ill. App. 414; East St. Louis & S. Ry. Co. v. Zink, 133 Ill. App. 127, judgment affirmed 82 N. E. 283, 229 Ill. 180.

Iowa. Riepe v. Elting, 89 Iowa, 82, 56 N. W. 285, 48 Am. St. Rep. 356, 26 L. R. A. 769.

Mo. Sires v. Clark, 112 S. W. 526, 132 Mo. App. 537.

Tex. El Paso Electric Ry. Co. v. Benjamin (Civ. App.) 202 S. W. 996; City of Greenville v. Branch (Civ. App.) 152 S. W. 478.

[48] **Ark.** Sadler v. Sadler, 16 Ark. 628.

Ill. Grace & Hyde Co. v. Strong, 79 N. E. 967, 224 Ill. 630, affirming judgment 127 Ill. App. 336; Field v. Crawford, 146 Ill. 136, 34 N. E. 481; Holler v. Chicago City Ry. Co., 209 Ill. App. 140; Sullivan v. People, 108 Ill. App. 328.

Ind. State v. Totten, 114 N. E. 82, 185 Ind. 580; Modern Woodmen of America v. Kincheloe, 94 N. E. 228, 175 Ind. 563, Ann. Cas. 1913C, 1259.

Iowa. Arnold v. Ft. Dodge, D. M. & S. R. Co., 173 N. W. 252, 186 Iowa, 538.

Ky. Proctor Coal Co. v. Beaver's Adm'r, 152 S. W. 965, 151 Ky. 839; Trosper Coal Co. v. Crawford, 153 S. W. 211, 152 Ky. 214.

Mo. Reeves v. Lutz, 177 S. W. 764, 191 Mo. App. 550.

Tex. Cranfill v. Hayden, 80 S. W. 609, 97 Tex. 544, reversing judgment (Civ. App.) 75 S. W. 573; Willis v. Strickland, 50 S. W. 159.

Va. Atlantic Coast Line R. Co. v. Tyler, 98 S. E. 641, 124 Va. 484.

W. Va. State v. Legg, 53 S. E. 545, 59 W. Va. 315, 3 L. R. A. (N. S.) 1152.

[49] Dean v. State, 214 S. W. 38, 139 Ark. 433; Robbins v. Fugit (Ind.) 126 N. E. 321; Goodman v. Saperstein, 81 A. 695, 115 Md. 678; Rosenkovitz v. United Rys. & Electric Co. of Baltimore City, 70 A. 108, 108 Md. 306.

[50] Sells v. Grand Trunk Western

[51] Hayward v. Merrill, 94 Ill. 349, 34 Am. Rep. 229.

last clear chance,[52] effect of usury on the rights of the parties,[53] stating the rule as to the measure of damages,[54] or as to the burden of proof,[55] or the requirement that a party shall prove his case by a preponderance of the evidence,[56] such ideas need not be repeated in other instructions. So the words, "If the jury find from the evidence," contained in one clause of an instruction, need not be repeated in subsequent clauses.[57]

In a criminal case the trial judge should take care to give to the jury once and in clear language every principle of law applicable to the case, and when he has done this he is not required to repeat any of them, no matter how many separate instructions are asked which may include them.[58] Thus a repetition of the definition of the offense charged should be avoided, if possible,[59] and this rule applies to instructions relating to the presumption of innocence, reasonable doubt, and the degree of proof required of the state,[60] to instructions on malice aforethought and premeditation,[61] on the law of justifiable or excusable homicide,[62] and on circumstances of mitigation.[63] Information that, in order to convict, it must appear that the offense charged was committed in the county named in the indictment, need not be repeated,[64] and after the court has de-

Ry. Co., 206 Ill. App. 45; Knowles v. Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627; Cannon v. Lewis, 18 Mont. 402, 45 P. 572; Glover v. Houston Belt & Terminal Ry. Co. (Tex. Civ. App.) 163 S. W. 1063; Missouri, K. & T. Ry. Co. of Texas v. Stogner (Tex. Civ. App.) 163 S. W. 319.

[52] Cleveland, C., C. & St. L. Ry. Co. v. Champe, 102 N. E. 868, 55 Ind. App. 243.

[53] Walker v. Lastinger, 81 S. E. 203, 141 Ga. 435.

[54] Stearns Coal & Lumber Co. v. Tuggle, 161 S. W. 1112, 156 Ky. 714.

[55] Stedman v. O'Neil, 72 A. 923, 82 Conn. 199, 22 L. R. A. (N. S.) 1229; Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; Ducharme v. St. Peter, 135 Ill. App. 530.

[56] J. M. Robinson, Norton & Co. v. Stalcup, 106 N. E. 395, 58 Ind. App. 370.

[57] **Ill.** Town of Bethel v. Pruett, 74 N. E. 111, 215 Ill. 162; Slack v. Harris, 65 N. E. 669, 200 Ill. 96, affirming judgment 101 Ill. App. 527; Village of Altamont v. Carter, 63 N. E. 613, 196 Ill. 286, affirming judgment 97 Ill. App. 196; People v. Mullen, 179 Ill. App. 262; Heffernan v. Ball, 109 Ill. App. 231; Chicago, R. I. & P. Ry. Co. v. Keely, 103 Ill. App. 205; Cleveland, C. C. & St. L. Ry. Co. v. Hall, 70 Ill. App. 429.

Ind. Indianapolis St. Ry. Co. v. Robinson, 61 N. E. 936, 157 Ind. 414.

Mo. Logan v. Field, 90 S. W. 127, 192 Mo. 54.

N. C. Wilkie v. Raleigh & C. F. R. Co., 37 S. E. 204, 127 N. C. 203, judgment modified on rehearing 38 S. E. 289, 128 N. C. 113.

[58] Thrasher v. State, 53 So. 256, 168 Ala. 130; People v. Bickerstaff (Cal. App.) 190 P. 656; People v. White, 128 P. 417, 20 Cal. App. 156.

[59] People v. Martin, 185 P. 1003; Castner v. People, 184 P. 387, 67 Colo. 327.

[60] People v. Bickerstaff, 190 P. 656.

[61] Brewer v. State, 78 S. W. 773, 72 Ark. 145.

[62] Territory v. Gonzales, 68 P. 925, 11 N. M. 301.

[63] Holt v. State, 100 S. W. 156, 51 Tex. Cr. R. 15.

[64] Keys v. State, 37 S. E. 762, 112 Ga. 392, 81 Am. St. Rep. 63; State v. Darragh, 54 S. W. 226, 152 Mo. 522.

fined certain terms as used in a designated instruction, it is not necessary to define such terms again, when afterwards used.[65]

§ 415. Limitations of rule against repetition

But while one clear and correct statement of a proposition of law would seem to be enough, the mere repetition of it will not necessarily constitute reversible error.[66] Where such a repetition is not prejudicial to the party complaining thereof, it will not work a

[65] Commonwealth v. Stout, 14 Ky. Law Rep. (abstract) 576.

[66] **U. S.** Grand Trunk Ry. Co. of Canada v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, affirming Ives v. Grand Trunk R. Co. (C. C. Mich.) 35 Fed. 176.

Colo. Liutz v. Denver City Tramway Co., 131 P. 258, 54 Colo. 371.

Ga. Wilson v. Barnard, 72 S. E. 943, 10 Ga. App. 98.

Ill. People v. Lewis, 96 N. E. 1005, 252 Ill. 281; People v. Cotton, 95 N. E. 283, 250 Ill. 338; Kravitz v. Chicago City Ry. Co., 210 Ill. App. 287; Lecklieder v. Chicago City Ry. Co., 172 Ill. App. 557; Eggmann v. Nutter, 169 Ill. App. 116; Roman v. Silbertrust, 159 Ill. App. 485; McMahon v. Chicago City Ry. Co., 143 Ill. App. 608, judgment affirmed 88 N. E. 223, 239 Ill. 334.

Ind. Davis v. Babb (Ind.) 125 N. E. 403.

Iowa. Livingstone v. Dole, 167 N. W. 639, 184 Iowa, 1340; Doran v. Waterloo, C. F. & N. R. Co., 153 N. W. 225, 170 Iowa, 614; Covert v. Town of Lovilia, 149 N. W. 67, 167 Iowa, 163; Buchholtz v. Incorporated Town of Radcliffe, 105 N. W. 336, 129 Iowa, 27; State v. McCahill, 72 Iowa, 111, 33 N. W. 599.

Ky. Wiltshire's Adm'x v. Kister, 160 S. W. 743, 156 Ky. 168; Louisville & N. R. Co. v. Logsdon, 71 S. W. 905, 114 Ky. 746, 24 Ky. Law Rep. 1566.

Md. Pillard v. Chesapeake S. S. Co. of Baltimore, 92 A. 1040, 124 Md. 468.

Mass. Mahar v. Steuer, 170 Mass. 454, 49 N. E. 741; Commonwealth v. Snelling, 32 Mass. (15 Pick.) 321.

Minn. Jacobsen v. City of Minneapolis, 132 N. W. 341, 115 Minn. 397.

Mo. State v. Murray, 193 S. W. 830; Huss v. Heydt Bakery Co., 108 S. W. 63, 210 Mo. 44.

Neb. Gandy v. Bissell's Estate, 97 N. W. 632, 5 Neb. (Unof.) 184, reversed on rehearing 100 N. W. 803, 72 Neb. 356; Denise v. City of Omaha, 69 N. W. 119, 49 Neb. 750; Gran v. Houston, 45 Neb. 813, 64 N. W. 245.

N. H. Saltmarsh v. Bow, 56 N. H. 428.

Ohio. Smart v. Masters & Wardens of N. C. Lodge No. 2, 27 Ohio Cir. Ct. R. 273.

Pa. Murray v. New York, L. & W. R. Co., 103 Pa. 37.

S. C. Keys v. Winnsboro Granite Co., 51 S. E. 549, 72 S. C. 97.

Tex. Smith v. Bryan (Civ. App.) 204 S. W. 359; Woodard v. State, 111 S. W. 941, 54 Tex. Cr. R. 86; Von Boeckmann v. Loepp (Civ. App.) 73 S. W. 849; International & G. N. Ry. Co. v. Leak, 64 Tex. 654.

Wis. Klipstein v. Raschein, 94 N. W. 63, 117 Wis. 248.

Illustrations of repetition not constituting reversible error. In an action for personal injuries, where the charge correctly stated the law governing the case, a judgment will not be reversed because in the charge the judge twice stated that, in order to entitle plaintiff to a verdict, he must show negligence on the part of defendant, and twice stated that plaintiff must show that he exercised ordinary care to avoid the accident. Maes v. Texas & N. O. Ry. Co. (Tex. Civ. App.) 23 S. W. 725. Where the court charged that the purchasers must have knowledge of the fraud to avoid a fraudulent conveyance, and in another charge he stated more specifically what would amount to such knowledge, and in other separate instructions he charged that such knowledge would avoid the sale, though the purchaser had paid a valuable consideration, that it would avoid the sale, though the vendee had no fraudulent intent in making the purchase,

reversal.[67] It is only where the repetition of a correct instruction appears to have created in the minds of the jury an erroneous impression of the law,[68] or to have prejudiced a party by giving undue prominence to a particular phase of a case,[69] that the judgment of the lower court will be disturbed on account thereof.

Unnecessary repetitions of instructions on a single subject, given at the instance of both parties cannot be made a ground of complaint against the verdict.[70]

that the sale with such notice was void as against the rights of creditors, that the sale would be void, though the only motive for making the purchase was because the property was cheap, and that actual knowledge on the part of the purchaser was not necessary to set aside the sale, it was held that, though the charge was objectionable, the judgment should not be reversed on the ground of too frequent repetition of the same principle of law to the jury. Traylor v. Townsend, 61 Tex. 144.

[67] Davis v. Michigan Cent. R. Co., 111 N. W. 76, 147 Mich. 479; Robinson v. State, 98 N. W. 694, 71 Neb. 142.

[68] Adams v. Elgin & Belvidere Electric Co., 204 Ill. App. 1.

[69] **Ark.** Huffman v. Sudbury, 194 S. W. 510, 128 Ark. 559.

Fla. Jacksonville Electric Co. v. Hellenthal, 47 So. 812, 56 Fla. 443.

Ind. Terry v. Davenport, 83 N. E. 636, 170 Ind. 74.

Kan. Murray v. Empire Dist. Electric Co., 162 P. 1145, 99 Kan. 507; Lawder v. Hinderson, 36 Kan. 754, 14 P. 164.

Tex. Carter v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 160 S. W. 987; Wood v. Dean (Civ. App.) 155 S. W. 363; Pettithory v. Clarke & Courts (Civ. App.) 139 S. W. 989; Wolf Cigar Stores Co. v. Kramer, 109 S. W. 990, 50 Tex. Civ. App. 411; (Civ. App.) Southern Kansas Ry. Co. of Texas v. Sage, 80 S. W. 1038, reversed 84 S. W. 814, 98 Tex. 438; Continental Ins. Co. v. Pruitt, 65 Tex. 125.

Wash. Alaska S. S. Co. v. Pacific Coast Gypsum Co., 138 P. 875, 78 Wash. 247.

Instructions held not improper under rule. A repetition in the instructions of the rule as to preponderance of the evidence, and the application of it to different phases of the case. Sonka v. Sonka (Tex. Civ. App.) 75 S. W. 325; Posener v. Harvey (Tex. Civ. App.) 125 S. W. 356. Where, in an action for injuries to plaintiff's wife, plaintiff contended that the railroad company was negligent in failing to stop its train at a certain station for a reasonable time, in starting it before plaintiff's wife could alight, in stopping it again at an inconvenient and dangerous place, and in failing to assist her in alighting, and the court, in instructing on each of these issues, charged that the plaintiff must establish negligence by a preponderance of the evidence, there was no such repetition of that phrase as to give undue prominence thereto. Martin v. St. Louis S. W. Ry. Co. of Texas (Tex. Civ. App.) 56 S. W. 1011. Where the court charged abstractly upon defendant's theory of defense, the giving of a special charge presenting the rule of law in connection with the concrete facts was not improper as undue repetition. Jones v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 157 S. W. 213. Where the main charge submits the issue of contributory negligence only generally, there is no undue repetition in reference to it because a special charge submits it in connection with the very facts on which defendant relies. Andrews v. Jefferson Cotton Oil & Refining Co., 74 S. W. 342, 32 Tex. Civ. App. 288. An instruction does not give undue prominence to a rule adopted for computation by repeating it in illustrations of its application. McAuley v. Harris, 71 Tex. 631, 9 S. W. 679.

[70] State v. Snider, 94 S. E. 981, 81 W. Va. 522.

It is held that a party has a right to a special instruction on any group of facts supported by pleadings and evidence, and which, if true, would be of controlling effect in his favor, although a charge in general terms is given which is to the same effect,[71] and where the failure to repeat a particular proposition of law may mislead the jury, it will be error not to repeat it.[72]

§ 416. Effect of repetition which misleads or gives undue prominence to certain matters

As is implied in the foregoing statement of the rule, if the frequent repetition of a phrase or a proposition of law is misleading,[73] or is such as to give undue prominence to certain features of a case, to the prejudice of one party or the advantage of another,[74] it will constitute reversible error.

[71] Chicago, R. I. & G. R. Co. v. Mitchum (Tex. Civ. App.) 194 S. W. 622.

[72] The Scrantonian v. Brown, 36 Pa. Super. Ct. 170.

Where an instruction was given upon one branch of a case, but was omitted when it should have been given as a qualification of another instruction upon a different branch of the case, it is cause for reversal. Cochrane v. Faris, 18 Tex. 850.

[73] Piette v. Bavarian Brewing Co., 91 Mich. 605, 52 N. W. 152.

[74] **Ill.** People v. Harrison, 104 N. E. 259, 261 Ill. 517; Kahl v. Chicago, M. & St. P. Ry. Co., 125 Ill. App. 294.

Okl. Price v. State, 98 P. 447, 1 Okl. Cr. 358.

Tex. Carl v. Settegast (Civ. App.) 211 S. W. 506; St. Louis Southwestern Ry. Co. of Texas v. Kerr (Civ. App.) 184 S. W. 1058; Heldenfels v. School Trustees of School Dist. No. 7, San Patricio County (Civ. App.) 182 S. W. 386; Lafferty v. Wilson (Civ. App.) 162 S. W. 379; Risinger v. Sullivan (Civ. App.) 161 S. W. 397; State v. Haley (Civ. App.) 142 S. W. 1003; Continental Oil & Cotton Co. v. Thompson (Civ. App.) 136 S. W. 1178; Stringfellow v. Braselton, 117 S. W. 204, 54 Tex. Civ. App. 1; Redmond v. Sherman Cotton Mills (Civ. App.) 100 S. W. 186; Highland v. Houston, E. & W. T. Ry. Co. (Civ. App.) 65 S. W. 649.

Wash. Chicago, M. & St. P. Ry. Co. v. Alexander, 91 P. 626, 47 Wash. 131.

Instructions held erroneous within rule. In an action against a carrier for death of a passenger, where the issues as to whether decedent was guilty of contributory negligence and whether she died from natural disease were sharply contested, the giving of special charges requested by defendant and calculated, by reason of repetition giving undue prominence to the defenses of contributory negligence and death from other than her injuries, to impress the jury with the belief that, in the court's opinion, plaintiff could not recover, was error. Sizemore v. St. Louis & S. F. Ry. Co. (Tex. Civ. App.) 130 S. W. 1024. Where in an action for injuries to a passenger while alighting from defendant's train, the court in its general charge submitted the question whether the box on which its passengers alighted was unfit or unsafe for the purpose; another charge requested by plaintiff was given to the effect that if the box used was such as was ordinarily used by defendant, and the jury should believe that by reason of its size and construction it was not a proper appliance, and that defendant was negligent in using such box, and by reason of such negligence plaintiff was caused to fall, then to find for plaintiff and another charge requested and given was that if the jury believed that the box commonly used by defendant in discharging its passengers, would, by reason of its size and construction, tip, slip, and

To emphasize by repetition an idea already contained in a charge may be as harmful as a charge on the weight of evidence,[75] and the judge ought not to repeat a rule of evidence, when by so doing the jury may be led to believe that the rule has not been complied with in the case before them.[76] It is held, however, that, burden of proof being a legal principle, not a fact issue, the repetition of such principle in instructions cannot mislead the jury into the belief that the court entertains views on fact issues adverse to the plaintiff.[77]

turn over, that by reason of such fact it was an unsafe appliance, and that defendant was negligent in using such box, then to find for plaintiff, and the evidence was such that it would authorize a verdict either way, it was held that the two special charges were sufficiently covered by the general charge, and that the repetition tended to impress on the jury the idea that the box was possibly an unsafe appliance. Missouri, K. & T. Ry. Co. of Texas v. Dunbar, 108 S. W. 500, 49 Tex. Civ. App. 12. The reiterating, in instructions, in an action against a railway company for running over a pedestrian on its tracks by a train, of the principles of law applicable to the issue of contributory negligence, is erroneous, as giving it undue prominence. Kroeger v. Texas & P. Ry. Co., 69 S. W. 809, 30 Tex. Civ. App. 87. In an action on a note given for the purchase price of land, and to foreclose a vendor's lien which defendant claimed was waived, it was error for the court to reiterate in its charge that "it was not necessary that there should be any contract, verbal or in writing, in order to create a vendor's lien," and that "the burden of proof rested on defendants to show a waiver of the lien," and thereby give undue prominence to such propositions. Cross v. Kennedy (Tex. Civ. App.) 66 S. W. 318.

Repetition of instructions on measure of damages. The giving of several instructions on the question of damages has not a tendency to lead the jury to think the court believes plaintiff should have a verdict; the court cautioning them that they are to make no such deduction, and all but one of the instructions being worded to prevent the giving of excessive damages in the event of a verdict for plaintiff. Johnston v. Beadle, 91 P. 1011, 6 Cal. App. 251.

[75] Frisby v. Withers, 61 Tex. 134.

Emphasizing preponderance of evidence rule. Repeating 12 times in the charge that the jury must believe "from a preponderance of the evidence" the facts alleged by plaintiff tended to emphasize the burden cast by law on plaintiff, and was probably harmful. Cook v. Urban (Tex. Civ. App.) 167 S. W. 251.

[76] Hays v. Hays, 66 Tex. 606, 1 S. W. 895.

[77] Beatty v. Metropolitan West Side Elevated R. Co., 141 Ill. App. 92; Dallas Waste Mills v. Texas Cake & Linter Co. (Tex. Civ. App.) 204 S. W. 868.

the reason that they violate the rule that they should be clear and

menced, such testimony should be received with caution, because of the improbability that a party would make statements prejudicial to himself, and because of the frailty of memory of witnesses, and their liability to misunderstand the words used." Riddle v. Webb, 110 Ala. 599, 18 So. 323. A charge that the law abhors fraud. McClendon v. McKissack, 38 So. 1020, 143 Ala. 188. A charge that an accusation of slander is easy to be brought and hard to defend, though the defendant be innocent. McLaughlin v. Beyer, 61 So. 62, 181 Ala. 427. An instruction, in an action for injuries to a servant, that the burden of proof is on plaintiff, and that, if the jury found that there was a disputed fact left in doubt, they should find the fact for defendant. Woodward Iron Co. v. Sheehan, 52 So. 24, 166 Ala. 429. An instruction, in an action for death of a servant while riding certain cars down an incline, that no duty rested on intestate's foreman to instruct him about riding the cars down the incline, if the danger was obvious and intestate was sufficiently developed to understand the danger, was properly refused as argumentative. Woodstock Iron Works v. Kline, 43 So. 362, 149 Ala. 391. An instruction, in an action for the death of a child struck by a train, that the engineer did not discover the child until he became aware that the object he saw on the track was a human being. Southern Ry. Co. v. Smith, 50 So. 390, 163 Ala. 174. A charge that, if any individual juror should believe that decedent's negligence contributed in the slightest degree to his death, plaintiff could not recover on certain counts. Alabama Great Southern R. Co. v. Hanbury, 49 So. 467, 161 Ala. 358. Instruction, in an action for death of a child, caused by falling into a drain into which was discharged hot water from a mill, that it was not necessary to prove that the pool of water was not of itself attractive to children was properly refused as argumentative. Thompson v. Alexander City Cotton Mills Co., 67 So. 407, 190 Ala. 184, Ann. Cas. 1917A, 721. An instruction that the law is that one who has by his negligence proximately contributed to his injury cannot recover damages against another who has negligently caused his death, and that the rule is applicable though the person injured is under 14 years of age, if he has sufficient mental capacity. Moss v. Mosley, 41 So. 1012, 148 Ala. 168. An instruction, in a suit for maintaining a nuisance by allowing filth to accumulate near plaintiff's lot, that in the nature and conditions of society numerous annoyances arise which do not give rise to liability, that the injury must be real, and not imaginary or whimsical, and must be material, and not simply inconvenience or trifling interruption, and that, unless such injury had been inflicted, the jury should find for defendant. N. K. Fairbank Co. v. Nicolai, 47 N. E. 360, 167 Ill. 242. An instruction, in an action for damages for maintaining a nuisance by discharging oil and water into the street and upon plaintiff's property, that, even though the jury find that plaintiff's property was located in a manufacturing district, defendant would be liable in damages if the jury believed that it was guilty of maintaining a nuisance close to plaintiff's residence, as the term "nuisance" was therein defined, and that plaintiff suffered inconvenience therefrom. Continental Oil & Cotton Co. v. Thompson (Tex. Civ. App.) 136 S. W. 1178. An instruction, in an action to recover compensation for medical services rendered, that there is nothing more sacred about the account of a physician than any other indebtedness, and that if, from the facts in the case, the jury find that there was no agreement as to fee to be charged, then the plaintiff is only entitled to a reasonable fee for services actually rendered, as proven by the evidence. Morrisette v. Wood, 26 So. 307, 123 Ala. 384, 82 Am. St. Rep. 127. An instruction, in an action against a railroad for injuries to a traveler on a highway, caused by his mule taking fright at a mail crane

concise, presenting only the point or matter of law on which the

erected at a crossing, that the term "a mule of ordinary gentleness," as used in the complaint, does not mean any particular mule which is ordinarily gentle, but means a mule which is as gentle as ordinarily gentle mules. Western Ry. of Alabama v. Cleghorn, 39 So. 133, 143 Ala. 392. A charge that the degree of care required of one entering the railroad tracks of defendant to discover and avoid injury from an approaching engine was as great as that which devolved on defendant's employés to discover and avoid injuring plaintiff, and, if the jury believed that if plaintiff had exercised as high a degree of care to guard against injury as defendant's employés should have observed to avoid injuring plaintiff, plaintiff would not have been injured, he could not recover, was properly refused as argumentative. Missouri, K. & T. Ry. Co. of Texas v. Owens (Tex. Civ. App.) 75 S. W. 579. An instruction, in an action against a railroad for the destruction of cotton by sparks alleged to have been emitted from an engine, that the mere fact that plaintiff's property was discovered to be on fire soon after the passage of one of the defendant's engines raised no presumption that the fire originated by sparks escaping from such engine. Alabama Great Southern R. Co. v. Sanders, 40 So. 402, 145 Ala. 449. An instruction, in an action against a railway company for a fire caused by sparks emitted from a locomotive, that the company was required to exercise the utmost care in running through a town where wooden buildings were situated so near to the track as to be exposed to fire that might come in large and dangerous quantities from its locomotives, and especially so if at the time the wind was blowing towards the buildings, etc. Sherrill v. Louisville & N. R. Co., 44 So. 153, 148 Ala. 1. An instruction, in an action against a railroad company for injuries resulting from a fire set by defendant's engine, that the mere fact that the fire originated from sparks emitted from an engine is not sufficient to fasten a liability upon the railroad company, and that the mere fact that a fire occurred along the line of defendant's road does not raise a presumption that it was caused by or originated from defendant's engine. Birmingham Ry., Light & Power Co. v. Martin, 42 So. 618, 148 Ala. 8. An instruction in an action for damages for breach of a written warranty as to the time a steel cable would wear which calls specific attention as to putting other cables in use. Metropolitan St. Ry. Co. v. Broderick & Bascom Rope Co., 137 S. W. 633, 150 Mo. App. 640. An instruction, in an action to recover wagons, obtained by defendants from a third person, that defendant's knowledge, before the purchase of the stock of such third person, that defendants owed plaintiff for the wagons, was not alone sufficient to put them on notice of fraud of such third person in obtaining the wagons. Parlin & Orendorff Co. v. Glover, 118 S. W. 731, 55 Tex. Civ. App. 112. An instruction offered by street railroad in a personal injury action, that it could only be held liable for a defect in its right of way if the defect was such as would make its codefendant, the city, liable. Fowler v. Chicago Rys. Co., 120 N. E. 635, 285 Ill. 196, affirming judgment 207 Ill. App. 430. An instruction, in an action for damages to a horse and buggy from a collision with a team of oxen and wagon on a public bridge, that public bridges are for the use of oxen and drays as much as for horses and buggies. Cohn & Goldberg Lumber Co. v. Robbins, 48 So. 853, 159 Ala. 289. An instruction, in an action for delay in delivering a telegram, sent by plaintiff's agent, that it was possible that plaintiff understood that the agent was acting for her when he went to send the message, but the evidence must show that he agreed to act as agent. Western Union Telegraph Co. v. Northcutt, 48 So. 553, 158 Ala. 539, 132 Am. St. Rep. 38. An instruction, in an action for delay in delivering a death telegram, that the jury should consider that plaintiff was one of six living

party asking them may rely,[81] and for the further reason that they

brothers, and that five of them and all four of the sisters were at the burial, in determining whether plaintiff suffered great mental pain as a result of the absence of the sixth brother. Western Union Telegraph Co. v. Benson, 48 So. 712, 159 Ala. 254. An instruction, in an action for trespass to land by cutting timber thereon, that, if plaintiff could not read, the jury should more carefully scrutinize the transaction in which a deed to the timber to defendant was signed by her and her husband, and if a false representation was made to her as to the nature of the deed, and such representations were made with knowledge of their falsity, and plaintiff believed them to be true, the jury should find the deed was obtained by fraud. Davis v. Miller Brent Lumber Co., 44 So. 639, 151 Ala. 580. An instruction, in an action for injuries caused by the pollution of a stream with coal dust and other foreign matter, which by overflow of the stream were deposited on the land of a riparian owner, that the law takes into consideration the fact that the use by mining companies of streams will result in some impairment of the quality of the water, and that if the use by defendant did not of itself greatly impair the quality of water the jury must find for defendant, was properly refused, as argumentative. Alabama Consol. Coal & Iron Co. v. Vines, 44 So. 377, 151 Ala. 398. An instruction that the will of an aged and weak-minded person should not be sustained, unless it appears that her property was fairly and voluntarily disposed of. Shirley v. Ezell, 60 So. 905, 180 Ala. 352. A clause in an instruction, in a will contest on the ground of mental incapacity and undue influence, that wills are often made in extremis, and when the bodily powers are broken and mental faculties enfeebled. Huffman v. Graves, 92 N. E. 289, 245 Ill. 440. An instruction that the evidence of the attesting witnesses to the alleged will is not entitled to any greater weight than the evidence of other witnesses as to the testamentary capacity of testator. Cummings v. McDonnell, 66 So. 717, 189 Ala. 96.

Instructions held not argumentative. A charge, in an action for wrongful death from the alleged negligent operation of an automobile owned by the defendant father and driven by the defendant son, bearing on alleged negligence of son, and pointing out items of negligence pleaded on which alone sufficient evidence had been adduced. Johnson v. Smith, 173 N. W. 675, 143 Minn. 350.

[79] **Ala.** Burton v. State, 69 So. 913, 194 Ala. 2; Smith v. State, 69 So. 402, 13 Ala. App. 399, certiorari denied Ex parte Smith, 69 So. 1020, 193 Ala. 680; Roden v. State, 69 So. 366, 13 Ala. App. 105; Jones v. State, 69 So. 66, 193 Ala. 10; Anderson v. State (Sup.) 68 So. 56; Ragsdale v. State, 67 So. 783, 12 Ala. App. 1; James v. State, 67 So. 773, 12 Ala. App. 16; Maxwell v. State, 67 So. 772, 12 Ala. App. 212; Ware v. State, 67 So. 763, 12 Ala. App. 101; Rector v. State, 66 So. 857, 11 Ala. App. 333; Wise v. State, 66 So. 128, 11 Ala. App. 72; Bryant v. State, 64 So. 333, 185 Ala. 8; Waldrop v. State, 64 So. 80, 185 Ala. 20; Clayton v. State, 64 So. 76, 185 Ala. 13; Mizell v. State, 63 So. 1000, 184 Ala. 16; Brooks v. State, 62 So. 569, 8 Ala. App. 277, judgment reversed 64 So. 295, 185 Ala. 1; Bone v. State, 62 So. 455, 8 Ala. App. 59; Chestnut v. State, 61 So. 609, 7 Ala. App. 72; Brock v. State (App.) 61 So. 474; Gaston v. State, 60 So. 805, 179 Ala. 1; Black v. State, 59 So. 692, 5 Ala. App. 87; Gardner v. State, 58 So. 1001, 4 Ala. App. 131; Barney v. State, 57 So. 598, 5 Ala. App. 302; Savage v. State, 57 So. 469, 174 Ala. 94; Pope v. State, 57 So. 245, 174 Ala. 63; Fowler v. State, 54 So. 115, 170 Ala. 65; Turner v. State, 49 So. 828, 160 Ala. 40; Kirby v. State, 44 So. 38, 151 Ala. 66; Allen v. State, 42 So. 1006, 148 Ala. 588; Simmons v. State, 40 So. 660, 145

[81] Bray v. Ely, 105 Ala. 553, 17 So. 180.

have a tendency to lead the court to invade the province of the

Ala. 61; Jefferson v. State, 110 Ala. 89, 20 So. 434.

Ark. Mason v. State, 192 S. W. 207, 127 Ark. 289; Stevens v. State, 174 S. W. 219, 117 Ark. 64; Lee v. State, 172 S. W. 1025, 116 Ark. 588; Tiner v. State, 172 S. W. 1010, 115 Ark. 494; Taylor v. State, 169 S. W. 341, 113 Ark. 520; White v. State, 152 S. W. 163, 105 Ark. 698; Bolling v. State, 54 Ark. 588, 16 S. W. 658.

Cal. People v. Lopez, 165 P. 722, 33 Cal. App. 530; People v. Converse, 153 P. 734, 28 Cal. App. 687; People v. Clayberg, 147 P. 994, 26 Cal. App. 614; People v. Wilson, 138 P. 971, 23 Cal. App. 513; People v. Cramley, 138 P. 123, 23 Cal. App. 340; People v. Kawasaki, 137 P. 287, 23 Cal. App. 92; People v. Hatch, 125 P. 907, 163 Cal. 368; People v. Smith, 110 P. 333, 13 Cal. App. 627; People v. Howland, 109 P. 894, 13 Cal. App. 363; People v. Holden, 109 P. 495, 13 Cal. App. 354; People v. Muhly, 104 P. 466, 11 Cal. App. 129; People v. McNamara, 94 Cal. 509, 29 P. 953.

Colo. McQueary v. People, 110 P. 210, 48 Colo. 214, 21 Ann. Cas. 560.

Fla. Wolf v. State, 73 So. 740; Bass v. State, 50 So. 531, 58 Fla. 1; Baldwin v. State, 35 So. 220, 46 Fla. 115.

Ga. Harris v. State, 70 S. E. 952, 136 Ga. 107; Jackson v. State, 64 S. E. 653, 132 Ga. 546; Miles v. State, 93 Ga. 117, 19 S. E. 805, 44 Am. St. Rep. 140; Beck v. State, 76 Ga. 452; Hayes v. State, 58 Ga. 35.

Idaho. State v. Marren, 107 P. 993, 17 Idaho, 766; State v. Fleming, 106 P. 305, 17 Idaho, 471.

Ill. People v. Keating, 93 N. E. 95, 247 Ill. 76; Zuckerman v. People, 72 N. E. 741, 213 Ill. 114; Gent v. People, 133 Ill. App. 159.

Mich. People v. Jansma, 147 N. W. 600, 181 Mich. 62; People v. Dupree, 141 N. W. 672, 175 Mich. 632; People v. Coulon, 114 N. W. 1013, 151 Mich. 200; People v. Hanaw, 65 N. W. 231, 107 Mich. 337.

Minn. State v. Yates, 109 N. W. 1070, 99 Minn. 461.

Mo. State v. Brown (App.) 193 S. W. 902; State v. Chinn, 133 S. W. 1196, 153 Mo. App. 611; State v. Fleetwood, 127 S. W. 934, 143 Mo. App. 698; State v. Sebastian, 114 S. W. 522, 215 Mo. 58.

Nev. State v. Buralli, 71 P. 532, 27 Nev. 41.

Okl. Love v. State, 150 P. 913, 12 Okl. Cr. 1; Miller v. State, 131 P. 717; 9 Okl. Cr. 255, L. R. A. 1915A, 1088; Price v. State, 98 P. 447, 1 Okl. Cr. 358.

Tenn. Cooper v. State, 138 S. W. 826, 123 Tenn. 37.

Tex. Head v. State, 175 S. W. 1062, 76 Tex. Cr. R. 496; Bradley v. State, 132 S. W. 484, 60 Tex. Cr. 398.

Utah. State v. McCurtain, 172 P. 481, 52 Utah, 63; State v. Romeo, 128 P. 530, 42 Utah, 46.

Va. Gottlieb v. Commonwealth, 101 S. E. 872, 126 Va. 807.

Illustrations of instructions held objectionable within rule. An instruction that the jury were to decide the case upon the law given by the court and the evidence from the witnesses and nothing more. West v. State, 75 So. 709, 16 Ala. App. 117. An instruction containing a general dissertation on the rights of accused to life and liberty, the duties of jurors, and the importance of convicting the guilty, informing the jury as to the method by which they were chosen, the reason why they were impaneled, and that they were selected as intelligent and qualified jurors. People v. Davidson, 88 N. E. 565, 240 Ill. 191. An instruction that "No exact definition of an overt act can be given. It may be a motion, a gesture, conduct or demonstration, or anything else that evidences a present design to take the life of defendant or to do him great bodily harm. Trifles, light as air when viewed alone, may become fraught with deadly meaning, when viewed in connection with all the preceding facts disclosed and with all the evidence in the case." Griffin v. State, 50 So. 962, 165 Ala. 29. A charge, in a prosecution against an agent for embezzling two sums, made up of items which he had failed to enter in his cash book, one of which sums

jury in determining the weight, probative effect, and sufficiency

he had paid back, that defendant was not being tried for failing to do his duty in regard to making entries in his cash book, and that, if the jury had a reasonable doubt as to whether defendant embezzled the sum he had not paid back, then they must acquit him. Willis v. State, 33 So. 226, 134 Ala. 429. A charge, in an instruction for murder, that there is no evidence of the good character of the deceased, and the jury may look to the circumstances of the case to determine whether deceased was a turbulent and violent man. Kennedy v. State, 40 So. 658, 147 Ala. 687. A charge that the jury were not required to find who did the shooting, unless they should be convinced beyond a reasonable doubt that defendant did it. Spraggins v. State, 35 So. 1000, 139 Ala. 93. A charge, in a prosecution for homicide, that the jury are to try the case according to the law and the evidence, and not according to their opinion as to whether public peace and good order would be promoted by conviction of accused. McGhee v. State, 59 So. 573, 178 Ala. 4. An instruction that the mere fact that, if any one of the witnesses said that they had not talked to any one about the evidence, it was immaterial evidence, and should not be considered in disregarding any witness' testimony on any material point, or in discrediting a witness' testimony on any material point. Patton v. State, 46 So. 862, 156 Ala. 23. A charge, in a prosecution for larceny of cheese, that if accused was employed by H., and at time he put the cheese on the wagon did so under instruction or direction of a person over him, and did so openly and notoriously, a strong presumption arises that there was no guilty intent to deprive the owner of the use thereof, which must be rebutted by strong and convincing evidence to the contrary before a conviction will be authorized. Hamilton v. State, 82 So. 557, 17 Ala. App. 109. A charge that the character of a man is made from his whole life, etc., that it would make no difference whether accused's sister had gone wrong before she did with decedent, yet he had the right to reclaim and to continue his efforts in that direction, and the jury have the right to look to all the evidence along that line in determining the conduct of decedent and accused at the time decedent was killed, and that accused had the right to consider the welfare of his sister, and to use all means for her good that were not in violation of law. Monteith v. State, 49 So. 777, 161 Ala. 18.

Instructions held not improper within rule. A charge, in a murder trial, distinguishing between the diseased and deranged condition of the mind rendering a person incapable of distinguishing between right and wrong, constituting insanity, which the law recognizes as a defense, and mere moral insensibility, passion, etc., which is not a defense, and cautioning the jury to observe the distinction. People v. Clark, 90 P. 549, 151 Cal. 200. An instruction that, if defendant's only connection with the sale was in depositing a package behind a counter, and in changing a dollar for the negro who sold the whisky, and, if he in no way aided in the sale or delivery, the jury should find for defendant. Thomas v. State, 68 So. 549, 12 Ala. App. 293. A charge, on a trial for pursuing the business of selling liquors, that the state was not required to show that such business or occupation was accused's principal business or occupation, but that if, although engaged in his usual occupation, he secretly sold liquors, he would be guilty. Dickson v. State, 146 S. W. 914, 66 Tex. Cr. R. 270.

Effect of statute. A statute declaring that it is beyond the province of a judge sitting in criminal causes to use any argument in his charge calculated to excite the sympathies or passions of the jury does not prohibit argumentative charges to juries, but only such as are referred to. Cesure v. State, 1 Tex. App. 19.

[80] **U. S.** (C. C. A. Cal.) San Pedro, L. A. & S. L. R. Co. v. Thomas, 187 F.

of the evidence, and what inferences of fact should be drawn therefrom.[82]

790, 109 C. C. A. 638; Northern Central Coal Co. v. Barrowman, 246 F. 906, 159 C. C. A. 178.

Ala. Johnson v. Johnson, 77 So. 335, 201 Ala. 41, 6 A. L. R. 1031; Boshell v. Cunningham, 76 So. 937, 200 Ala. 579; Wear v. Wear, 76 So. 111, 200 Ala. 345; Kelly v. Cook, 73 So. 220, 15 Ala. App. 350; Alabama Fuel & Iron Co. v. Baladoni, 73 So. 205, 15 Ala. App. 316; Jackson v. Roanoke Banking Co., 72 So. 530, 197 Ala. 349; Hooper v. Herring, 70 So. 308, 14 Ala. App. 455; Sibley v. Barclay, 70 So. 201, 14 Ala. App. 422; certiorari denied Ex parte Barclay, 70 So. 1012, 195 Ala. 694; Orr v. Stewart, 69 So. 649, 13 Ala. App. 542; Birmingham Ry., Light & Power Co. v. Donaldson, 68 So. 596, 14 Ala. App. 160; Moon v. Benton, 68 So. 589, 13 Ala. App. 473; Manley v. Birmingham Ry., Light & Power Co., 68 So. 60, 191 Ala. 531; Southern Ry. Co. v. Harrison, 67 So. 597, 191 Ala. 436. Birmingham Ry., Light & Power Co. v. Hass, 67 So. 504, 190 Ala. 273; Johnson v. Colvin, 65 So. 328, 186 Ala. 538; Southern Ry. Co. v. Smith, 58 So. 429, 177 Ala. 367; Penney v. McCauley, 57 So. 510, 3 Ala. App. 497; Johnston Bros. Co. v. Brentley, 56 So. 742, 2 Ala. App. 281; Louisville & N. R. Co. v. Young, 53 So. 213, 168 Ala. 551; Alabama Steel & Wire Co. v. Tallant, 51 So. 835, 165 Ala. 521; Penry v. Dozier, 49 So. 909, 161 Ala. 292; Birmingham Ry., Light & Power Co. v. Williams, 48 So. 93, 158 Ala. 381; Rutherford v. Dyer, 40 So. 974, 146 Ala. 665; Alabama Great Southern R. Co. v. Sanders, 40 So. 402, 145 Ala. 449; Pullman Co. v. Krauss, 40 So. 398, 145 Ala. 395, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218; Kansas City, M. & B. R. Co. v. Matthews, 39 So. 207, 142 Ala. 298; Louisville & N. R. Co. v. Sullivan Timber Co., 35 So. 327, 138 Ala. 379; Southern Ry. Co. v. Howell, 34 So. 6, 135 Ala. 639; King v. Franklin, 31 So. 467, 132 Ala. 559; Pearson v. Adams, 29 So. 977, 129 Ala. 157; Fuller v. Gray, 27 So. 458, 124 Ala. 388; Nelms v. Steiner, 22 So. 435, 113 Ala. 562; City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Adams v. Thornton, 82 Ala. 260, 3 So. 20; Adams v. Thornton, 78 Ala. 489, 56 Am. Rep. 49.

Ark. St. Louis, I. M. & S. Ry. Co. v. Howard, 188 S. W. 14, 124 Ark. 588; American Bauxite Co. v. Dunn, 178 S. W. 934, 120 Ark. 1, Ann. Cas. 1917C, 625; Pine Bluff Natural Gas Co. v. Guest, 177 S. W. 917, 119 Ark. 629; Rector v. Robins, 102 S. W. 209, 82 Ark. 424.

Cal. Sellars v. Southern Pac. Co., 166 P. 599, 33 Cal. App. 701; Pacific Improvement Co. v. Maxwell, 146 P. 900, 26 Cal. App. 265; In re Gird's Estate, 108 P. 499, 157 Cal. 534, 137 Am. St. Rep. 131; In re Dolbeer's Estate, 86 P. 695, 149 Cal. 227, 9 Ann. Cas. 795; Schander v. Gray, 86 P. 695, 149 Cal. 227.

Colo. McCormick v. Parriott, 80 P. 1044, 33 Colo. 382.

Conn. Radwick v. Goldstein, 98 A. 583, 90 Conn. 701; Stedman v. O'Neil, 72 A. 923, 82 Conn. 199, 22 L. R. A. (N. S.) 1229.

Fla. Logan Coal & Supply Co. v. Hasty, 67 So. 72, 68 Fla. 539; Escambia County Electric Light & Power Co. v. Sutherland, 55 So. 83, 61 Fla. 167; Florida East Coast Ry. Co. v. Welch, 44 So. 250, 53 Fla. 145, 12 Ann. Cas. 210.

Ga. Western & A. R. Co. v. Jarrett, 96 S. E. 17, 22 Ga. App. 313; Brown v. Matheson, 83 S. E. 98, 142 Ga. 396; Flemister v. Central Georgia Power Co., 79 S. E. 148, 140 Ga. 511; Macon Ry. & Light Co. v. Vining, 51 S. E. 719, 123 Ga. 770.

Ill. Wickes v. Walden, 81 N. E. 798, 228 Ill. 56; Pittsburgh, C., C. & St. L. Ry. Co. v. Banfill, 69 N. E. 499, 206 Ill. 553, affirming judgment 107 Ill. App. 254; Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999; Thompson v. Force, 65 Ill. 370; McCormick v. Decker, 204

[82] Gehm v. People, 87 Ill. App. 158; Wolff v. Carstens, 134 N. W. 400, 148 Wis. 178.

Thus an instruction singling out certain facts and calling the

Ill. App. 554; McDermott v. Rex Electric Co., 201 Ill. App. 391; Illinois Cent. R. Co. v. McDaniel, 199 Ill. App. 282; Gibbons v. Southern Illinois Ry. & Power Co., 199 Ill. App. 154; Born v. Schrieber, 199 Ill. App. 101; Thomas v. Ohio Coal Co., 199 Ill. App. 50; Devine v. L. Fish Furniture Co., 189 Ill. App. 136; Mengelkamp v. Consolidated Coal Co., 173 Ill. App. 370; Schmalfeld v. Peoria & E. Ry. Co., 158 Ill. App. 335; Ranney v. Chicago & A. R. Co., 158 Ill. App. 104; Randall v. Sterling, D. & E. Electric Ry. Co., 158 Ill. App. 56; Willison v. Dering Coal Co., 156 Ill. App. 209; Ventriss v. Pana Coal Co., 155 Ill. App. 152; Fisher v. City of Geneseo, 154 Ill. App. 288; Dudley v. Peoria Ry. Co., 153 Ill. App. 619; Orr v. Warner & Frame, 149 Ill. App. 539; Mitchell v. Libby, McNeill & Libby, 149 Ill. App. 201; Swanson v. Chicago City Ry. Co., 148 Ill. App. 135, judgment affirmed, 90 N. E. 210, 242 Ill. 388; Penney v. Johnston, 142 Ill. App. 634; Illinois Steel Co. v. Koshinski, 135 Ill. App. 587, judgment affirmed Koshinski v. Illinois Steel Co., 83 N. E. 149, 231 Ill. 198; Elgin, A. & S. Traction Co. v. Wilcox, 132 Ill. App. 446; Conklin Const. Co. v. Walsh, 131 Ill. App. 609; White v. Kiggins, 130 Ill. App. 404; Chicago Union Traction Co. v. Nuetzel, 114 Ill. App. 466; Chicago Title & Trust Co. v. Ward, 113 Ill. App. 327; Cleveland, C., C. & St. L. Ry. Co. v. Alfred, 113 Ill. App. 236; Davenport, R. I. & N. W. Ry. Co. v. De Yaeger, 112 Ill. App. 537; Shickle-Harrison & Howard Iron Co. v. Beck, 112 Ill. App. 444; People v. Peden, 109 Ill. App. 560; Lake Erie & W. R. Co. v. Delong, 109 Ill. App. 241; West Chicago St. R. Co. v. Lieserowitz, 99 Ill. App. 591, judgment affirmed 64 N. E. 718, 197 Ill. 607; Griffin Wheel Co. v. Markus, 79 Ill. App. 82, affirmed 54 54 N. E. 206, 180 Ill. 391.

Iowa. Strasberger v. Farmers' Elevator Co., 167 N. W. 184, 184 Iowa, 66; Case v. Chicago Great Western Ry. Co., 126 N. W. 1037, 147 Iowa, 747; Gray v. Chicago, R. I. & P. R. Co., 121 N. W. 1097, 143 Iowa, 268.

Md. Fletcher v. Dixon, 68 A. 875, 107 Md. 420.

Mass. Wyman v. Whicher, 60 N. E. 612, 179 Mass. 276.

Mich. Wood v. Standard Drug Store, 157 N. W. 403, 190 Mich. 654.

Minn. Duer v. Gagnon, 152 N. W. 880, 129 Minn. 517; Reem v. St. Paul City Ry. Co., 84 N. W. 652, 82 Minn. 98.

Mo. Pasche v. South St. Joseph Town-Site Co. (App.) 190 S. W. 30; Asbury v. Kansas City, 144 S. W. 127, 161 Mo. App. 496; Melican v. Missouri-Edison Electric Co., 90 Mo. App. 595; Flannery v. St. Louis, I. M. & S. Ry. Co., 44 Mo. App. 396.

Mont. Albertini v. Linden, 123 P. 400, 45 Mont. 398.

N. H. Minot v. Boston & M. R. R., 66 A. 825, 74 N. H. 230.

N. C. Daniel v. Dixon, 77 S. E. 305, 161 N. C. 377.

Ohio. Jackson Knife & Shear Co. v. Hathaway, 27 Ohio Cir. Ct. R. 745.

Or. Gile v. Lasselle, 171 P. 741, 89 Or. 107.

R. I. Ribas v. Revere Rubber Co., 91 A. 58, 37 R. I. 189.

Tex. Smith v. Bryan (Civ. App.) 204 S. W. 359; El Paso Electric Ry. Co. v. Benjamin (Civ. App.) 202 S. W. 996; Hart-Parr Co. v. Paine (Civ. App.) 199 S. W. 822; Gulf, C. & S. F. Ry. Co. v. Gentry (Civ. App.) 197 S. W. 482; Gulf States Telephone Co. v. Evetts (Civ. App.) 188 S. W. 289; Kansas City, M. & O. Ry. Co. of Texas v. Corn (Civ. App.) 186 S. W. 807; Cleburne St. Ry. Co. v. Barber (Civ. App.) 180 S. W. 1176; W. P. Carmichael Co. v. Miller (Civ. App.) 178 S. W. 976; Miller v. Campbell (Civ. App.) 171 S. W. 251; Kansas City, M. & O. Ry. Co. of Texas v. Treadwell & Wilkison (Civ. App.) 164 S. W. 1089; Glover v. Houston Belt & Terminal Ry. Co. (Civ. App.) 163 S. W. 1063; Bomar v. Munn (Civ. App.) 158 S. W. 1186; Beckwith v. Powers (Civ. App.) 157 S. W. 177; Hughes-Buie Co. v. Mendoza (Civ. App.) 156 S. W. 328; Jordan v. Johnson (Civ. App.) 155 S. W. 1194; Gilmore v. Brown (Civ. App.) 150 S. W. 964; Gulf, C. & S. F. R. Co. v. McGinnis (Civ. App.) 147

attention of the jury to them,[83] by telling them that they may consider such facts for certain purposes,[84] or by stating that such facts do or do not warrant certain conclusions,[85] are in the nature of an argument, and are properly refused for that reason.

S. W. 1188; Galveston, H. & S. A. Ry. Co. v. Kurtz (Civ. App.) 147 S. W. 658; Houston Belt & Terminal Ry. Co. v. Johansen (Civ. App.) 143 S. W. 1186; Texas & P. Ry. Co. v. Boyd (Civ. App.) 141 S. W. 1076; Kansas City, M. & O. Ry. Co. of Texas v. Bigham (Civ. App.) 138 S. W. 432; Gulf, C. & S. F. R. Co. v. Farmer, 115 S. W. 260, 102 Tex. 235, reversing judgment (Civ. App.) 108 S. W. 729; Missouri, K. & T. Ry. Co. of Texas v. Hibbitts, 109 S. W. 228, 49 Tex. Civ. App. 419; Eastern Texas R. Co. v. Moore (Civ. App.) 94 S. W. 394; Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375; Missouri, K. & T. Ry. Co. of Texas v. Carter, 68 S. W. 159, 95 Tex. 461; Houston & T. C. R. Co. v. Harvin (Civ. App.) 54 S. W. 629; Rice v. Ward (Civ. App.) 54 S. W. 318, judgment reversed 56 S. W. 747, 93 Tex. 532; Hurst v. McMullen (Civ. App.) 47 S. W. 666, rehearing denied 48 S. W. 744; McDonald v. International & G. N. Ry. Co., 86 Tex. 1, 22 S. W. 939, 40 Am. St. Rep. 803; Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Equitable Mortgage Co. v. Norton, 71 Tex. 683, 10 S. W. 301.

Utah. Smith v. Gilbert, 164 P. 1026, 49 Utah, 510.

Wis. Weiting v. Town of Millston, 77 Wis. 523, 46 N. W. 879.

[83] Kirk v. Wolf Mfg. Co., 118 Ill. 567, 8 N. E. 815; Dangerfield v. Hope, 157 Ill. App. 63.

[84] **Ala.** Penney v. Grant, 79 So. 271, 16 Ala. App. 510; Chappell v. State, 73 So. 134, 15 Ala. App. 227; Jones v. State, 57 So. 36, 174 Ala. 85; Louisville & N. R. Co. v. Holland, 55 So. 1001, 173 Ala. 675; Merrill v. Sheffield Co., 53 So. 219, 169 Ala. 242; Alabama Consol. Coal & Iron Co. v. Heald, 53 So. 162, 168 Ala. 626; Hill v. State, 46 So. 864, 156 Ala. 3; Logan v. State, 46 So. 480, 155 Ala. 85; Loveman v. Birmingham Ry., L. & P. Co., 43 So. 411, 149 Ala. 515; Williams v. State, 41 So. 992, 147 Ala. 10; Andrews v. Tucker, 29 So. 34, 127 Ala. 602; Dennis v. State, 23 So. 1002, 118 Ala. 72.

Tex. Hurlbut v. Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

Instructions improper within rule. An instruction that, if plain-

[85] **Ala.** Brand v. State, 69 So. 379, 13 Ala. App. 390; Caldwell-Watson Foundry & Machine Co. v. Watson, 62 So. 859, 183 Ala. 326; McCary v. Alabama Great Southern R. Co., 62 So. 18, 182 Ala. 597; Central of Georgia Ry. Co. v. Bagley, 55 So. 894, 173 Ala. 611; Sweatt v. State, 47 So. 194, 156 Ala. 85; Carter v. State, 47 So. 191, 156 Ala. 72.

N. J. Cottrell v. Fountain, 77 A. 465, 80 N. J. Law, 1.

Instructions improper within rule. A charge, in a prosecution for murder, that if it is not shown that the dogs could take up and carry the trail of a human being after the time shown to have elapsed, the jury should not consider the trailing of the dogs as a circumstance. Jones v. State, 74 So. 843, 16 Ala. App. 7, certiorari denied 75 So. 1003, 200 Ala. 696. A charge, in a prosecution for permitting stock to be at large in a stock law district, that, as a person not living in a stock law district has a right to let his stock run at large, and not keep a guard for them, defendant would not be guilty unless he had knowledge. Blalock v. State, 63 So. 26, 8 Ala. App. 349. A charge, in a prosecution for uttering a fraudulent prospectus, which submitted the effect of affidavits of defendant stating that the land was grazing land, and which stated that if defendant believed that there was oil in said land, but there had been no discovery, he had a legal right to make such affidavit, yet under such circumstances he would have a right to state in the prospectus that such lands contained oil. People v. Merritt, 122 P. 839, 18 Cal. App. 58, rehearing denied 122 P. 844, 18 Cal. App. 58.

The court is not bound to give an instruction argumentative in form, although the argument is a legitimate one,[86] and although the instruction states the legal proposition involved correctly.[87]

An instruction with respect to the weight and credibility of expert testimony should not be argumentative.[88]

§ 418. Application of rule in criminal cases

In a criminal prosecution the trial court should not argue the law of the case in its charge to the jury.[89] The defense cannot insist that the judge shall charge the jury argumentatively, or comment on the evidence, or point out the weak points in the case for the prosecution.[90] A charge that every citizen, no matter how humble, has a lawful right to bear arms in defense of his person,[91]

tiff was entitled to any damages, the jury should consider the fact that defendant's son was being beaten over the head by plaintiff and that such son was bloody, if the jury should find that he was bloody. Morris v. McClellan, 45 So. 641, 154 Ala. 639, 16 Ann. Cas. 305. An instruction, in suit for injuries to a child of 10 or 12 from contact with an electric light wire, that the jury, in determining contributory negligence, must "consider the fact that the plaintiff in this case has lived all his life in a city, where they had electric lights and electric wires, and the fact that the plaintiff thus had opportunities to learn and appreciate the dangers of such agencies." Potera v. City of Brookhaven, 49 So. 617, 95 Miss. 774. An instruction, in a prosecution for homicide, in which there was no evidence that deceased had had intercourse with others than accused, her husband, that, if the jury believed beyond a reasonable doubt that accused was guilty of murder in the first degree, they might consider the fact, if they believed from the evidence that it was a fact, that deceased, to the knowledge of accused, had been engaged in illicit relations with others, solely for the purpose of fixing the punishment which the jury should impose on accused. Thomas v. State, 43 So. 371, 150 Ala. 31. An instruction, that if defendant was too drunk to form a design the jury might look to that fact in determining whether he provoked the difficulty. Davis v. State, 44 So. 561, 152 Ala. 25. An instruction that, in determining plaintiff's contributory negligence, his familiarity with the sidewalk, the time of day, and condition of the weather, should be considered. City of Bonham v. Crider (Tex. Civ. App.) 27 S. W. 419.

[86] In re Clark's Estate, 181 P. 639, 180 Cal. 395.

[87] Village of Brocton v. Wiese, 204 Ill. App. 556; Southern Traction Co. v. Kirksey (Tex. Civ. App.) 222 S. W. 702; State v. Burns, 168 P. 955, 51 Utah, 73.

[88] Miller v. State, 131 P. 717, 9 Okl. Cr. 255, L. R. A. 1915A, 1088.

Instructions held argumentative. An instruction that testimony of experts dependent on hypothetical questions is unsatisfactory because it cannot convey the precise reason why the conclusions were reached, and is unreliable because frequently based on speculation, and that such opinions are not entitled to as much weight as facts, and that opinions based on the same facts are often diametrically opposed to each other, is erroneous as being an argument why the testimony was unreliable and unsatisfactory. In re Blake's Estate, 68 P. 827, 136 Cal. 306, 89 Am. St. Rep. 135.

[89] State v. Ardoin, 22 So. 620, 49 La. Ann. 1145, 62 Am. St. Rep. 678.

[90] People v. Crawford, 48 Mich. 498, 12 N. W. 673.

[91] Gibbs v. State, 47 So. 65, 156 Ala. 70. See Carwile v. State, 39 So. 220, 148 Ala. 576.

or that, where a man is free from fault in bringing on a difficulty, he is justified in using such violence as is necessary to protect himself against bodily harm,[92] or that it is better that the guilty should go free than that the innocent should be punished,[93] or that the state is as much interested in the acquittal of the innocent as in the punishment of the guilty,[94] is properly refused as argumentative.

So the objection of argumentativeness lies against instructions not to discriminate against the defendant because of his race,[95] that there is no duty to convict to elevate the colored race,[96] that it is a principle of law that justice should be tempered with mercy,[97] that if the jury find the accused guilty it is no more their moral duty under the law to hang him than to sentence him to the penitentiary,[98] that the fact that the jurors have said on oath they would convict on circumstantial evidence does not mean that the jury must convict,[99] that the guilt of defendant of other offenses than that charged does not justify conviction,[1] that a juror is not required to return a verdict contrary to his own judgment of the evidence and the law given him by the court,[2] that if there is reason-

[92] Murray v. State, 69 So. 354, 13 Ala. App. 175.

[93] **Ala.** McGhee v. State, 59 So. 573, 178 Ala. 4; Burkett v. State, 45 So. 682, 154 Ala. 19; Parham v. State, 42 So. 1, 147 Ala. 57; Bell v. State, 37 So. 281, 140 Ala. 57; Walker v. State, 35 So. 1011, 139 Ala. 56; Barnes v. State, 111 Ala. 56, 20 So. 565; Lowe v. State, 88 Ala. 8, 7 So. 97; Perry v. State, 6 So. 425, 87 Ala. 30; Carden v. State, 84 Ala. 417, 4 So. 823.

Cal. People v. Currie, 117 P. 941, 16 Cal. App. 731; People v. Nunley, 76 P. 45, 142 Cal. 441; Id., 75 P. 676, 142 Cal. 105; People v. Ebanks, 49 P. 1049, 117 Cal. 652, 40 L. R. A. 269.

Ga. Mixon v. State, 51 S. E. 580, 123 Ga. 581, 107 Am. St. Rep. 149.

Idaho. State v. Steel, 113 P. 721, 19 Idaho, 463; State v. Fleming, 106 P. 305, 17 Idaho, 471.

Ill. Seacord v. People, 121 Ill. 623, 13 N. E. 194; People v. Darr, 179 Ill. App. 130, judgment affirmed 104 N. E. 389, 262 Ill. 202.

Ind. Coleman v. State, 111 Ind. 563, 13 N. E. 100.

Mont. Territory v. Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

Neb. Parrish v. State, 14 Neb. 60, 15 N. W. 357.

Va. McCue v. Commonwealth, 49 S. E. 623, 103 Va. 870.

[94] Adkins v. State, 76 So. 465, 16 Ala. App. 181; Smith v. State, 51 So. 610, 165 Ala. 50; Parker v. State, 51 So. 260, 165 Ala. 1; People v. Smith, 110 P. 333, 13 Cal. App. 627.

[95] Johnson v. State, 73 So. 210, 15 Ala. App. 298, certiorari denied Ex parte Johnson, 73 So. 1000, 198 Ala. 692; Pope v. State, 57 So. 245, 174 Ala. 63; Pope v. State, 53 So. 292, 168 Ala. 33; Barker v. State, 28 So. 589, 126 Ala. 83.

[96] Pope v. State, 34 So. 840, 137 Ala. 56.

[97] Hankins v. State, 74 So. 400, 15 Ala. App. 581.

[98] Thomas v. State, 43 So. 371, 150 Ala. 31.

[99] Phillips v. State, 50 So. 194, 162 Ala. 14.

[1] Kirkwood v. State, 62 So. 1011, 8 Ala. App. 108, certiorari denied 63 So. 990, 184 Ala. 9.

[2] Anderson v. State, 49 So. 460, 160 Ala. 79.

able ground to believe from the evidence that another could have killed the deceased to find the defendant not guilty,[3] or that it is improper to consider whether the defendant might be pardoned after conviction.[4] In a criminal case it is proper to refuse charges having no other office than to refute arguments of the prosecuting attorney.[5]

On the other hand, a charge is not argumentative merely because a correct statement of the law contained therein is adverse to the hypothesis of innocence.[6] Instructions are not argumentative because they impress upon the jury a sense of their high responsibility to the public as well as to the accused,[7] nor because they admonish the jury that the gravity or magnitude of the punishment prescribed by law for the offense charged should not be allowed to affect their judgment.[8]

The rule against argumentative instructions applies to cautionary instructions with respect to the credibility of the testimony of police officers, detectives, or informers,[9] to instructions with respect to the extent of corroboration of the testimony of accomplices,[10] to instructions cautioning the jury against considering the failure of the accused to testify,[11] to instructions upon the effect of flight as evi-

[3] Wright v. State, 72 So. 564, 15 Ala. App. 91.

[4] McClain v. State, 62 So. 241, 182 Ala. 67.

[5] Smith v. State, 51 So. 632, 165 Ala. 74; Tribble v. State, 40 So. 938, 145 Ala. 23; White v. State, 32 So. 139, 133 Ala. 122; Mitchell v. State, 30 So. 348, 129 Ala. 23.

When reversible error. Where the court, in apparently direct response to the argument of counsel for accused, emphasized the difference between the rules as to felonies and misdemeanors, whereby the instruction became argumentative, it was ground for reversal. Ballard v. State, 74 S. E. 846, 11 Ga. App. 104.

[6] Nowell v. State, 88 S. E. 909, 18 Ga. App. 143.

[7] State v. Sehon, 68 So. 221, 137 La. 83.

Instructions proper within rule. In a prosecution for embezzlement, remarks by the court, introductory to the instructions, that the offense charged is a grave one, involving the betrayal and breach of trust reposed in a trusted employé; that the business of corporations must be intrusted to employés, and it is a matter of great importance that they shall honestly care and faithfully account for what is committed to them; that persons can protect their property from strangers, but not from trusted employés; and that the case is also important to defendant, because it involves his personal liberty and his reputation and character, and important to the state, because it is charged with the grave duty of apprehending and punishing criminal offenses, wherefore the court asks the jury's careful attention to the instructions—are not erroneous, as amounting to an argument for the state. Secor v. State, 95 N. W. 942, 118 Wis. 621.

[8] State v. Baldes, 110 N. W. 440, 133 Iowa, 158.

[9] Harmon v. State, 62 So. 438, 8 Ala. App. 311, certiorari denied Ex parte Harmon, 64 So. 1018, 185 Ala. 672; Sapp v. State, 56 So. 45, 2 Ala. App. 190; City of Everett v. Simmons, 150 P. 414, 86 Wash. 276.

[10] Crittenden v. State, 32 So. 273, 134 Ala. 145.

[11] Matthews v. State, 79 So. 507, 16 Ala. App. 514; Barden v. State, 40

dence of guilt,[12] to instructions on circumstantial evidence,[13] to instructions on the effect of good character of accused [14] and to instructions on the doctrine of reasonable doubt.[15]

So. 948, 145 Ala. 1; Ledbetter v. State (Ala.) 39 So. 618.

[12] Kirkwood v. State, 62 So. 1011, 8 Ala. App. 108; certiorari denied 63 So. 990, 184 Ala. 9; Young v. State, 40 So. 656, 147 Ala. 687; Mitchell v. State, 32 So. 132, 133 Ala. 65.

[13] Miller v. State, 74 So. 840, 16 Ala. App. 3; Willis v. State, 33 So. 226, 134 Ala. 429; Spraggins v. Same, 35 So. 1000, 139 Ala. 93; State v. Romeo, 128 P. 530, 42 Utah, 46.

Instruction held not argumentative. An instruction that circumstantial evidence is to be regarded in all cases, and is many times as conclusive as direct evidence of eyewitnesses, that when it is strong and satisfactory, the jury should consider it, neither enlarging or belittling its force, and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, the jury should convict, but they are not to fancy situations or circumstances which do not appear in the evidence, but are to make those just and reasonable inferences from circumstances proven, which the guarded judgment of a reasonable man would ordinarily make under like circumstances, is not open to the objection of being an argument in favor of circumstantial evidence. State v. Hassan, 128 N. W. 960, 149 Iowa. 518.

[14] Watkins v. State, 32 So. 627, 133 Ala. 88; Naugher v. State, 23 So. 26, 116 Ala. 463.

Instructions improper within rule. Instructions that, no matter how conclusively the other evidence considered by itself might point to guilt, proof of good character might create a reasonable doubt, where doubt would not otherwise exist, and might lead the jury to believe, in view of the probabilities, that one of such good character would not be guilty and the other evidence was not true, or that the witnesses in some way might be mistaken; that good character is an important fact with every man, and never more so than when he is on trial for an offense rendered improbable by a uniform course of life, etc. State v. Meyers, 117 P. 818, 59 Or. 537. A charge that good character, when proven, is a good thing, and that the jury could look to defendant's good character, and consider it in connection with other facts and circumstances, even to generate a doubt; that the law recognizes love of life as a natural and legitimate sentiment, and, while it cannot be controlled or molded by notions of chivalry, it permits every one who is without fault, and who has adopted every reasonable expedient to avert the necessity, to take the life of his assailant rather than lose his own; that the divine law did not require that we should love our neighbors better than ourselves. Parker v. State, 45 So. 248, 153 Ala. 25. An instruction in a murder trial that the fact, if it was a fact, that accused's character was not discussed until after he was accused of the homicide, was not evidence that his character was not good, since under the law the best character is generally that least talked of, such fact being negative evidence of good character frequently of the most satisfactory kind. Way v. State, 46 So. 273, 155 Ala. 52. A charge in a prosecution for homicide that good character is an important fact, and never more so than when a man is on trial with an offense which is rendered improbable by a uniform course of life inconsistent with such crime, and that there are cases where it becomes a man's sole dependence, and may prove sufficient to outweigh evidence of the most positive character, the most clear and satisfactory cases being sometimes rebutted by it, etc. State v. Stentz, 74 P. 588, 33 Wash. 444.

[15] **Ala.** Pinson v. State, 78 So. 876, 201 Ala. 522; Cunningham v. State, 69 So. 982, 14 Ala. App. 1; Moore v. State, 67 So. 789, 12 Ala. App. 243;

§ 419. Statement of contentions of parties or of undisputed facts

A statement in detail of the contentions of the parties, the jury being told that they are the judges of the facts,[16] is not objectionable as argumentative. Thus instructions, in a criminal case, stating the contentions of the state and the defendant are ordinarily not objectionable as argumentative,[17] but an instruction which repeats the substance of the testimony for the state and submits it to the jury, with the argumentative deductions drawn therefrom by the prosecuting attorney as the issues in the case, is erroneous.[18]

Collins v. State, 58 So. 80, 3 Ala. App. 64; Humphries v. State, 56 So. 72, 2 Ala. App. 1; Bailey v. State, 53 So. 296, 390, 168 Ala. 4; Smith v. State, 51 So. 632, 165 Ala. 74; Gaston v. State, 49 So. 876, 161 Ala. 37.

Instructions held improper within rule. A charge in a prosecution for murder that the defendant should not be convicted simply because they believed beyond a reasonable doubt the truth of certain incriminating facts, but that they must believe beyond a reasonable doubt that these facts established defendant's guilt. Pope v. State, 53 So. 292, 168 Ala. 33. An instruction that it is not the duty of the jury to convict defendant to vindicate the law, or improve public morals, unless the evidence was so convincing as to lead their minds to the conclusion that defendant could not be innocent. Lovett v. State, 64 So. 643, 10 Ala. App. 72. An instruction, in a prosecution against an agent for embezzlement, that, on the question of criminal intent, the jury might consider the fact, if the evidence showed it to be such, that defendant offered to pay all that might be due, if ascertained, and that if the jury were not convinced, beyond all reasonable doubt and to a moral certainty, that defendant retained money, the property of his principal, with a criminal intent, they should acquit. Willis v. State, 33 So. 226, 134 Ala. 429. An instruction, on a trial for homicide, that the jury was not called on to avenge the murder of deceased, and that before a verdict of guilt would be authorized they must believe from the evidence beyond a reasonable doubt and to a moral certainty that accused was guilty. Saulsberry v. State, 59 So. 476, 178 Ala. 16. A charge that while it was true that guilt, when properly proven beyond all reasonable doubt, should be punished yet that, unless guilt is shown by testimony which comes up to the high standard prescribed for the trial of a crime, accused should be acquitted, and that it was better that the guilty go unpunished than that the innocent, or those not shown guilty beyond a reasonable doubt, should be punished. Smith v. State, 51 So. 610, 165 Ala. 50. An instruction that the requirement of belief beyond a reasonable doubt was not a fiction of law, but intended as a shield against conviction until that degree of proof is made which leads the jury to believe that defendant cannot reasonably be innocent from the evidence. Watts v. State, 59 So. 270, 177 Ala. 24.

[16] Asplund v. Calumet & Hecla Mining Co., 143 N. W. 633, 177 Mich. 529.

[17] Wilkes v. State, 84 S. E. 721, 16 Ga. App. 185.

[18] Rouse v. State, 58 S. E. 416, 2 Ga. App. 184; Thomas v. State, 95 Ga. 484, 22 S. E. 315.

Emphasizing testimony favorable to state. The court may review the evidence, but if its charge is argumentative, emphasizing testimony favorable to the state, discrediting the case and the testimony of defendant, he is not given such a trial as is guaranteed by the Constitution and laws. State v. Almos, 142 N. W. 801, 122 Minn. 479.

A statement of undisputed facts cannot be objected to as argumentative.[19]

§ 420. Repetition as constituting argument

A repetition of a proposition in different instructions may be of such a character as to be in the nature of an argument.[20] However, an instruction is not argumentative merely because it contains unnecessary repetition.[21]

§ 421. Effect of argumentative instructions as ground for reversal

The giving of an argumentative charge is not ground for reversal, unless the party complaining thereof is injured thereby,[22] and if an argumentative instruction asserts a correct proposition of law and one not entirely abstract, and its misleading tendencies can be remedied by an explanatory charge, it will not work a reversal;[23] but if such instructions are prejudicial to the party complaining of them,[24] or the verdict is clearly the result thereof,[25] they will be cause for reversal, and in a criminal case, where the natural effect of a charge is to operate as a powerful argument for conviction, and to no longer leave the minds of the jury open to the convincing force of the evidence, and to that alone, a conviction will be set aside.[26]

In Alabama it has been held that the giving or refusing of argumentative instructions rests largely in the discretion of the trial court,[27] and there are some decisions in this jurisdiction to the effect that the giving of an argumentative instruction which states the law correctly is not a ground of error,[28] but it is not appre-

[19] Davis v. Michigan Cent. R. Co., 111 N. W. 76, 147 Mich. 479.

[20] Nelson v. Chicago City Ry. Co., 163 Ill. App. 98; Chisum v. Chesnutt (Tex. Civ. App.) 36 S. W. 758.

[21] Baltimore & O. S. W. R. Co. v. Walker, 84 N. E. 730, 41 Ind. App. 588.

[22] **Ala.** Baldwin v. State, 111 Ala. 11, 20 So. 528; Payne v. Crawford, 102 Ala. 387, 14 South. 854; Trufant v. White, 99 Ala. 526, 13 So. 83; Bell v. Kendall, 93 Ala. 489, 8 So. 492; Waxelbaum v. Bell, 91 Ala. 331, 8 So. 571.

Ga. August v. State, 76 S. E. 164, 11 Ga. App. 798.

Ill. Collins Ice Cream Co. v. Stephens, 59 N. E. 524, 189 Ill. 200.

Neb. Carleton v. State, 43 Neb. 373, 61 N. W. 699.

Pa. Thrall v. Wilson, 17 Pa. Super. Ct. 376.

[23] Steed v. Knowles, 97 Ala. 573, 12 South. 75.

[24] Cothran v. Moore, 1 Ala. 423; Wabash Ry. Co. v. Perkins, 137 Ill. App. 514, judgment affirmed Perkins v. Wabash R. Co., 84 N. E. 677, 233 Ill. 458; Illinois Cent. R. Co. v. Collison, 134 Ill. App. 443; Dazey v. Stairwalt, 123 Ill. App. 489.

[25] Grudzinski v. Chicago City Ry. Co., 165 Ill. App. 152.

[26] Commonwealth v. Garvey, 65 Pa. Super. Ct. 56.

[27] Whaley v. Sloss-Sheffield Steel & Iron Co., 51 So. 419, 164 Ala. 216, 20 Ann. Cas. 822; Karr v. State, 106 Ala. 1, 17 South. 328.

[28] Council v. Mayhew, 55 So. 314, 172 Ala. 295; Thompson v. State, 26 So. 141, 122 Ala. 12; Coghill v. Kennedy, 24 So. 459, 119 Ala. 641.

hended that this court would refuse to reverse on the ground of such an instruction, shown to be harmful to an appellant.

H. Confused or Misleading Instructions

§ 422. General rule.

It is proper to refuse instructions calculated to mislead or confuse the jury,[29] and the giving of such instructions constitutes

[29] **U. S.** (C. C. A. Colo.) Union Pac. Ry. Co. v. O'Brien, 49 Fed. 538, 1 C. C. A. 354; (C. C. A. Mo.) Blanton v. United States, 213 F. 820, 130 C. C. A. 22, Ann. Cas. 1914D, 1238; (C. C. A. Pa.) Weiss v. Bethlehem Iron Co., 88 F. 23, 31 C. C. A. 363; (C. C. A. Va.) Pulaski Mining Co. v. Hagan, 196 F. 724, 116 C. C. A. 352.

Ala. Birmingham Ry., Light & Power Co. v. Milbrat, 78 So. 224, 201 Ala. 368; Johnson v. Johnson, 77 So. 335, 201 Ala. 41, 6 A. L. R. 1031; Louisville & N. R. Co. v. Martin, 73 So. 909, 198 Ala. 540; Miller v. State, 72 So. 506, 15 Ala. App. 4; Spinks v. State, 71 So. 623, 14 Ala. App. 75; White v. State, 71 So. 452, 195 Ala. 681; Burton v. State, 69 So. 913, 194 Ala. 2; Moon v. Benton, 68 So. 589, 13 Ala. App. 473; Fortner v. State, 67 So. 720, 12 Ala. App. 179; Johnson v. Colvin, 65 So. 328, 186 Ala. 538; Hale v. State, 64 So. 530, 10 Ala. App. 22; Birmingham Ry., Light & Power Co. v. Long, 59 So. 382, 5 Ala. App. 510; Faulk v. State, 59 So. 225, 4 Ala. App. 177; Bailey v. State, 53 So. 296, 390, 168 Ala. 4; Louisville & N. R. Co. v. Johnson, 50 So. 300, 162 Ala. 665; Penry v. Dozier, 49 So. 909, 161 Ala. 292; Hays v. State, 46 So. 471, 155 Ala. 40; Simmons v. State, 40 So. 660, 145 Ala. 61; Nordan v. State, 39 So. 406, 143 Ala. 13; Pitts v. State, 37 So. 101, 140 Ala. 70; Vaughn v. State, 30 So. 669, 130 Ala. 18; Southern Ry. Co. v. Lynn, 29 So. 573, 128 Ala. 297; Ragland v. State, 27 So. 983, 125 Ala. 12; Lafayette Ry. Co. v. Tucker, 27 So. 447, 124 Ala. 514; Morris v. State, 27 So. 336, 124 Ala. 44; Bomar v. Rosser, 26 So. 510, 123 Ala. 641; McLeroy v. State, 25 So. 247, 120 Ala. 274; Louisville & N. R. Co. v. Cowherd, 23 So. 793, 120 Ala. 51; Sullivan v. State, 23 So. 678, 117 Ala. 214; Hooper v. State, 106 Ala. 41, 17 So. 679; Wills v. State, 74 Ala. 21; Clifton v. State, 73 Ala. 473; Wills v. State, 73 Ala. 362; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2; Adams v. State, 52 Ala. 379; Clark v. State, 49 Ala. 37; Salomon v. State, 28 Ala. 83; Swallow v. State, 22 Ala. 20.

Cal. People v. Cox, 155 P. 1010, 29 Cal. App. 419; Arbunich v. United Railroads of San Francisco, 152 P. 51, 28 Cal. App. 291; Estrella Vineyard Co. v. Butler, 57 P. 980, 125 Cal. 232; People v. Strange, 61 Cal. 496; People v. Best, 39 Cal. 690; People v. Maxwell, 24 Cal. 14; People v. Hobson, 17 Cal. 424.

Fla. Bass v. State, 50 So. 531, 58 Fla. 1; Minor v. State, 45 So. 816, 55 Fla. 71; Jacksonville Electric Co. v. Sloan, 42 So. 516, 52 Fla. 257; Jacksonville Electric Co. v. Adams, 39 So. 183, 50 Fla. 429, 7 Ann. Cas. 241.

Ill. Illinois, I. & M. Ry. Co. v. Freeman, 71 N. E. 444, 210 Ill. 270; Eggmann v. Nutter, 169 Ill. App. 116; Chicago City Ry. Co. v. Phillips, 138 Ill. App. 438; Illinois Cent. R. Co. v. Becker, 119 Ill. App. 221; Zipkie v. City of Chicago, 117 Ill. App. 418; Baxter v. People, 8 Ill. (3 Gilman) 368.

Ind. American Motor Car Co. v. Robbins, 103 N. E. 641, 181 Ind. 417; Dean v. State, 130 Ind. 237, 29 N. E. 911.

Iowa. State v. Fleming, 86 Iowa, 294. 53 N. W. 234.

Kan. State v. Arch, 157 P. 1198, 98 Kan. 404.

Md. Rosman v. Travelers' Ins. Co. of Hartford, Conn., 96 A. 875, 127 Md. 689, Ann. Cas. 1918C, 1047.

error,[30] which will work a reversal,[31] in the absence of a showing that the jury were not misled thereby.[32] An error in giving con-

Mass. Dixon v. New England R. Co., 179 Mass. 242, 60 N. E. 581.

Mich. Holland v. Rea, 12 N. W. 167, 48 Mich. 218; Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801; Schoenberg v. Voigt, 86 Mich. 310; McKercher v. Curtis, 35 Mich. 478.

Minn. Pearson v. United States Fidelity & Guaranty Co., 164 N. W. 919, 138 Minn. 240; Fransen v. Falk Paper Co., 160 N. W. 789, 135 Minn. 284; Nichols v. Atwood, 149 N. W. 672, 127 Minn. 425; Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284).

Mo. Martin v. Wiglesworth (App.) 193 S. W. 906; Scott v. Boeckeler Lumber Co. (App.) 186 S. W. 1104; Knapp v. Hanley, 132 S. W. 747, 153 Mo. App. 169; Price v. Town of Breckenridge, 92 Mo. 378, 5 S. W. 20; State v. Ott, 49 Mo. 326; Deere v. Plant, 42 Mo. 60; Kaw Brick Co. v. Hogsett, 82 Mo. App. 546; Sharp v. Sturgeon, 75 Mo. App. 651; Wood v. White, 6 Mo. App. 592, memorandum; Carlin v. Russell, 5 Mo. App. 583, memorandum.

Mont. State v. Postal Telegraph Cable Co., 161 P. 953, 53 Mont. 104.

Nev. Colquhoun v. Wells, Fargo & Co., 21 Nev. 459, 33 P. 977.

Ohio. Adams v. State, 29 Ohio St. 412; Callahan v. State, 21 Ohio St. 306.

Okl. Frisco Lumber Co. v. Spivey, 140 P. 157, 40 Okl. 633; Friedman v. Weisz, 58 P. 613, 8 Okl. 392.

Pa. Commonwealth v. De Leo, 89 A. 584, 242 Pa. 510.

S. C. Knobeloch v. Germania Sav. Bank, 27 S. E. 962, 50 S. C. 259.

Utah. P. A. Sorensen Co. v. Denver & R. G. R. Co., 164 P. 1020.

Va. McCoy v. Norfolk & C. R. Co., 37 S. E. 788, 99 Va. 132; Levasser v. Washburn, 11 Grat. 572.

Wash. Johansen v. Pioneer Mining Co., 137 P. 1019, 77 Wash. 421; Hanstad v. Canadian Pac. Ry. Co., 87 P. 832, 44 Wash. 505.

W. Va. Bartley v. Western Maryland Ry. Co., 95 S. E. 443, 81 W. Va. 795; Brogan v. Union Traction Co., 86 S. E. 753, 76 W. Va. 698; Laraway v. Croft Lumber Co., 84 S. E. 333, 75 W. Va. 510; Walker v. Strosnider, 67 S. E. 1087, 67 W. Va. 39, 21 Ann. Cas. 1; Stewart v. Doak, 52 S. E. 95, 58 W. Va. 172; State v. Greer, 22 W. Va. 800; Wheeling Gas Co. v. City of Wheeling, 8 W. Va. 320; Henry v. Davis, 7 W. Va. 715.

Wis. Weidner v. Standard Life & Accident Ins. Co., 113 N. W. 50, 132 Wis. 624; Odegard v. North Wisconsin Lumber Co., 110 N. W. 809, 130 Wis. 659.

Instructions held misleading within rule. Where defendant, on prosecution for aggravated assault, pleads a former conviction of fighting in a public place, an instruction that, unless the jury believe that the offense charged in the case before them is the same offense charged in the former case, the plea of former conviction can-

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[30] See note 30 on page 758.

[31] **Ill.** Hanecy v. McLaughlin, 159 Ill. App. 408.

Ky. American Book Co. v. Archer, 186 S. W. 672, 170 Ky. 744; Illinois Cent. R. Co. v. Tandy, 107 S. W. 715, 32 Ky. Law Rep. 962.

Mich. Dodge v. Brown, 22 Mich. 446.

Mo. Klamp v. Rodewall, 19 Mo. 449.

Neb. Mutual Hail Ins. Co. of Wisconsin v. Wilde, 8 Neb. 427, 1 N. W. 384.

Ohio. Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co., 5 Ohio St. 450.

Pa. Renn v. Tallman, 25 Pa. Super. Ct. 503; Stuart v. Line, 11 Pa. Super. Ct. 345.

Tex. Kalamazoo Nat. Bank v. Sides (Civ. App.) 28 S. W. 918.

Va. Gordon v. City of Richmond, 88 Va. 436, 2 S. E. 727; Ragland v. Butler, 18 Grat. 323.

Conflicting evidence. Where the evidence is conflicting, a misleading charge will not be held harmless. Finks v. Cox (Tex. Civ. App.) 30 S. W. 512.

[32] Furgeson v. Brown, 1 Mo. App. Rep'r 458; Gulf, C. & S. F. Ry. Co. v. Greenlee, 62 Tex. 344; Hudson v. Morriss, 55 Tex. 595.

fusing and misleading instructions is not cured by the fact that their general tenor is unduly favorable to the complaining party.[33]

not avail, is misleading. Lawson v. State (Tex. Cr. App.) 32 S. W. 895. A charge authorizing the jury to convict without regard to the evidence as to venue, or as to when the offense was committed. Shackleford v. State, 79 Ala. 26. An instruction that if an offense is committed on the boundary of two counties, or if it is uncertain where the boundary is, a conviction could be had in either county, is misleading, when there is no proof that the offense was committed on such boundary, or that the location thereof was uncertain, and the only uncertainty was as to the place where the offense was committed. Jones v. State, 54 Ark. 371, 15 S. W. 1026. An instruction that "no circumstance introduced in evidence can be used by you as a basis for any inference of guilt against the defendants unless such circumstance is first proven to your entire satisfaction; and every circumstance in the case which is not proven to your entire satisfaction should be wholly dismissed from your consideration, and must not be permitted to influence you to any extent against the defendants. Any circumstance which is essential to a conclusion of guilt against the defendants should be established beyond all reasonable doubt, and to a moral certainty, before it can be used by the jury against the defendants"—is misleading, since it would be probably be understood to mean that guilt must be proved beyond the possibility of a doubt. Gindrat v. People, 138 Ill. 103, 27 N. E. 1085. A charge that "all evidence is more or less circumstantial, the difference being in the degree, and it is sufficient for the purpose when it excludes disbelief, that is, actual and not technical disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror, while he believes as a man." State v. Pratt, 20 Iowa, 267.

A charge in a criminal prosecution that, "while the law seeks to punish the guilty, and to check crime, it never attempts to check crime by punishing the innocent, or even the reasonably doubtful innocent." Shelby v. State, 97 Ala. 87, 11 So. 727. An instruction that it is not for the jury to say whether defendant did wrong or not; that they are only to consider the wrong charged in the indictment. Dryman v. State, 102 Ala. 130, 15 So. 433. A charge that the jury has no right to pardon any one, for any offense whatever, and, if you are satisfied, beyond a reasonable doubt, that the defendant is guilty in manner and form as charged in the indictment, then it would be a gross violation of your duty as sworn jurors to acquit him through sympathy or a spirit of condonation of his offense, nor have you any right to disregard any testimony tending to establish any fact in controversy in this case, it being your duty to consider all the evidence, fairly and impartially, with the view of ascertaining the real truth." Smith v. State, 55 Ark. 259, 18 S. W. 237. An instruction that "proof of contradictory statements or declarations on material points made by a witness may be sufficient to raise a reasonable doubt in the minds of the jury." Washington v. State, 58 Ala. 355. A charge, in a prosecution of a person for wrecking a train, "that in determining their verdict they are not circumscribed nor confined to the testimony of witnesses, but that they can consider all the circumstances surrounding the case, and that it is not necessary to prove the actual facts of the conspiracy to wreck a train, but that it may be collected from collateral circumstances, if any, which may in evidence." Nail v. State, 70 Miss. 32, 11 So. 793. A charge, on an indictment for murder, that if any reasonable doubt exist in the minds of the jury as to the credibility of any witness, they must give the benefit of the doubt to the prisoner. Shipp v. Commonwealth, 86 Va. 746, 10 S. E. 1065.

[30] Ala. Citizens' Light, Heat & Power Co. v. Lee, 62 So. 199, 182 Ala.

[33] Chicago, B. & Q. R. Co. v. Anderson, 38 Neb. 112, 56 N. W. 794.

§ 423. Specific applications of rule

An instruction which is correct as an abstract proposition of law may be misleading in view of the evidence, and properly re-

561; Southern Ry. Co. v. Hobson, 58 So. 751, 4 Ala. App. 408.

Ark. Bates v. Ford, 162 S. W. 1097, 110 Ark. 567.

Cal. Thompson v. Los Angeles & S. D. B. Ry. Co., 134 P. 709, 165 Cal. 748.

Colo. Trimble v. Collins, 172 P. 421, 64 Colo. 464.

Ga. Seaboard Air Line Ry. v. Arrant, 87 S. E. 714, 17 Ga. App. 489; Hilton v. Sylvania & G. R. Co., 68 S. E. 746, 8 Ga. App. 10; Nelson v. Spence, 58 S. E. 697, 129 Ga. 35.

Ill. Douvia v. City of Ottawa, 200 Ill. App. 131; Weltz v. Connell, 196 Ill. App. 211; Hostettler v. Mushrush, 194 Ill. App. 58; Howell v. Empire State Surety Co., 183 Ill. App. 220; Driza v. Jones & Adams Coal Co., 171 Ill. App. 139; Dickey v. Ghere, 163 Ill. App. 641; Stufflebeam v. Jewell, 155 Ill. App. 108.

Ind. Bump v. McGrannahan, 111 N. E. 640, 61 Ind. App. 136; Vandalia Coal Co. v. Coakley (App.) 108 N. E. 382; Shilling v. Braniff, 58 N. E. 855, 25 Ind. App. 676.

Iowa. Merchants' Transfer & Storage Co. v. Chicago, R. I. & P. Ry. Co., 150 N. W. 720, 170 Iowa, 378.

Ky. Cincinnati, N. O. & T. P. Ry. Co. v. McElroy, 142 S. W. 1009, 146 Ky. 668; Dorsey v. Commonwealth, 17 S. W. 183; Louisville & N. R. Co. v. Logan, 9 Ky. Law Rep. (abstract) 893.

Md. Doggett v. Tatham, 81 A. 376, 116 Md. 147.

Mo. Bean v. Lucht, 145 S. W. 1171, 165 Mo. App. 173; State v. Owsley, 111 Mo. 450, 20 S. W. 194; Wheeler v. Chestnut, 69 S. W. 621, 95 Mo. App. 546.

Neb. Faulkner v. Gilbert, 86 N. W. 1074, 62 Neb. 126, denying rehearing 85 N. W. 843, 61 Neb. 602.

N. Y. Gourd v. Healy, 150 N. Y. S. 1006, 165 App. Div. 288; Dale v. Interborough Rapid Transit Co. (Sup.) 131 N. Y. S. 590.

N. C. Morton v. Washington Light & Water Co., 86 S. E. 294, 169 N. C. 468; Bragaw v. Supreme Lodge, 32 S. E. 544, 124 N. C. 154.

Pa. Pennsylvania R. Co. v. Berry, 68 Pa. (18 P. F. Smith) 272.

S. C. Gillian v. Southern Ry. Co., 93 S. E. 865, 108 S. C. 195; Cathcart v. Matthews, 89 S. E. 1021, 105 S. C. 329.

Tex. Missouri, K. & T. Ry. Co. of Texas v. Robertson (Civ. App.) 189 S. W. 284; Kansas City, M. & O. Ry. Co. of Texas v. Hall (Civ. App.) 152 S. W. 445; Power State Bank v. Carver (Civ. App.) 148 S. W. 341; Hazard v. Western Commercial Travelers' Ass'n, 116 S. W. 625, 54 Tex. Civ. App. 110; Champion v. Johnson County (Civ. App.) 109 S. W. 1146; St. Louis Southwestern Ry. Co. of Texas v. Groves, 97 S. W. 1084, 44 Tex. Civ. App. 63; Magee v. Oklahoma City & T. R. Co. (Civ. App.) 95 S. W. 1092; Patterson v. State (Cr. App.) 60 S. W. 557.

Va. Pocahontas Consol. Collieries Co. v. Hairston, 83 S. E. 1041, 117 Va. 118; Whealton & Wisherd v. Doughty, 82 S. E. 94, 116 Va. 566; Kincheloe v. Tracewells, 11 Grat. 587.

Wash. Revilla Fish Products Co. v. American-Hawaiian S. S. Co., 137 P. 337, 77 Wash. 49.

W. Va. State v. Davis, 51 S. E. 230, 58 W. Va. 94; Parrish v. City of Huntington, 50 S. E. 416, 57 W. Va. 286; State v. Sutfin, 22 W. Va. 771; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; State v. Cain, 20 W. Va. 679.

Wis. J. H. Clark Co. v. Rice, 106 N. W. 231, 127 Wis. 451, 7 Ann. Cas. 505; Sullivan v. Collins, 83 N. W. 310, 107 Wis. 291; Buel v. State, 80 N. W. 78, 104 Wis. 132.

Illustrations of instructions objectionable within rule. An instruction referring to a certain contingency, but not stating the nature of the contingency, and unintelligible for want of such explanation. Gambrill v. Schooley, 52 A. 500, 95 Md. 260, 63 L. R. A. 427. In a prosecution for assault with intent to ravish, requested instructions charging jury

fused for that reason.[84] After a proper instruction has been given, it is error to give another instruction which modifies it or ob-

that if they believed the evidence they must "acquit" defendant of an assault with intent to ravish, in place of instructing them that they could not find him guilty of that offense, was misleading, as it was liable to impress the jury that, being acquitted, he could not be found guilty of assault. Pitman v. State, 42 So. 993, 148 Ala. 612. An instruction that the burden of showing that a sectional line was not a straight line was upon the party claiming that fact, and, if the evidence as to the line being straight or otherwise was of equal weight, then the presumption that it was straight would not be overthrown. North v. Jones, 100 N. E. 84, 53 Ind. App. 203. An instruction confusing two distinct rules as to damages. Louisville & N. R. Co. v. Hughes, 84 S. E. 451, 143 Ga. 206. Instruction that burden of proof was on plaintiff to prove case by preponderance of evidence, and on defendants to prove defense by preponderance of evidence. Quanah, A. & P. Ry. Co. v. Novit (Tex. Civ. App.) 199 S. W. 496. A charge that, if the jury was unable to harmonize the testimony of plaintiff and defendant and was unable to say who was telling the truth as to the contract in controversy, they should not find for plaintiff. Johnston Bros. Co. v. Bentley, 56 So. 742, 2 Ala. App. 281. An instruction that the jury, in determining the cause of an injury, might "look to the size and shape of the evidence of injury on the plaintiff's shoulder." Southern Bell Telephone & Telegraph Co. v. Mayo, 33 So. 16, 134 Ala. 641. An instruction, which required the jury to determine what the negligence charged in the complaint was. Western Union Telegraph Co. v. Northcutt, 48 So. 553, 158 Ala. 539, 132 Am. St. Rep. 38. An instruction that the burden was on defendant to prove the defense of payment for services, and if defendant had failed to so prove to the reasonable satisfaction of the jury they should not find against plaintiff on that account. Cole v. Waters, 147 S. W. 552, 164 Mo. App. 567. An instruction, in an action on a contract whereby defendant guaranteed the payment to plaintiff of an indebtedness of a decedent, that if plaintiff accepted a certain sum of money in settlement of his claim "by and without the consent of the defendant," this operates to discharge said M. as guarantor. Marx v. Ely, 41 So. 411, 148 Ala. 659. A charge, in a prosecution for keeping a saloon open and selling intoxicating liquors on Sunday, that if accused kept open his saloon and sold intoxicating liquors at any time prior to midnight on the day immediately preceding the Sunday in question, he should be acquitted, was misleading and confusing, since it in effect told the jury that even though accused kept his saloon open and sold liquors between midnight on Saturday and six o'clock of the following Monday morning he should be acquitted if at any time prior to midnight of Saturday he also

[84] **Ala.** Lawson v. State, 46 So. 259, 155 Ala. 44.

Cal. People v. Arnold, 127 P. 1060, 20 Cal. App. 35.

Ga. Hagood v. State, 62 S. E. 641, 5 Ga. App. 80; Holland v. State, 60 S. E. 205, 3 Ga. App. 465.

Ill. Lindberg v. Chicago City Ry. Co., 83 Ill. App. 433.

Iowa. Gray v. Chicago, R. I. & P. Ry. Co., 139 N. W. 934, 160 Iowa, 1.

Kan. State v. Ingram, 16 Kan. 14.

Me. Gilmore v. McNeil, 45 Me. 599.

Md. Baltimore & O. R. Co. v. Boyd, 67 Md. 32, 10 A. 315, 1 Am. St. Rep. 362.

Nev. Zelavin v. Tonopah Belmont Development Co., 149 P. 188, 39 Nev. 1.

N. Y. Hills v. Interborough Rapid Transit Co., 163 N. Y. S. 1010, 176 App. Div. 754.

In Alabama, however, it is not reversible error to give a charge that states a true proposition of law, which, as applied to the facts, might be misleading, where the party objecting thereto offers no explanatory charge. Forst v. Leonard, 22 So. 481, 116 Ala. 82.

scures its meaning.[35] An instruction may be so verbose as to be misleading.[36]

In a criminal prosecution an instruction containing several definitions of the crime charged against the defendant is erroneous, because confusing.[37] An instruction submitting an undisputed fact to the jury may be erroneous, and cause for reversal, as causing the jury to doubt the existence of such fact.[38] The court

kept it open and sold liquors. O'Grady v. People, 95 P. 346, 42 Colo. 312. An instruction that one who owns property along the railroad must know that trains are expected to run with regularity, and if there are special risks from no want of care in the proper equipment of the trains, those risks are incident to the situation, and the extra care they demand devolves upon the other party, and the consequence of not exercising it must fall on him because the railroad is not in fault. Florida East Coast Ry. Co. v. Welch, 44 So. 250, 53 Fla. 145, 12 Ann. Cas. 210.

Illustrations of instructions held not misleading. An instruction, in an action for breach of contract to thresh a crop of rice, that if the jury believed that there was no contract of threshing, as alleged in the petition, or if plaintiff's damage was caused by his neglect, or the crop was not properly cut, bound, and shocked, and the water was not sufficiently drained off the land, etc., the verdict must be for defendants. Kerr v. Blair, 105 S. W. 548, 47 Tex. Civ. App. 406. The use of the words "evidence" and "testimony" in instructions without regard to technical difference in meaning. Scherrer v. City of Seattle, 100 P. 144, 52 Wash. 4. An instruction that, when a man and wife contract to sell their homestead, the wife may up to the last moment before her privy acknowledgment is completed retract and thereby defeat the sale. London v. Crow, 102 S. W. 177, 46 Tex. Civ. App. 190. An instruction that the jury should find there was no contributory negligence if there was no evidence thereon or it was evenly balanced, and, if there was no evidence of a balance or a preponderance against negligence of defendant, they should find him not guilty of negligence. Wellington v. Reynolds, 97 N. E. 155, 177 Ind. 49. Instructions, in an action to recover an advance payment on a purchase of seed corn, that the purchaser could not recover without an express warranty, and that, if the corn was sold without an express warranty, and was reasonably fit for seed corn, defendant might recover on his counterclaim. Totten v. Stevenson, 135 N. W. 715, 29 S. D. 71. An instruction that, when the jury "have reached a conviction under the evidence" and the law, they must write it in their verdict. The use of the word "conviction," taken in connection with the context, could not have misled the jury to believe that the court had reference to the conviction of accused, rather than to the conviction in their own minds. Flannigan v. State, 79 S. E. 745, 13 Ga. App. 663.

[35] Ward v. Brown, 44 S. E. 488, 53 W. Va. 227.

[36] **Idaho.** Thatcher v. Quirk, 4 Idaho, 267, 38 P. 652.

Ill. Scott v. Parlin & Orendorff Co., 146 Ill. App. 92; Adams v. Smith, 58 Ill. 417.

Ind. Jeffersonville Mfg. Co. v. Holden, 102 N. E. 21, 180 Ind. 301.

Mo. Stid v. Missouri Pac. Ry. Co., 139 S. W. 172, 236 Mo. 382; Williams v. Ranson, 136 S. W. 349, 234 Mo. 55.

Okl. Friedman v. Weisz, 58 P. 613, 8 Okl. 392.

[37] People v. Monahan, 59 Cal. 389.

[38] Seaboard Air Line Ry. Co. v. Hess, 74 So. 500, 73 Fla. 494.

Harmless error. That a clause in a charge, used simply as an hypothesis for submitting the main issue in the case, submitted an undisputed fact cannot be held to be misleading as causing the jury to doubt such fact, when its existence was shown beyond the shadow of a doubt by positive and undisputed evidence, making it impossible for the jury to

should not use the facts of another case as an illustration in its charge, since a slight variance in the facts might mislead the jury.[39]

An instruction using a word in different senses,[40] or an instruction susceptible of two constructions, one of which is calculated to confuse and mislead the jury,[41] is erroneous and may be refused,[42] although where an instruction is given in a certain sense and acted upon by the jury in the sense intended, and is otherwise correct, judgment will not be reversed because the language used, strictly construed, might have a different meaning.[43] An instruction that if the jury do not believe the evidence they should find the defendant not guilty is obscure and properly refused.[44]

§ 424. Limitations of rule

Under the above rule instructions need not be the most simple and direct that can be given in the case. If they are such as may be readily understood, and are not misleading to the ordinary mind, they are sufficient,[45] and an instruction which correctly states a pertinent rule of law should not be refused, because the language used is not the most precise and elegant English, if it is not misleading to an intelligent jury.[46]

Ambiguity or lack of clearness in an instruction will not be cause for reversal, if it is apparent that the jury were not misled,[47] or, if there is no good reason to suppose that the jury did not understand the meaning intended to be conveyed.[48] While the inadvertent use of a wrong word or the inadvertent omission of a word may render an instruction misleading and constitute reversi-

believe the contrary. Kelsey v. Collins, 108 S. W. 793, 49 Tex. Civ. App. 230.

[39] State v. Tapp, 89 S. E. 394, 105 S. C. 55.

[40] Neff v. City of Cameron, 111 S. W. 1139, 213 Mo. 350, 18 L. R. A. (N. S.) 320, 127 Am. St. Rep. 606.

[41] Virginia Cent. R. Co. v. Sanger, 15 Grat. (Va.) 230; White v. Sohn, 59 S. E. 890, 63 W. Va. 80.

[42] Rolston v. Langdon, 26 Ala. 660; Wheeling Gas Co. v. City of Wheeling, 8 W. Va. 320.

[43] Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864.

Double meaning of "cured." An instruction allowing compensation for nursing and attention to plaintiff's child until "cured" is not erroneous, because, her limb having been amputated, defendant claims she would never be cured, as "cured" means the act of healing, to heal a wounded limb, and the jury could not have construed it as contended. Ft. Worth & D. C. Ry. Co. v. Wininger (Tex. Civ. App.) 159 S. W. 881.

[44] Leonard v. State, 43 So. 214, 150 Ala. 89.

[45] Carson v. Old Nat. Bank, 79 P. 927, 37 Wash. 279.

[46] Tiggerman v. City of Butte, 119 P. 477, 44 Mont. 138.

[47] Hoitt v. Holcomb, 32 N. H. 185.

[48] Lackawanna & B. R. Co. v. Chenewith, 52 Pa. (2 P. F. Smith) 382, 91 Am. Dec. 168.

ble error,[49] this will not necessarily be so,[50] as where the word "defendant" is used for "plaintiff," or vice versa.[51]

The use of a word in an instruction cannot be objected to as ambiguous or misleading, if it is used in connection with a word which makes its meaning definite and certain,[52] and the granting of a special instruction which is too technical and apt to mislead the jury is not reversible error, if the court in its charge correctly instructs the jury on the subject of the special request and removes any ambiguity.[53] If instructions taken separately are proper, a contention that when taken together they have a tendency to mislead is not tenable.[54]

In determining whether an instruction is misleading, the pleadings and the evidence should be considered,[55] and the court will credit the jury with common discernment and common sense.[56] Whether an instruction is misleading depends, not on the meaning which the ingenuity of counsel can, at leisure, wrest from it, but on how and in what sense, under the evidence and the circumstances of the trial, ordinary men would undesrtand it,[57] and a contention that an instruction is misleading may be untenable, in view of the findings of fact of the jury showing that they were not misled.[58] In some jurisdictions a judgment will not be reversed

[49] Markley v. Western Union Telegraph Co., 132 N. W. 37, 151 Iowa, 612; Galveston Land & Improvement Co. v. Levy, 30 S. W. 504, 10 Tex. Civ. App. 104.

[50] St. Louis, I. M. & S. Ry. Co. v. Day, 110 S. W. 220, 86 Ark. 104; Lake Erie & W. R. Co. v. Hobbs, 81 N. E. 90, 40 Ind. App. 511; Lee v. Wild Rice Lumber Co., 112 N. W. 887, 102 Minn. 74; Texas & P. Ry. Co. v. Johnson, 106 S. W. 773, 48 Tex. Civ. App. 135.

[51] Benton v. Harley, 94 S. E. 46, 21 Ga. App. 168; Magowan v. Kentucky Utilities Co., 200 S. W. 367, 179 Ky. 114; Campbell v. Springfield Traction Co., 163 S. W. 287, 178 Mo. App. 520.

[52] Harris v. Welch, 70 Iowa, 80, 29 N. W. 811.

[53] O'Dwyer v. Northern Market Co., 30 App. D. C. 244.

[54] People v. Scarbak, 92 N. E. 286, 245 Ill. 435. Compare Galveston, H. & S. A. Ry. Co. v. Eaten (Tex. Civ. App.) 44 S. W. 562.

[55] Aldrich Mining Co. v. Pearce, 68 So. 900, 192 Ala. 195; Bowles v. Lowery, 62 So. 107, 181 Ala. 603; Georgia Southern & F. Ry. Co. v. Hamilton Lumber Co., 58 So. 838, 63 Fla. 150.

[56] Chicago & G. T. Ry. Co. v. Smith, 124 Ill. App. 627; Chicago City Ry. Co. v. Same, 124 Ill. App. 627, judgment affirmed 80 N. E. 716, 226 Ill. 178.

Instructions framed in technical language. The appellate court will not reverse on the ground that a charge, though correct in law, is so framed as not to be readily understood except by a lawyer, when there is reason to believe that a jury of average intelligence would not be misled thereby, and it appears that no request to present the issues more fully was made by counsel in the court below. Blum v. Stein, 68 Tex. 608, 5 S. W. 454.

[57] Young v. City of Fairfield, 173 Ill. App. 311; Eckels v. Cooper, 136 Ill. App. 60; Bickel v. Martin, 115 Ill. App. 367.

[58] Citizens' St. Ry. Co. v. Merl, 59 N. E. 491, 26 Ind. App. 284.

merely upon the ground that an instruction is calculated to mislead the jury, when the party aggrieved fails to ask to have the same modified, or an additional instruction given.[59]

§ 425. Misstatements of evidence

A misstatement by the trial judge with respect to the evidence bearing on a material fact introduced on behalf of either party, whether such misstatement is as to the quality or character of the evidence or as to the facts testified to, constitutes error,[60] which may be ground for reversal,[61] as being unfair and misleading,[62] and a request for an instruction involving the danger of a misstatement of the evidence may properly be refused.[63] Such a

[59] **U. S.** Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; (C. C. Mass.) Locke v. United States, Fed. Cas. No. 8,442, 2 Cliff. 574.

Ala. Evans v. State, 82 So. 625, 17 Ala. App. 141; Johnson v. Louisville & N. R. Co., 82 So. 100, 203 Ala. 86; National Supply Co. v. J. T. Horne Veneer Co., 81 So. 856, 17 Ala. App. 78; Empire Clothing Co. v. Hammons, 81 So. 838, 17 Ala. App. 60; Ex parte Hill, 69 So. 598, 194 Ala. 559, denying certiorari City of Tuscaloosa v. Hill, 69 So. 486, 14 Ala. App. 541; Reeves v. State, 68 So. 569, 13 Ala. App. 1; Loeb v. City of Montgomery, 61 So. 642, 7 Ala. App. 325; George F. Craig & Co. v. Pierson Lumber Co., 53 So. 803, 169 Ala. 548; Millender v. State, 46 So. 756, 155 Ala. 17; Heningburg v. State, 45 So. 246, 153 Ala. 13; Chandler v. Jost, 96 Ala. 596, 11 So. 636; Wilhoyte v. Udell, 9 So. 550, 93 Ala. 302; Waxelbaum v. Bell, 91 Ala. 331, 8 So. 571; Birmingham Fire Brick Works v. Allen, 86 Ala. 185, 5 So. 454; Callan v. McDaniel, 72 Ala. 96; Whilden v. Merchants' & Planters' Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Durr v. Jackson, 59 Ala. 203; Smith v. Fellows, 58 Ala. 467; Hart v. Bray, 50 Ala. 446; Abraham v. Nunn, 42 Ala. 51; Sharp v. Burns, 35 Ala. 653; Partridge v. Forsyth, 29 Ala. 200; Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162; Casky v. Haviland, 13 Ala. 314; Borum v. Garland, 9 Ala. 452.

Ga. Ellis v. Smith, 10 Ga. 253.

Ind. Hallock v. Iglehart, 30 Ind. 327.

Ill. Warner v. Dunnavan, 23 Ill. 380.

Minn. McCormick v. Louden, 64 Minn. 509, 67 N. W. 366.

N. Y. Springsteed v. Lawson, 14 Abb. Prac. 328.

Or. Schoellhamer v. Rometsch, 26 Or. 394, 38 P. 344.

Pa. Peirson v. Duncan, 162 Pa. 187, 29 A. 733, 34 Wkly. Notes Cas. 456.

Wash. McQuillan v. City of Seattle, 13 Wash. 600, 43 P. 893; Box v. Kelso, 5 Wash. 360, 31 P. 973.

[60] **Ala.** American Oak Extract Co. v. Ryan, 104 Ala. 267, 15 So. 807.

Ark. Boren v. Bettis, 194 S. W. 850, 128 Ark. 457.

Conn. Fengar v. Brown, 57 Conn. 60, 17 A. 321.

Neb. Barton v. Shull, 97 N. W. 292, 70 Neb. 324; Stephens v. Patterson, 29 Neb. 697, 46 N. W. 154.

N. Y. Tuffey v. Brooklyn Union Gas Co., 92 N. Y. S. 489, 102 App. Div. 416.

Pa. Yerkes v. Wilson, *81 Pa. 9.

Tex. Downey v. Dennis (Civ. App.) 128 S. W. 667.

[61] Van Valkenberg v. Van Valkenberg, 90 Ind. 433; Orris v. Chicago, R. I. & P. Ry. Co., 214 S. W. 124, 279 Mo. 1; Steinbrunner v. Pittsburgh & W. Ry. Co., 146 Pa. 504, 23 A. 239, 28 Am. St. Rep. 806, 29 Wkly. Notes Cas. 173; Gregory v. Baugh, 2 Leigh (Va.) 665.

[62] Idaho Mercantile Co. v. Kalanquin, 66 P. 933, 8 Idaho, 101; Hutchinson v. Crain, 3 Ill. App. 20.

[63] Northern Central Coal Co. v. Barrowman (C. C. A. Mo.) 246 F. 906.

misstatement will not, however, constitute reversible error, in the absence of anything to show prejudice therefrom to the party complaining of it,[64] and, as is shown more fully in another chapter, it is the duty of a party, affected by such a serious mistake in quoting testimony, to call the attention of the court to it immediately after the charge, in order that the court may have an opportunity to correct it.[65]

§ 426. Comments by court on the justice or validity of rules of law stated by it

It is not improper for the court to characterize a rule of law stated by it as the rule of common sense,[66] but it is error for the trial judge to express disapproval of the law given to the jury,[67] or to take away its effect by observations which may inflame the jury into disregarding it.[68]

159 C. C. A. 178; Tuckwood v. Hawthorn, 67 Wis. 326, 30 N. W. 705.

[64] **Cal.** Knowles v. Murphy, 107 Cal. 107, 40 P. 111.

Kan. Bellew v. Ahrburg, 23 Kan. 287.

Mass. McIntire v. Leland, 118 N. E. 665, 229 Mass. 348.

N. Y. Looram v. Third Ave. R. Co., 6 N. Y. S. 504.

Pa. Richards v. Willard, 176 Pa. 181, 35 A. 114, 38 Wkly. Notes Cas. 400; Udderzook v. Harris, 140 Pa. 236, 21 A. 395; Penn Mut. Ins. Co. v. Snyder, 3 Wkly. Notes Cas. 269; Roberts v. Halstead, 9 Pa. 32, 49 Am. Dec. 541; Hamet v. Dundass, 4 Pa. 178; Dennis v. Alexander, 3 Pa. 50.

Tex. Gooch v. Addison, 13 Tex. Civ. App. 76, 35 S. W. 83.

Assumption that jury not misled. Where a judge told the jury that there was nothing said concerning a particular item, overlooking the fact that there was evidence given regarding such item, it will be assumed, notwithstanding, that the jury had that evidence in mind when considering the verdict. Herst v. De Comeau, 31 N. Y. Super. Ct. 590.

[65] Mann v. Cowan, 8 Pa. Super. Ct. 30.

[66] Henry v. Klopfer, 147 Pa. 178, 23 A. 338, 29 Wkly. Notes Cas. 331; Id., 147 Pa. 178, 23 A. 337, 29 Wkly. Notes Cas. 331.

[67] Kennedy v. Bebout, 62 Ind. 363; Fitzgerald v. St. Paul, M. & M. Ry. Co., 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212.

Instructions not improper within rule. Language in a charge as follows: "It is my duty to charge you the law as it is declared to be by our supreme court, without reference to my own personal opinion in regard to the matter," followed by a statement of the law as decided by the supreme court, is not error. Dial v. Agnew, 28 S. C. 454, 6 S. E. 295.

[68] McFadden v. Reynolds (Pa.) 11 A. 638.

I. Inconsistent or Contradictory Instructions

§ 427. Rule that such instructions are erroneous

It is error to give conflicting or contradictory instructions on material issues,[69] and such instructions are properly refused.[70]

[69] **U. S.** Deserant v. Cerillos Coal R. Co., 20 S. Ct. 967, 178 U. S. 409, 44 L. Ed. 1127, reversing judgment Same v. Cerillos Coal R. Co., 55 P. 290, 9 N. M. 495; (C. C. A. N. Y.) J. H. Sullivan Co. v. Wingerath, 203 F. 460, 121 C. C. A. 584.

Ala. Harvey v. State, 73 So. 200, 15 Ala. App. 311; Clinton Mining Co. v. Bradford, 69 So. 4, 192 Ala. 576.

Ark. Simmons v. Lusk, 194 S. W. 11, 128 Ark. 336; Swearingen v. C. W. Bulger & Son, 176 S. W. 328, 117 Ark. 557; Turquett v. McMurrain, 161 S. W. 175, 110 Ark. 197; Chicago Mill & Lumber Co. v. Johnson, 147 S. W. 86, 104 Ark. 67; Wells v. State, 145 S. W. 531, 102 Ark. 627; Helena Hardwood Lumber Co. v. Maynard, 138 S. W. 469, 99 Ark. 377; St. Louis, I. M. & S. Ry. Co. v. Hudson, 130 S. W. 534, 95 Ark. 506; Jones v. State, 116 S. W. 230, 89 Ark. 213; Kansas City Southern Ry. Co. v. Brooks, 105 S. W. 93, 84 Ark. 233.

Cal. National Bank of San Mateo v. Whitney, 183 P. 789, 181 Cal. 202, 8 A. L. R. 298; People v. Ross, 126 P. 375, 19 Cal. App. 469; Hayden v. Consolidated Mining & Dredging Co., 84 P. 422, 3 Cal. App. 136; Haight v. Vallet, 89 Cal. 245, 26 P. 897, 23 Am. St. Rep. 465; Agnew v. Kimball, 9 P. 91, 68 Cal. xix; Monroe v. Cooper, 6 P. 378, 66 Cal. xviii; Aguirre v. Alexander, 58 Cal. 21; People v. Messersmith, 57 Cal. 575; Bank of Stockton v. Bliven, 53 Cal. 708; McCreery v. Everding, 44 Cal. 246; Brown v. McAllister, 39 Cal. 573.

Colo. Barr v. Colorado Springs & I. Ry. Co., 168 P. 263, 63 Colo. 556; San Miguel Consol. Gold Min. Co. v. Stubbs, 90 P. 842, 39 Colo. 359; Arnett v. Huggins, 70 P. 765, 18 Colo. App. 115.

Ga. Savannah Electric Co. v. McClelland, 57 S. E. 91, 128 Ga. 87; Cress v. State, 55 S. E. 491, 126 Ga. 564.

Idaho. State v. Webb, 55 P. 892, 6 Idaho, 428; Giffen v. City of Lewiston, 55 P. 545, 6 Idaho, 231; Holt v. Spokane & P. R. Co., 3 Idaho (Hasb.) 703, 35 P. 39.

Ill. Chicago, B. & Q. R. Co. v. Payne, 49 Ill. 499; Chicago & A. Ry. Co. v. Henline, 120 Ill. App. 134; Turner v. Owen, 122 Ill. App. 501; Wood v. Olson, 117 Ill. App. 128; Chicago & A. Ry. Co. v. Jennings, 114 Ill. App. 622; Thomas v. Riley, 114 Ill. App. 520; Dauchy Iron Works v. Toles, 107 Ill. App. 216; Fessenden v. Doane, 89 Ill. App. 229, judgment affirmed 58 N. E. 974, 188 Ill. 228; Knowlton v. Fritz, 5 Ill. App. 217.

Ind. Cleveland, C., C. & St. L. Ry. Co. v. Lynn, 85 N. E. 999, 171 Ind. 589, reversing judgment (App.) 83 N. E. 1135, judgment affirmed on rehearing 86 N. E. 1017, 171 Ind. 589; Wenning v. Teeple, 144 Ind. 189, 41 N. E. 600; McDougal v. State, 88 Ind. 24; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Somers v. Pumphrey, 24 Ind. 231.

Iowa. Peterson v. McManus, 172 N. W. 460, 187 Iowa, 522; State v. Glaze, 159 N. W. 260, 177 Iowa, 457; Adams v. Junger, 139 N. W. 1096, 158 Iowa, 449; Blake v. Miller, 112 N. W. 158, 135 Iowa, 1; Brusseau v. Lower Brick Co., 110 N. W. 577, 133 Iowa, 245; Kerr v. Topping, 80 N. W. 321, 109 Iowa, 150.

Ky. Eagle Coal Co. v. Patrick's Adm'r, 170 S. W. 960, 161 Ky. 333; Ferguson v. Fox's Adm'r, 1 Metc. 83.

La. State v. Hogg, 53 So. 225, 126

[70] Sweeney v. Erving, 33 S. Ct. 416, 228 U. S. 233, 57 L. Ed. 815, Ann. Cas. 1914D, 905, affirming judgment 35 App. D. C. 57, 43 L. R. A. (N. S.) 734; Michigan City v. Werner, 114 N. E. 636, 186 Ind. 149; Southern Ry. Co. v. Weidenbrenner, 109 N. E. 926, 61 Ind. App. 314; Advance Transfer Co. v. Chicago, R. I. & P. Ry. Co. (Mo. App.) 195 S. W. 566.

The tendency of contradictory instructions is necessarily to con-

La. 1053, 29 L. R. A. (N. S.) 830, 21 Ann. Cas. 124.

Mass. Mooar v. Harvey, 125 Mass. 574.

Mich. Grogitzki v. Detroit Ambulance Co., 152 N. W. 923, 186 Mich. 374; Kennedy v. Ford, 149 N. W. 1013, 183 Mich. 481; Hayes v. City of St. Clair, 139 N. W. 1037, 173 Mich. 631; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

Minn. McCormick v. Kelly, 28 Minn. 135, 9 N. W. 675.

Miss. Illinois Cent. R. Co. v. McGowan, 46 So. 55, 92 Miss. 603; Solomon v. City Compress Co., 69 Miss. 319, 12 So. 339; Kansas City, M. & B. R. Co. v. Lilly, 8 So. 644; Herndon v. Henderson, 41 Miss. 584.

Mo. Padgett v. Pence, 178 S. W. 205; Gourley v. American Hardwood Lumber Co., 170 S. W. 339, 185 Mo. App. 360; Stid v. Missouri Pac. Ry. Co., 139 S. W. 172, 236 Mo. 382; Kelley v. United Rys. Co. of St. Louis, 132 S. W. 269, 153 Mo. App. 114; Porter v. Missouri Pac. Ry. Co., 97 S. W. 880, 199 Mo. 82; Hurst v. St. Louis & S. F. R. Co., 94 S. W. 794, 117 Mo. App. 25; Vermillion v. Parsons, 94 S. W. 298, 118 Mo. App. 260; Roberts, Johnson & Rand Shoe Co. v. Shepherd, 96 Mo. App. 698, 70 S. W. 931; Edmonston v. Jones, 69 S. W. 741, 96 Mo. App. 83; Hoover v. Mercantile Town Mut. Ins. Co., 69 S. W. 42, 93 Mo. App. 111; Spillane v. Missouri Pac. Ry. Co., 111 Mo. 555, 20 S. W. 293; Fath v. Tower Grove & L. Ry., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; State v. Herrell, 97 Mo. 105, 10 S. W. 387, 10 Am. St. Rep. 289; Stone v. Hunt, 94 Mo. 475, 7 S. W. 431; Otto v. Bent, 48 Mo. 23; State v. Bonden, 31 Mo. 402; Schneer v. Lemp, 17 Mo. 142; Sharp v. Sturgeon, 75 Mo. App. 651; Union Bank of Trenton v. First Nat. Bank, 64 Mo. App. 253; Jones v. Chicago, B. & K. C. Ry. Co., 59 Mo. App. 137; Evers v. Shumaker, 57 Mo. App. 454; Martinowsky v. City of Hannibal, 35 Mo. App. 70; Legg v. Johnson, 23 Mo. App. 590; Swan v. Lullman, 12 Mo. App. 584, memorandum; Lampert v. Laclede Gaslight Co., 12 Mo. App. 576, memorandum.

Mont. State v. Jones, 139 P. 441, 48 Mont. 505; State v. Peel, 59 P. 169, 23 Mont. 358, 75 Am. St. Rep. 529; Kelley v. Cable Co., 7 Mont. 70, 14 P. 633.

Neb. Peterson v. Chicago, M. & St. P. Ry. Co., 161 N. W. 1043, 101 Neb. 3; Bryant v. Modern Woodmen of America, 125 N. W. 621, 86 Neb. 372, 27 L. R. A. (N. S.) 326, 21 Ann. Cas. 365; Omaha St. Ry. Co. v. Boeson, 94 N. W. 619, 68 Neb. 437; Town of Denver v. Myers, 88 N. W. 191, 63 Neb. 107.

N. Y. Hartman v. Joline (Sup.) 112 N. Y. S. 1057.

N. C. A. Blanton Grocery Co. v. Taylor, 78 S. E. 276, 162 N. C. 307; Edwards v. Atlantic Coast Line R. Co., 39 S. E. 730, 129 N. C. 78.

Okl. Firebaugh v. Du Bois, 158 P. 924, 59 Okl. 236; Kansas City, M. & O. Ry. Co. v. Roe, 150 P. 1035, 50 Okl. 105; Payne v. McCormick Harvesting Mach. Co., 66 P. 287, 11 Okl. 318.

Or. Malloy v. Marshall-Wells Hardware Co., 173 P. 267, 90 Or. 303, judgment affirmed on rehearing 175 P. 659, 90 Or. 303.

Pa. Commonwealth v. Deitrick, 70 A. 275, 221 Pa. 7; Elk Tanning Co. v. Brennan, 52 A. 246, 203 Pa. 232; Gearing v. Lacher, 146 Pa. 397, 23 A. 229, 30 Wkly. Notes Cas. 414; Selin v. Snyder, 11 Serg. & R. 319.

R. I. G. W. McNear, Inc., v. American & British Mfg. Co., 107 A. 242, 42 R. I. 302.

S. C. Warren v. Wilson, 71 S. E. 818, 89 S. C. 420, appeal dismissed on petition for rehearing 71 S. E. 992, 89 S. C. 420.

S. D. Coulter v. Gudehus, 139 N. W. 330, 30 S. D. 616.

Tex. Merka v. State, 199 S. W. 1123, 82 Tex. Cr. R. 550; Walker v. State, 181 S. W. 191, 78 Tex. Cr. R. 237; Park v. Pyle (Civ. App.) 157 S. W. 445; Renfro v. Texas Cent. Ry. Co. (Civ. App.) 141 S. W. 820; St. Louis Southwestern Ry. Co. of Texas v. Anderson, 124 S. W. 1002, 61 Tex. Civ. App. 374; Williamson v. D. M. Smith & Co. (Civ. App.) 79 S. W. 51; Eddy v. Bosley, 78 S. W. 565, 34

fuse and mislead the jury.[71] Such instructions are further ob-

Tex. Civ. App. 116; Kraus v. Haas, 6 Tex. Civ. App. 665, 25 S. W. 1025.

Utah. Connell v. Oregon Short Line R. Co., 168 P. 337, 51 Utah, 26; Konold v. Rio Grande W. Ry. Co., 60 P. 1021, 21 Utah, 379, 81 Am. St. Rep. 693.

Va. Roanoke Ry. & Electric Co. v. Carroll, 72 S. E. 125, 112 Va. 598; Southern Ry. Co. v. Hansbrough's Adm'x, 60 S. E. 58, 107 Va. 733; City of Winchester v. Carroll, 40 S. E. 37, 99 Va. 727; Chesapeake & O. Ry. Co. v. Jennings, 34 S. E. 986, 98 Va. 70.

W. Va. Stuck v. Kanawha & M. Ry. Co., 89 S. E. 280, 78 W. Va. 490; Tower v. Whip, 44 S. E. 179, 53 W. Va. 158, 63 L. R. A. 937; Ward v. Ward, 35 S. E. 873, 47 W. Va. 766; Reese v. Wheeling & E. G. R. Co., 42 W. Va. 333, 26 S. E. 204; McKelvey v. Chesapeake & O. Ry. Co., 35 W. Va. 500, 14 S. E. 261; State v. Cain, 20 W. Va. 679; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

Wis. Bleiler v. Moore, 69 N. W. 164, 94 Wis. 385; Gove v. White, 23 Wis. 282.

Illustrations of contradictory instructions. A charge, in a prosecution for adultery, that if the jury believed beyond a reasonable doubt that prosecutrix was pregnant, they should consider such fact in connection with other evidence as tending to connect defendant with the crime or corroborate prosecutrix's testimony, but that such pregnancy was not of itself any evidence that defendant had had sexual intercourse with prosecutrix. State v. Thompson, 87 P. 709, 31 Utah, 228. Instructions, in action to establish boundary line, that burden was on plaintiff to show alleged true line by greater weight of evidence, and that defendant, contending that another line was true dividing line, had burden of establishing it. Tillotson v. Fulp, 90 S. E. 500, 172 N. C. 499. Instruction that one furnishing plans for a building was an independent contractor, and a charge that owner should furnish correct plans. Bayne v. Everham, 163 N. W. 1002, 197 Mich. 181. Instruction, in action against carriers for delay in transportation, that neither carrier was responsible for damage not directly or proximately caused by it, and another instruction that the initial carrier was responsible for the delay on any of the connecting carriers, and therefore entitled to recover over against the carrier responsible. Texas & P. Ry. Co. v. Cauble (Tex. Civ. App.) 168 S. W. 369. An instruction, in an action for injuries to a passenger carried beyond her station, that she had a right to walk back without assuming the risks incident thereto, and which leaves to the jury to say whether she was justified in electing to walk back. St. Louis, I. M. & S. Ry. Co. v. Bright, 159 S. W. 33, 109 Ark. 4. A charge that a conviction cannot be had upon an accomplice's testimony, unless the jury believe it to be true and that it shows or tends to show accused's guilt, and a charge that if the jury are satisfied that certain witnesses were accomplices, or have a reasonable doubt whether they were or were not, they cannot convict upon their testimony, unless they believe the witnesses' testimony true, and that it shows accused guilty as charged in the indictment, and unless there is other evidence tending to connect accused with the commission of the offense, are in direct conflict; and the first one, erroneously stating that accomplice testimony need only tend to connect accused with the offense, was not cured by the other, stating the correct rule. Tate v. State, 116 S. W. 604, 55 Tex. Cr. R. 397; Id. (Tex. Cr. App.)

[71] Farnsworth v. Tampa Electric Co., 57 So. 233, 62 Fla. 166; Catanzaro Di Giorgio Co. v. F. W. Stock & Sons, 81 A. 385, 116 Md. 201; Eyre-Shoemaker Const. Co. v. Mackin, 81 A. 267, 116 Md. 58; Pullman Co. v. Custer (Tex. Civ. App.) 140 S. W. 847.

Conflict between main charge and requested instructions. A mere conflict between instructions in chief and those given at the request of a party does not necessarily mislead. Eyser v. Weissgerber, 2 Iowa, 463.

jectionable, because they devolve upon the jury the duty of de-

116 S. W. 606, 607; Taylor v. State (Tex. Cr. App.) 116 S. W. 606. An instruction, in ejectment, that plaintiffs were suing only for land lying north and "east" of a certain slough, and that they could not recover any land "east" of the slough. Grady v. Royar (Mo.) 181 S. W. 428. Instruction that, where a person's acts necessarily operate to defraud others, he must be deemed to have intended a fraud, and instructions stating that fraud could not be presumed. Barrows v. Case, 165 P. 779, 63 Colo. 266. Where, under an indictment for assault with intent to kill, the jury were authorized under the charge to convict of aggravated assault, a further instruction that, if the jury found that a companion of accused was guilty of an aggravated assault, defendant should be acquitted, or, if they had a reasonable doubt, they should acquit him of any charge whatever, was erroneous, as contradictory and misleading. Henry v. State (Tex. Cr. App.) 54 S. W. 592. Instructions that mere excitement or agitation does not destroy the element of deliberation in murder in the first degree, and that, in passing on defendant's motives and intentions, and the reasonableness and good faith thereof, the jury should take into consideration any agitation and excitement, if such were shown, were inconsistent, and calculated to mislead. State v. Grugin, 47 S. W. 1058, 147 Mo. 39, 42 L. R. A. 774, 71 Am. St. Rep. 553. In a prosecution for murder, in which it appeared that defendant's wife was killed while he and another were engaged in a shooting affray, an instruction that evidence tending to show that defendant shot at the other person engaged in the affray could not be considered as any evidence of the guilt of the defendant, but that, if the jury believed defendant killed deceased, they might consider such evidence as showing the condition of defendant's mind at the time he fired and the intent with which he did so, is erroneous, as contradictory. Bennett v. State (Tex. Cr. App.) 75 S. W. 314. On a prosecution for murder, an instruction that, if the jury believed beyond a reasonable doubt that the facts necessary to establish guilt were proven, it was their duty to convict, though they might doubt whether one or more of the circumstances attempted to be proved had been established. Brady v. Commonwealth, 11 Bush (Ky.) 282. In a prosecution for homicide, it was error to charge in one instruction that if defendant was led to commit the homicide from learning that decedent had insulted his wife, and also that the decedent had used violent language to and threatened defendant with bodily harm, he was only guilty of manslaughter, and in the next that, in order to reduce his offense to manslaughter, it was only necessary for the jury to believe that he was led to commit the homicide from learning that decedent had insulted his wife. Barbee v. State, 124 S. W. 961, 58 Tex. Cr. R. 129. An instruction which, if the killing is shown, assumes a crime to be murder, and requires proof of the lower degree to be made by the defendant before the jury can reduce the degree to manslaughter, is inconsistent with an instruction that the burden of proof never shifts, but remains with the state throughout the trial. Kennison v. State, 115 N. W. 289, 80 Neb. 688. On a trial for illegally selling intoxicating liquors, an instruction directing a verdict of guilty if the sale was made within a year prior to filing the information and an instruction directing an acquittal unless the sale was made on a certain date as testified to by a state's witness. State v. Fellers, 127 S. W. 95, 140 Mo. App. 723. An instruction that concurrence in the minds of the parties, in pursuance of a decision to commit a theft, renders them all alike guilty, whether they were in fact present at the theft or not, and an instruction that defendant would not be found guilty if there was a reasonable doubt as to his presence at the place where the offense was committed. Criner v. State, 53 S. W. 873, 41 Tex. Cr. R. 290. In a prosecution for grand larceny, an instruction,

termining which of two kinds of instructions shall be followed, or

which in one clause told the jurors that they might use their own knowledge in determining any fact in the case, and in another paragraph told them that they must determine the facts from the evidence introduced. State v. Blaine, 124 P. 516, 45 Mont. 482. Instructions, authorizing recovery if plaintiff's deceased was injured by rock falling from one of main entries in defendant employer's coal mine and another denying recovery unless plaintiff proved that injury occurred at point specified in complaint. State ex rel. Central Coal & Coke Co. v. Ellison, 195 S. W. 722, 270 Mo. 645, quashing judgment (App.) Goode v. Central Coal & Coke Co., 186 S. W. 1122. An instruction that all persons engaged in the same work are fellow servants, though one may be a foreman, and an instruction that where a man has power to control men, whether called a superintendent or foreman, for whose negligence the master is liable. Petroleum Iron Works Co. v. Bullington, 161 P. 538, 61 Okl. 311. A charge, in effect instructing the jury that if they do not believe a witness as to one material part of his evidence they must believe him as to other parts. Southern Ry. Co. v. Penney, 51 So. 392, 164 Ala. 188.

Instructions held not inconsistent. In an action for death of an employé in falling from a scaffold constructed by the master, instructions that, if decedent did not use ordinary care, the finding should be for defendant, and that if the jury found defendant's negligence to have been the proximate cause of decedent's fall, the finding should be for the plaintiff, were not inconsistent. Storey v. J. C. Mardis Co., 173 N. W. 115, 186 Iowa, 809. Instructions that if the jury, from a consideration of all the evidence, were satisfied of defendant's guilt beyond a reasonable doubt, it was their duty to find him guilty, and that, as the evidence was circumstantial, each material circumstance must be proven to the jury's satisfaction beyond a reasonable doubt, or they should acquit, were not in conflict. People v. Weber, 86 P. 671, 149 Cal. 325. A charge that: "Defendant is charged in the second count of the indictment with the crime of assault with intent to kill, without malice, and this is the only matter for your determination; the other two counts being withdrawn from your consideration. * * * 'Malice,' as above used, means the intentional doing of a wrongful act without just cause or excuse,"—and a subsequent charge that if defendant purposely and intentionally made an assault on the prosecuting witness, and shot him with intent to kill, he was guilty of an assault with intent to kill, were not objectionable as contradictory, and as, when taken together, authorizing the jury to find malice to be an ingredient of the offense. State v. Moore, 68 S. W. 358, 168 Mo. 432. A charge directing an acquittal if the jury believed accused's story, and a charge that, if there was any doubt after weighing the testimony, they must give accused the benefit of it, are not inconsistent. State v. Kroll, 93 A. 571, 87 N. J. Law, 330. An instruction that, before the jury could acquit, they must find defendant was laboring under such a defect of reason from disease of the mind as to not know—that is, as not to have sufficient mental capacity to know—the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong, and an instruction that, before the jury could acquit on the ground of insanity, it must appear defendant was affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged by overriding his reason and judgment, are not inconsistent, though from the vague language used the jury might reasonably infer that defendant had the burden of establishing his insanity. State v. Crowe, 102 P. 579, 39 Mont. 174, 18 Ann. Cas. 643. An instruction on manslaughter that "insulting words or gestures or an ordinary assault and battery so slight as to show no intention to inflict pain or injury are not deemed adequate cause" is proper, and not contradic-

what rule of law shall control the case,[72] and because it cannot

tory of a further instruction that "any condition or circumstance which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment, or terror rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause," etc. Davis v. State, 124 S. W. 104, 57 Tex. Cr. R. 545. On a prosecution for robbery an instruction that if the property was feloniously taken, and was received into the possession of defendant shortly thereafter, any failure of defendant to account for such possession was a circumstance tending to show his guilt and he was bound to explain the possession in order to remove the effect thereof, was not in conflict with another instruction that possession of stolen property, unexplained, was not, of itself, sufficient to justify a conviction, but was a circumstance to be considered in connection with other testimony. People v. Wilson, 67 P. 322, 135 Cal. 331. An instruction that the jury are the exclusive judges of the weight of the testimony and the credibility of the witnesses is not inconsistent with a charge that a conviction cannot be had on the uncorroborated testimony of the accomplice. Barrett v. State, 115 S. W. 1187, 55 Tex. Cr. R. 182.

Instructions on character of accused. An instruction that evidence tending to show accused's bad character is not evidence that accused is guilty of the offense charged is not inconsistent with an instruction that good character does not excuse crime but that the jury may consider evidence of good character in determining the guilt or innocence of accused. State v. Priest, 114 S. W. 949, 215 Mo. 1. Where the court, at the request of defendant, instructed the jury that, if defendant has proved a good character as a man of peace, such good character may be sufficient to cause a reasonable doubt of his guilt, though no such doubt would have existed without such proof; and that proof of good character was relevant to the question of guilt, to be considered with the other facts in the case, it was held that an addition by the court that, if the jury believed defendant guilty, then proof of such good character would be of no avail to him, did not conflict with the previous instruction. State v. Levigne, 30 P. 1084, 17 Nev. 435.

Instructions upon drunkenness of accused as affecting intent. Where, in a prosecution for assault with intent to kill, defendant claimed that he was too drunk at the time to form an intent, and the court charged that drunkenness in itself was no defense, but that, if defendant was so completely intoxicated that he was incapable at the time of forming an intent, he could not be found guilty, and another instruction charged that, if the liquor had merely inflamed defendant's passion while he was still able to distinguish right from wrong and knew at the time he was doing wrong, drunkenness would be no defense, it was held that such instructions were not objectionable as inconsistent. State v. Yates, 109 N. W. 1005, 132 Iowa, 475.

Instructions on reasonable doubt. Where, at the request of the state the jury were instructed that a doubt, to authorize an acquittal, should be a reasonable doubt, fairly arising from the evidence as a whole, and that a mere possibility that the defendant might be innocent would not warrant an acquittal, and at the request of the accused the jury were instructed that it is not enough to justify a verdict of guilty that there may be a strong suspicion, or even a strong probability, of the guilt of defendant; that the law requires proof by legal and credible evidence,—such as, when all considered, produces a clear conviction of the defendant's guilt beyond a reasonable doubt; that if the jury entertain any reasonable doubt as to whether defendant was excusable and justified in the acts complained of, or if any one of the

[72] Fowler v. Wallace, 31 N. E. 53, 131 Ind. 347; W. B. Johnson & Co. v. Central Vermont Ry. Co., 79 A. 1095, 84 Vt. 486.

usually be determined from the verdict which of the inconsistent instructions has been followed.[73] Such rule applies, even although one of the instructions is incorrect, and the other is a correct instruction, given to remedy the first.[74]

§ 428. Specific applications of rule

An instruction that all men, sane or insane, "act from motive," and that, if the accused had no motive, it might be considered as a circumstance in favor of his plea of insanity, is self-contradictory.[75] So, in a prosecution for homicide, instructions on the issue of insanity based solely on the "right and wrong test" are in irreconcilable conflict with others based on that test as modified by the "irresistible impulse test."[76] So a charge that, if the jury have a doubt arising from the evidence or lack of evidence as to all the material allegations of the indictment, they will give the defendant the benefit thereof and find him guilty of such degree of crime as from the evidence beyond a reasonable doubt they believe him to be guilty of, and that he should be acquitted if he is guilty of no crime, is erroneous, as, if the jury have a reasonable doubt as to all the material facts, they cannot convict the defendant of any degree of crime.[77]

§ 429. Submitting opposing theories of case

Instructions which correctly state the law are not contradictory merely because the application of each instruction to the case depends upon the view which the jury may take of the evidence.[78] Instructions stating the law applicable to opposite theories of the case often become necessary, because one party tries his case on one theory of the law and the evidence, while the other party tries his side of the case upon a different theory;[79] and while, in some jurisdictions, a plaintiff cannot go to the jury on two distinct and entirely contradictory grounds, and it is error to submit a case to

jury, after having considered all the evidence, and after a consultation with his fellow jurymen, entertains a reasonable doubt, accused should be acquitted, it was held that such instructions were not conflicting. State v. Moore, 56 S. W. 883, 150 Mo. 204.

[73] Gardner v. Metropolitan St. Ry. Co., 122 S. W. 1068, 223 Mo. 389, 18 Ann. Cas. 1166; Kelly v. Lewis Inv. Co., 133 P. 826, 66 Or. 1, Ann. Cas. 1915B, 568; Weld-Neville Cotton Co. v. Lewis (Tex. Civ. App.) 163 S. W. 667.

[74] Harkrider v. Howard, 203 S. W. 14, 134 Ark. 575; Rector v. Robins, 86 S. W. 667, 74 Ark. 437; City of Lincoln v. Heinzel, 134 Ill. App. 439.

[75] Blume v. State, 56 N. E. 771, 154 Ind. 343.

[76] State v. Keerl, 75 P. 362, 29 Mont. 508, 101 Am. St. Rep. 579.

[77] Cook v. State, 35 So. 665, 46 Fla. 20.

[78] City of Richmond v. Gentry, 68 S. E. 274, 111 Va. 160.

[79] Keim v. Gilmore & P. R. Co., 131 P. 656, 23 Idaho, 511; Hendrix v. Corning, 214 S. W. 253, 201 Mo. App. 555.

the jury on conflicting theories, and tell them that they may, if the evidence warrants, find for the plaintiff on either theory,[80] in other jurisdictions a plaintiff may rely upon inconsistent grounds of recovery, and where he may prevail upon either he can have both submitted to the jury, such submission being in the alternative and making it plain that a recovery may be had upon only one.[81]

§ 430. Effect of such instructions as ground for reversal

The giving of conflicting instructions is ground for the reversal of a judgment,[82] where they are calculated to mislead the jury as to matters material to the issues,[83] or leave them in doubt as to the law,[84] unless the evidence is such that the jury could not have been misled,[85] or unless the appellate court is satisfied that the appellant was not injured by the error,[86] and in some jurisdictions the giving of conflicting instructions is generally presumed to prejudice the party complaining.[87]

Where, however, no harm has come from such conflict to the party complaining thereof,[88] and the jury has not been misled,

[80] Anderson v. Oscamp (Ind. App.) 85 N. E. 707; Winchell v. Latham (N. Y.) 6 Cow. 682.

[81] Texas & P. Ry. Co. v. Matkin, 107 Tex. 125, 174 S. W. 1098, affirming judgment (Civ. App.) 142 S. W. 604.

Evidence supporting only one theory.. The presentation of two inconsistent theories of plaintiff's case to the jury, on one of which he was entitled to recover, and on the other of which he could not recover without a disregard of all the evidence introduced by him, was reversible error. Behen v. St. Louis Transit Co., 85 S. W. 346, 186 Mo. 430.

[82] **Cal.** Clark v. McElvy, 11 Cal. 154.

Fla. Florida East Coast Ry. Co. v. Jones, 62 So. 898, 66 Fla. 51.

Ill. Illinois Linen Co. v. Hough, 91 Ill. 63.

Ind. Watts v. Chicago & E. I. R. Co., 104 N. E. 42, 61 Ind. App. 51; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973.

Mo. Carder v. Primm, 60 Mo. App. 423; Frank v. Grand Tower & C. Ry. Co., 57 Mo. App. 181.

N. Y. Clarke v. Schmidt, 104 N. E. 613, 210 N. Y. 211, reversing judgment 132 N. Y. S. 1124, 148 App. Div. 895.

Tex. Trinity & Brazos Valley Ry. Co. v. Lunsford (Civ. App.) 160 S. W. 677.

Va. Powhatan Lime Co. v. Affleck's Adm'r, 79 S. E. 1054, 115 Va. 643; Norton Coal Co. v. Hanks' Adm'r, 62 S. E. 335, 108 Va. 521.

[83] Illinois Match Co. v. Chicago, R. I. & P. Ry. Co., 95 N. E. 492, 250 Ill. 396, reversing judgment 153 Ill. App. 568; Cummings v. Holland, 130 Ill. App. 315; Pendleton v. Chicago City Ry. Co., 120 Ill. App. 405; State v. Dudley, 91 N. E. 605, 45 Ind. App. 674; Canton Lumber Co. of Baltimore City v. Miller, 76 A. 415, 112 Md. 258.

[84] Steele v. Michigan Buggy Co., 95 N. E. 435, 50 Ind. App. 635.

[85] Escambia County Electric Light & Power Co. v. Sutherland, 55 So. 83, 61 Fla. 167.

[86] Randall v. Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

[87] Producers' Coal Co. v. Mifflin Coal Mining Co., 95 S. E. 948, 82 W. Va. 311.

[88] Nuckolls v. Gaut, 12 Colo. 361, 21 P. 41.

such inconsistency will not constitute ground for reversal.[89] Thus inconsistency between different instructions is harmless error, where the inconsistency arises from error in the instruction in favor of the appellant,[90] and the court may present the various phases of the case suggested by the evidence or the contentions of the parties, although they are inconsistent with each other, when from the instructions as a whole the jury cannot be misled.[91]

J. Singling Out or Giving Undue Prominence to Particular Facts or Matters

Singling out matters as invasion of province of jury, see, ante, § 44.

§ 431. General rule

It is improper to single out a particular issue or defense, so as to impress the jury with the idea that it is the controlling one, or to lead them to attach undue prominence to such issue or defense,[92] or to emphasize the theory of one party as compared with

[89] Carrington v. Pacific Mail S. S. Co., 1 Cal. 475; Robbins v. Roth, 95 Ill. 464; Garey v. Sangston, 64 Md. 31, 20 A. 1034; Maier v. Massachusetts Ben. Ass'n, 107 Mich. 687, 65 N. W. 552; Jansen v. Williams, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207.

[90] Williams v. Southern Pac. R. Co., 110 Cal. 457, 42 P. 974; Graybeal v. Gardner, 146 Ill. 337, 34 N. E. 528, affirming 48 Ill. App. 305; Hillebrant v. Green, 93 Iowa, 661, 62 N. W. 32.

[91] Votaw v. McKeever, 92 P. 1120, 76 Kan. 870.

[92] **Fla.** Jacksonville Electric Co. v. Adams, 39 So. 183, 50 Fla. 429, 7 Ann. Cas. 241.

Ill. Zoeller v. Court of Honor, 168 Ill. App. 562.

Neb. Rising v. Nash, 48 Neb. 597, 67 N. W. 460.

Ohio. Lake Shore & M. S. Ry. Co. v. Whidden, 23 Ohio Cir. Ct. R. 85.

Tex. Munsey v. Marnet Oil & Gas Co. (Civ. App.) 199 S. W. 686; Van Geem v. Cisco Oil Mill (Civ. App.) 152 S. W. 1108; Huber v. Texas & P. Ry. Co. (Civ. App.) 113 S. W. 984; Buchanan v. Missouri, K. & T. Ry. Co. of Texas, 107 S. W. 552, 48 Tex. Civ. App. 299; Dallas & O. C. El. Ry. Co. v. Harvey (Civ. App.) 27 S. W. 423.

Instructions held not improper within rule. Where in an action for the death of a trolley car passenger who jumped from the car on a parallel track in front of an approaching car on that track to avoid danger of a collision by another car running into the car on which he was riding, the theory of plaintiff was that defendant had negligently placed decedent in a perilous position, and the theory of defendant was that decedent had not been placed in a position of imminent peril, an instruction that the basis of the action was negligence which could not be presumed from the mere fact that decedent was run over by a car, but that before plaintiff could recover he must prove, not only that defendant was negligent, but that the negligence charged was the proximate cause of decedent's death, was not objectionable as directing the attention of the jury to the count of the declaration charging negligence in the operation of the car which struck decedent. Adamson's Adm'r v. Norfolk & P. Traction Co., 69 S. E. 1055, 111 Va. 556. In an action for injuries to plaintiff's wife in alighting from a car, where the defendant pleaded contributory negligence, in that she left the car on the side opposite the depot, and that she attempted to leave it with a lot of

the theory of his adversary,[93] and instructions, objectionable because of such emphasis, are properly refused, however correct they may be as legal propositions.[94]

It is improper to give an instruction which singles out, and calls undue attention to, a particular part of the testimony or a partic-

bundles and packages in her arms, rendering her unable to use the railing, whereby she was caused to lose her balance and fall, special instructions on the subject of contributory negligence conformable to these phases, given in addition to a charge in general terms on contributory negligence, were not erroneous as giving undue prominence to the issue. Rambie v. San Antonio & G. R. R., 100 S. W. 1022, 45 Tex. Civ. App. 422. Where the court stated in the general charge that the burden of proof was on plaintiff to establish the material allegations of his petition, the giving of a special charge that, if a passenger is injured while alighting from a train, he cannot recover therefor, unless it is shown by a preponderance of evidence that the injury was caused by the failure of the company to exercise the proper degree of care, was not objectionable as giving undue prominence to the rule of law expressed. Ramble v. San Antonio & G. R. R., 100 S. W. 1022, 45 Tex. Civ. App. 422. The court not having told the jury on whom the burden of proof rested to prove whether insured met his death in a violation, or attempted violation, of law, but only that to find for defendant they must believe that insured, without justification and in violation of law, made an assault to murder K., and in the course of the difficulty was shot, plaintiff was entitled to a charge that such burden was on defendant; so that giving plaintiffs' charge that the burden was on defendant to show that insured met his death in a violation, or an attempted violation, of law, could not be complained of as giving undue prominence to the necessity of defendant making such showing by a preponderance of the evidence. Woodmen of the World v. McCoslin, 126 S. W. 894, 59 Tex. Civ. App. 574. Where, in an action against an iron company for injuries to plaintiff while employed in the construction of a building, one of the issues was whether the building was being constructed by the iron company or by a realty company organized by the same persons that owned and controlled the iron company, and there was evidence that before plaintiff's injury the officers and stockholders of the iron company determined to organize the realty company, but that the realty company was not incorporated until after a building permit had been issued for the building on which plaintiff was injured, the permit being taken out by the agent of the iron company, an instruction that the realty company was not incorporated until a date specified, which was the date shown by the evidence as the date of the incorporation, was not objectionable as giving undue prominence to the date of the incorporation of the realty company. Kirn v. E. E. Southern Iron Co., 124 S. W. 45, 140 Mo. App. 451.

[93] Weiss v. Bethlehem Iron Co. (C. C. A. Pa.) 88 F. 23, 31 C. C. A. 363; In re Townsend's Estate, 97 N. W. 1108, 122 Iowa, 246; St. Louis Southwestern Ry. Co. of Texas v. Terhune (Tex. Civ. App.) 81 S. W. 74; Barton v. Stroud-Gibson Grocer Co. (Tex. Civ. App.) 40 S. W. 1050.

[94] **Ill.** Slack v. Harris, 65 N. E. 669, 200 Ill. 96, affirming judgment 101 Ill. App. 527.

Mass. Kenny v. Town of Ipswich, 59 N. E. 1007, 178 Mass. 368.

Minn. Fransen v. Falk Paper Co., 160 N. W. 789, 135 Minn. 284.

N. H. Davis v. Concord & M. R. R., 44 A. 388, 68 N. H. 247.

R. I. Reynolds v. Narragansett Electric Lighting Co., 59 A. 393, 26 R. I. 457.

Tex. Jacksonville Ice & Electric Co. v. Moses, 134 S. W. 379, 63 Tex. Civ. App. 496.

Wis. Watson v. Milwaukee & M. R. Co., 57 Wis. 332, 15 N. W. 468.

ular part of the evidence,[95] or at least the giving of such an in-

[95] **U. S.** (C. C. A., Ark.) Western Coal & Mining Co. v. Berberich, 94 F. 329, 36 C. C. A. 364; (C. C. A. Colo.) Trumbull v. Erickson, 97 F. 891, 38 C. C. A. 536; (C. C. A. Minn.) Minneapolis General Electric Co. v. Cronon, 166 F. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816.

Ala. Birmingham Ry., Light & Power Co. v. Kyser, 82 So. 151, 208 Ala. 121; Minor v. Coleman, 74 So. 841, 16 Ala. App. 5; Dillworth v. Holmes Furniture & Vehicle Co., 73 So. 288, 15 Ala. App. 340; Stinson v. Faircloth Byrd Co., 57 So. 143, 3 Ala. App. 607; Western Union Telegraph Co. v. Robbins, 56 So. 879, 3 Ala. App. 234; Duncan v. St. Louis & S. F. R. Co., 44 So. 418, 152 Ala. 118; Abercrombie v. Fourth Nat. Bank, 39 So. 606; Birmingham Ry. & Electric Co. v. Mason, 39 So. 590, 144 Ala. 387, 6 Ann. Cas. 929; Central of Georgia Ry. Co. v. Larkins, 37 So. 660, 142 Ala. 375; Louisville & N. R. Co. v. Jones, 30 So. 586, 130 Ala. 456; Pearson v. Adams, 29 So. 977, 129 Ala. 157; Decatur Car Wheel & Mfg. Co. v. Mehaffey, 29 So. 646, 128 Ala. 242; Louisville & N. R. Co. v. Orr, 26 So. 35, 121 Ala. 489; Williamson v. Tyson, 105 Ala. 644, 17 So. 336; Wadsworth v. Williams, 101 Ala. 264, 13 So. 755; Steed v. Knowles, 97 Ala. 573, 12 So. 75.

Ark. St. Louis Southwestern Ry. Co. v. Aydelott, 194 S. W. 873, 128 Ark. 479; Western Coal & Mining Co. v. Jones, 87 S. W. 440, 75 Ark. 76.

Ga. Stiles v. Shedden, 58 S. E. 515, 2 Ga. App. 317.

Ill. Helbig v. Citizens' Ins. Co., 84 N. E. 897, 234 Ill. 251, affirming judgment Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115; Funston v. Hoffman, 83 N. E. 917, 232 Ill. 360; Wickes v. Walden, 81 N. E. 798, 228 Ill. 56; Chicago Anderson Pressed Brick Co. v. Reinneiger, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249; Protection Life Ins. Co. v. Dill, 91 Ill. 174; Martin v. Johnson, 89 Ill. 537; Hatch v. Marsh, 71 Ill. 370; M. H. Boals Planing Mill Co. v. Cleveland, C., C. & St. L. Ry. Co., 211 Ill. App. 125; McCormick v. Decker, 204 Ill. App. 554; Trainer v. Baker, 195 Ill. App. 216; Ballah v. Peoria Life Ass'n, 159 Ill. App. 222; Harvey v. McQuirk, 158 Ill. App. 50; Ventriss v. Pana Coal Co., 155 Ill. App. 152; Karkowski v. La Salle County Carbon Coal Co., 154 Ill. App. 399, judgment affirmed (1911) 93 N. E. 780, 248 Ill. 195; Fisher v. City of Geneseo, 154 Ill. App. 288; Gash v. Home Ins. Co. of New York, 153 Ill. App. 31; Penney v. Johnston, 142 Ill. App. 634; Aygarn v. Rogers Grain Co., 141 Ill. App. 402; Hughes v. Hughes, 133 Ill. App. 654; Trustees of Schools, etc., St. Clair County v. Yoch, 133 Ill. App. 32; Long v. Long, 132 Ill. App. 409; Purcell v. McKeel, 129 Ill. App. 428; Turner v. Lord & Thomas, 124 Ill. App. 117; Springfield Consol. Ry. Co. v. Gregory, 122 Ill. App. 607; Turner v. Righter, 120 Ill. App. 131; Beyer v. Martin, 120 Ill. App. 50; Chicago City Ry. Co. v. Lowitz, 119 Ill. App. 360, judgment affirmed 75 N. E. 755, 218 Ill. 24; New Ohio Washed Coal Co. v. Hindman, 119 Ill. App. 287; Scott v. Snyder, 116 Ill. App. 393; Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322; Hart v. Carsley Mfg. Co., 116 Ill. App. 159, reversed 77 N. E. 897, 221 Ill. 444, 112 Am. St. Rep. 189, 5 Ann. Cas. 720; Munford v. Miller, 7 Ill. App. 62; Anderson v. Warner, 5 Ill. App. 416; Wright v. Bell, 5 Ill. App. 352; Hutchinson v. Crain, 3 Ill. App. 20.

Ind. North v. Jones, 100 N. E. 84, 53 Ind. App. 203.

Iowa. Haman v. Preston, 173 N. W. 894, 186 Iowa, 1292; In re Eveleth's Will, 157 N. W. 257, 177 Iowa, 716; Whitman v. Chicago Great Western Ry. Co., 153 N. W. 1023, 171 Iowa, 277; Kelly v. Chicago, R. I. & P. Ry. Co., 114 N. W. 536, 138 Iowa, 273, 128 Am. St. Rep. 195.

Kan. Honick v. Metropolitan St. Ry. Co., 71 P. 265, 66 Kan. 124.

Ky. Stearns Coal & Lumber Co. v. Williams, 186 S. W. 931, 171 Ky. 46; Bennett v. Knott, 112 S. W. 849; Drake v. Holbrook, 92 S. W. 297, 28

Ky. Law Rep. 1319; South Covington & C. St. Ry. Co. v. Schilling, 89 S. W. 220, 28 Ky. Law Rep. 309; Louisville Ry. Co. v. Hartman's Adm'r, 83 S. W. 570, 26 Ky. Law Rep. 1174; Crabtree v. Dawson, 83 S. W. 557, 119 Ky. 148, 26 Ky. Law Rep. 1046, 67 L. R. A. 565, 115 Am. St. Rep. 243; Louisville & N. R. Co. v. Banks, 33 S. W. 627; Ohio R. Co. v. Finney, 15 Ky. Law Rep. (abstract) 29; Kentucky Tobacco Ass'n v. Ashley, 5 Ky. Law Rep. (abstract) 184.

Md. Safe-Deposit & Trust Co. v. Berry, 49 A. 401, 93 Md. 560; Higgins v. Grace, 59 Md. 365.

Mass. Quinlan v. Hugh Nawn Contracting Co., 126 N. E. 369, 235 Mass. 190; Neafsey v. Szemeta, 126 N. E. 368, 235 Mass. 160; O'Brien v. Shea, 95 N. E. 99, 208 Mass. 528, Ann. Cas. 1912A, 1030; O'Leary v. Boston Elevated Ry. Co., 95 N. E. 85, 209 Mass. 62; Woodbury v. Sparrell Print, 84 N. E. 441, 198 Mass. 1; Packer v. Thomson-Houston Electric Co., 56 N. E. 704, 175 Mass. 496; Moseley v. Washburn, 45 N. E. 753, 167 Mass. 345; Troeder v. Hyams, 153 Mass. 536, 27 N. E. 775; Packer v. Hinckley Locomotive Works, 122 Mass. 484; Littlefield v. Huntress, 106 Mass. 121; Howe v. Howe, 99 Mass. 88; Stebbins v. Miller, 12 Allen, 591.

Mich. First Nat. Bank v. Union Trust Co., 122 N. W. 547, 158 Mich. 94, 133 Am. St. Rep. 362; McKinnon Boiler & Machine Co. v. Central Michigan Land Co., 120 N. W. 26, 156 Mich. 11; Webster v. Sibley, 40 N. W. 772, 72 Mich. 630; People v. Colerick, 34 N. W. 683, 67 Mich. 362.

Minn. Geddes v. Van Rhee, 148 N. W. 549, 126 Minn. 517; Taubert v. Taubert, 114 N. W. 763, 103 Minn. 247; Atwood Lumber Co. v. Watkins, 103 N. W. 332, 94 Minn. 464.

Miss. Hooks v. Mills, 57 So. 545, 101 Miss. 91.

Mo. Robinson v. Cruzen (App.) 202 S. W. 449; Fitzsimmons v. Commerce Trust Co. (App.) 200 S. W. 437; Greenbrier Distillery Co. v. Van Frank, 126 S. W. 222, 147 Mo. App. 204; Gibler v. Quincy, O. & K. C. R. Co., 107 S. W. 1021, 129 Mo. App. 93; Zander v. St. Louis Transit Co., 103 S. W. 1006, 206 Mo. 445; Spohn v. Missouri Pac. Ry. Co., 87 Mo. 74; Fine v. St. Louis Public Schools, 39 Mo. 59; McAlister v. Irvine, 69 Mo. App. 442; Chaney v. Phœnix Ins. Co., 62 Mo. App. 45; Dobbs v. Cates' Estate, 60 Mo. App. 658.

Neb. Kleutsch v. Security Mut. Life Ins. Co., 100 N. W. 139, 72 Neb. 75; City of South Omaha v. Wrzensinski, 92 N. W. 1045, 66 Neb. 790; Martens v. Pittock, 92 N. W. 1038, 3 Neb. (Unof.) 770; Markel v. Moudy, 11 Neb. 213, 7 N. W. 853.

Pa. Reichenbach v. Ruddach, 127 Pa. 564, 18 A. 432, 24 Wkly. Notes Cas. 476.

S. C. Pearlstine v. Westchester Fire Ins. Co., 49 S. E. 4, 70 S. C. 75.

Tex. McDonald v. Stafford (Civ. App.) 213 S. W. 732; First Nat. Bank of Garner, Iowa, v. Smith (Civ. App.) 183 S. W. 862; Yealock v. Yealock (Civ. App.) 141 S. W. 842; Gallagher v. Neilon (Civ. App.) 121 S. W. 564; McKay v. Peterson, 113 S. W. 981, 52 Tex. Civ. App. 195; Raywood Rice, Canal & Milling Co. v. Wells, 77 S. W. 253, 33 Tex. Civ. App. 545; Laferiere v. Richards, 67 S. W. 125, 28 Tex. Civ. App. 63; New York & T. Land Co. v. Gardner (Civ. App.) 25 S. W. 737.

Utah. Kent v. Ogden, L. & I. Ry. Co., 167 P. 666, 50 Utah, 328.

Vt. Vaillancourt v. Grand Trunk Ry. Co. of Canada, 74 A. 99, 82 Vt. 416.

Va. Cerriglio v. Pettit, 75 S. E. 303, 113 Va. 533; Douglas Land Co. v. T. W. Thayer Co., 58 S. E. 1101, 107 Va. 292.

W. Va. Parkersburg Nat. Bank v. Hannaman, 60 S. E. 242, 63 W. Va. 358; Delmar Oil Co. v. Bartlett, 59 S. E. 634, 62 W. Va. 700; Bice v. Wheeling Electrical Co., 59 S. E. 626, 62 W. Va. 685; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

Instructions held erroneous as in violation of rule. An instruction, in an action on a note executed to a decedent in which defendant pleaded payment and produced several receipts acknowledging payment for money advanced, that the production of the receipts signed by decedent was a complete defense unless

overcome by proof showing that the payments were in fact not made. Steltemeier v. Barrett, 122 S. W. 1095, 145 Mo. App. 534. An instruction as to the measure of damages for negligent killing, that "in arriving at this the jury may take into consideration the age of decedent and the probable duration of his life." Louisville & N. R. Co. v. Shoemake's Adm'r, 171 S. W. 383, 161 Ky. 746. An instruction that the refusal of plaintiff to submit to a physical examination by defendant's physician may properly be considered by the jury. Simpson v. Peoria Ry. Co., 179 Ill. App. 307. An instruction referring to the effect of agitation and excitement upon an ordinarily prudent person while acting in an emergency. St. Louis & S. F. R. Co. v. Casselberry (Tex. Civ. App.) 139 S. W. 1161. An instruction, in a personal injury suit, which gives undue prominence to physical disabilities and infirmities of the plaintiff. Geary v. City of Chicago, 161 Ill. App. 461. An instruction in ejectment, which calls especial attention to the fact that plaintiff and his grantor denied that they had agreed on the division line, is unfair to defendant, who testified that they had so agreed. Clayton v. Feig, 54 N. E. 149, 179 Ill. 534. An instruction, in an action on a life policy, precluding recovery if insured was seen alive after a particular date. Springmeyer v. Sovereign Camp, Woodmen of the World, 143 S. W. 872, 163 Mo. App. 338. Instruction, in an action for malicious prosecution, that the jury might look to the fact that defendant caused the prosecution to be dismissed against plaintiff as a circumstance tending to show malice, and that, if defendant was not actuated by malice, the verdict must be for defendant. Rutherford v. Dyer, 40 So. 974, 146 Ala. 665. An instruction, in an action by a railway brakeman for injuries, where life tables were read as evidence, that if the jury considered the tables, it should also consider the hazardous nature of plaintiff's employment as tending to determine the length of his life and the duration of his ability to labor. Louisville & N. R. Co. v. Irby, 132 S. W. 393, 141 Ky. 145, judgment modified 134 S. W. 139, 142 Ky. 273. An instruction, in an action for injuries on the paved street of a large city, as to care required of plaintiff emphasizing the fact that the accident occurred between street intersections. Rugenstein v. Ottenheimer, 140 P. 747, 70 Or. 600. An instruction, in suit for injuries to a child of 10 or 12 from contact with an electric light wire, that the jury in determining contributory negligence must "consider the fact that the plaintiff in this case has lived all his life in a city, where they had electric lights and electric wires, and the fact that the plaintiff thus had opportunities to learn and appreciate the dangers of such agencies." Potera v. City of Brookhaven, 49 So. 617, 95 Miss. 774. An instruction in an action for injuries to plaintiff at a railroad crossing that, if the evidence was evenly balanced as to the speed of an engine and the witnesses as to this matter were equally credible, it was the jury's duty to give credence to those witnesses who testified that the speed did not exceed five miles per hour. Southern Ry. Co. v. Weatherlow, 51 So. 381, 164 Ala. 151. An instruction, in an action upon notes given to plaintiff in payment of machinery purchased for defendants, charging that the giving of the notes was not a relinquishment of defendants' claim for excess charges upon the machinery. Robinson v. Silver, 87 A. 699, 120 Md. 41. An instruction, in an action to recover wagons, obtained by defendants from a third person, that defendant's knowledge before the purchase of the stock of such third person that he owed plaintiff for the wagons was not alone sufficient to put defendants on notice as to any fraud of such third person in obtaining the wagons. Parlin & Orendorff Co. v. Glover, 118 S. W. 731, 55 Tex. Civ. App. 112. A charge, in an action for breach of warranty, that it was the duty of the jury to look to the time when the buyer made complaint to the seller to determine whether any defect existed at the time the machin-

ery was sold. W. T. Adams Mach. Co. v. Turner, 50 So. 308, 162 Ala. 351, 136 Am. St. Rep. 28. An instruction that actual sale of property by a trustee in bankruptcy is evidence of its market value. Herzberg v. Riddle, 54 So. 635, 171 Ala. 368. An instruction, on the trial of a question of will or no will, that, if the jury believe there is gross inequality in the distribution of the estate by the instrument and that no reason therefor exists, they may consider such fact in connection with all the other circumstances proven in the case in determining whether such paper is in fact the testator's will. Stokes' Ex'r v. Shippen, 13 Bush (Ky.) 180. An instruction that the jury might consider the adequacy of the amount paid for a release in determining the competency of plaintiff. Robinson v. Chicago, R. I. & P. Ry. Co., 150 P. 636, 96 Kan. 137, judgment affirmed on rehearing 153 P. 494, 96 Kan. 654. Instructions, in suit for work and materials in improving property defendant was superintending, specifically calling the jury's attention to whether he was an independent contractor and only slightly referring to the question of whether credit was given defendant or the owner, which was the final criterion of liability. Lambert v. Phillips & Son, 64 S. E. 945, 109 Va. 632.

Instructions held not objectionable within rule. Where a charge after setting out every condition on which plaintiff's right to recover depended concluded with the statement that, unless the jury found the affirmative of each and every fact submitted in that paragraph of the charge, the verdict should be for defendant, was not objectionable as giving undue emphasis, and tending to indicate the judge's view of a particular feature of the evidence. Houston & T. C. R. Co. v. Rutland, 101 S. W. 529, 45 Tex. Civ. App. 621. An instruction that if the jury believed the defendant, at the time of the alleged injury, was engaged in running street cars, it was bound to use the utmost care and diligence for the safety of its passengers, and is liable for injuries to its passengers, occasioned by the slightest neglect, against which human prudence and foresight might have guarded, does not call the attention of the jury to any part of the evidence on the questions of negligence or contributory negligence. Blue Ridge Light & Power Co. v. Price, 62 S. E. 938, 108 Va. 652. Where the issue was whether a contract was mutually rescinded in June, as alleged by plaintiff, and the proof showed that in November following he served on defendant a notice of rescission, and the court charged, at his request, that, if defendant abandoned the contract before the notice, the giving of it did not restore to him any rights under his contract, an instruction that, if plaintiff did not consider the contract abandoned until he gave the notice, a verdict should be rendered for defendant, was not objectionable as calling the jury's attention to a particular part of the evidence. Darst v. Devini, 102 S. W. 787, 46 Tex. Civ. App. 311. Where, in libel, defendant relied on the defense of privilege in publishing a fair report of a judicial proceeding, and it appeared that a part of the proceeding favorable to plaintiff was omitted, an instruction that if defendant omitted the favorable matter to mislead the public, and not through inadvertence, was not objectionable as singling out one item of evidence. Meriwether v. Publishers: Geo. Knapp & Co., 123 S. W. 1100, 224 Mo. 617. An instruction on the question of contributory negligence of one who, having crossed from the south side of a street to the north side and put a letter in the mail box of an eastbound car, was struck while recrossing the street, and just after emerging from behind such car, by an eastbound car, which tells the jury they will consider, as shown by the evidence, certain enumerated facts and circumstances, together with any other fact or circumstance shown on the trial, bearing on the question, held not to single out facts favorable to plaintiff. Dow v. Des Moines City Ry. Co., 126 N. W. 918, 148 Iowa, 429.

struction is not good practice,[96] and it is proper to refuse it;[97]

[96] Still v. San Francisco & N. W. Ry. Co., 98 P. 672, 154 Cal. 559, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177; Anfenson v. Banks, 163 N. W. 608, 180 Iowa, 1066, L. R. A. 1918D, 482; Gray v. Chicago, R. I. & P. Ry. Co., 139 N. W. 934, 160 Iowa, 1; State v. Newlin, 182 P. 133, 92 Or. 589.

[97] **U. S.** Rio Grande W. Ry. Co. v. Leak, 163 U. S. 280, 16 S. Ct. 1020, 41 L. Ed. 160; (C. C. A. Kan.) Connecticut Mut. Life Ins. Co. v. Hillmon, 107 F. 834, 46 C. C. A. 668, reversed 23 S. Ct. 294, 188 U. S. 208, 47 L. Ed. 446; (C. C. A. Mich.) Arnold v. Horrigan, 238 F. 39, 151 C. C. A. 115; (C. C. A. Minn.) Chicago, M. & St. P. Ry. Co. v. Anderson, 168 F. 901, 94 C. C. A. 241; (C. C. A. Mo.) Northern Central Coal Co. v. Barrowman, 246 F. 906, 159 C. C. A. 178.

Ala. Kuykendall v. Edmondson, 77 So. 24, 200 Ala. 650; Huntsville Knitting Mills v. Butner, 76 So. 54, 200 Ala. 288; Southern Ry. Co. v. Hayes, 73 So. 945, 198 Ala. 601; Keller v. Jones & Weeden, 72 So. 89, 196 Ala. 417; Councill v. Mayhew, 55 So. 314, 172 Ala. 295; Alabama Steel & Wire Co. v. Tallant, 51 So. 835, 165 Ala. 521; Western Union Telegraph Co. v. Benson, 48 So. 712, 159 Ala. 254; Drennen v. Satterfield, 24 So. 723, 119 Ala. 84.

Ark. Jenkins v. Quick, 151 S. W. 1021, 105 Ark. 467.

Conn. Pratt v. Dunlap, 82 A. 195, 85 Conn. 180; Tetreault v. Smedley Co., 71 A. 786, 81 Conn. 556.

D. C. Sullivan v. Capital Traction Co., 34 App. D. C. 358; Turner v. American Security & Trust Co., 29 App. D. C. 460.

Ga. Georgia Ry. & Electric Co. v. Gatlin, 82 S. E. 888, 142 Ga. 293.

Ill. Nolte v. Nolte, 190 Ill. App. 469; Martini v. Donk Bros. Coal & Coke Co., 169 Ill. App. 139; Nave v. Gross, 162 Ill. App. 83; Haywood v. Dering Coal Co., 145 Ill. App. 506; Wilkinson v. Ætna Life Ins. Co., 144 Ill. App. 38, judgment affirmed 88 N. E. 550, 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269.

Ind. Cottrell v. Shadley, 77 Ind. 348.

Iowa. Case v. Chicago Great Western Ry. Co., 126 N. W. 1037, 147 Iowa, 747; Hanrahan v. O'Toole, 117 N. W. 675, 139 Iowa, 229.

Kan. Kerr v. Coberly, 105 P. 520, 81 Kan. 376; Smart v. Missouri Pac. Ry. Co., 102 P. 253, 80 Kan. 438.

Ky. Chesapeake & O. Ry. Co. v. Lang's Adm'x, 133 S. W. 570, 141 Ky. 592; Louisville & N. R. Co. v. Ueltschi's Ex'rs, 97 S. W. 14, 29 Ky. Law Rep. 1136.

Md. Earp v. Phelps, 87 A. 806, 120 Md. 282; Stouffer v. Alford, 78 A. 387, 114 Md. 110.

Mass. Doherty v. Phœnix Ins. Co., 112 N. E. 940, 224 Mass. 310; Grier v. Guarino, 101 N. E. 981, 214 Mass. 411; O'Brien v. Shea, 95 N. E. 99, 208 Mass. 528, Ann. Cas. 1912A, 1030; Carroll v. Boston Elevated Ry. Co., 86 N. E. 793, 200 Mass. 527; Lufkin v. Lufkin, 65 N. E. 840, 182 Mass. 476, dismissed 192 U. S. 601, 24 S. Ct. 849, 48 L. Ed. 583; Gunther v. Gunther, 63 N. E. 402, 181 Mass. 217; Peck v. Clark, 142 Mass. 436, 8 N. E. 335.

Mich. Wood v. Standard Drug Store, 157 N. W. 403, 190 Mich. 654; Silverstone v. London Assur. Corporation, 153 N. W. 802, 187 Mich. 333; Philpott v. Kirkpatrick, 137 N. W. 232, 171 Mich. 495; Beurmann v. Van Buren, 7 N. W. 67, 44 Mich. 496.

Minn. Brown v. Chicago & N. W. Ry. Co., 152 N. W. 729, 129 Minn. 347; Froberg v. Smith, 118 N. W. 57, 106 Minn. 72.

Mo. Pasche v. South St. Joseph Town-Site Co. (App.) 190 S. W. 30; Smith v. Jefferson Bank, 126 S. W. 810, 147 Mo. App. 461; Lowenstein v. Missouri Pac. Ry. Co., 119 S. W. 430, 134 Mo. App. 24; Lohmeyer v. St. Louis Cordage Co., 119 S. W. 49, 137 Mo. App. 624, transferred from the Supreme Court 113 S. W. 1108, 214 Mo. 685; Dobbs v. Cates' Estate, 60 Mo. App. 658.

Mont. Albertini v. Linden, 123 P. 400, 45 Mont. 398.

N. H. Minot v. Boston & M. R. R., 66 A. 825, 74 N. H. 230.

this rule applying in criminal cases.[98] Such instructions tend to invade the province of the jury and to mislead them.[99]

Or. Service v. Sumpter Valley Ry. Co., 171 P. 202, 88 Or. 554; Crossen v. Oliver, 69 P. 308, 41 Or. 505.

S. C. Carr v. Mouzon, 68 S. E. 661, 86 S. C. 461.

Tenn. Gulf Compress Co. v. Insurance Co. of Pennsylvania, 167 S. W. 859, 129 Tenn. 586.

Tex. Panhandle & S. F. Ry. Co. v. Morrison (Civ. App.) 191 S. W. 138; Houston & T. C. R. Co. v. Lindsey (Civ. App.) 175 S. W. 708; Van Zandt-Moore Iron Works v. Axtell, 126 S. W. 930, 58 Tex. Civ. App. 353; Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 91 S. W. 355.

Vt. G. R. Bianchi Granite Co. v. Terre Haute Monument Co., 99 A. 875, 91 Vt. 177; Maidment v. Frazier, 98 A. 987, 90 Vt. 520.

Va. New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264.

W. Va. Daniels v. Charles Boldt Co., 88 S. E. 613, 78 W. Va. 124.

Wis. Mickuczauski v. Helmholz Mitten Co., 134 N. W. 369, 148 Wis. 153; Fidelity Trust Co. v. Wisconsin Iron & Wire Works, 129 N. W. 615, 145 Wis. 385.

[98] **U. S.** Perovich v. United States, 27 S. Ct. 456, 205 U. S. 86, 51 L. Ed. 722; Bird v. United States, 23 S. Ct. 42, 187 U. S. 118, 47 L. Ed. 100; (C. C. A. Mo.) Colburn v. United States, 223 F. 590, 139 C. C. A. 136, certiorari denied 36 S. Ct. 163, 239 U. S. 643, 60 L. Ed. 483; Weddel v. United States, 213 F. 208, 129 C. C. A. 552; (C. C. A. Okl.) Dosset v. United States, 248 F. 902, 161 C. C. A. 20; Stout v. United States, 227 F. 799, 142 C. C. A. 323, certiorari denied 36 S. Ct. 549, 241 U. S. 664, 60 L. Ed. 1227.

Ala. Madry v. State, 78 So. 866, 201 Ala. 512; Franklin v. State, 78 So. 411, 16 Ala. App. 417; Lawson v. State, 76 So. 411, 16 Ala. App. 174; Miller v. State, 75 So. 819, 16 Ala. App. 143; Feal[illegible] v. City of Birmingham, 73 So. 296, 15 Ala. App. 367; Coplon v. State, 73 So. 225, 15 Ala. App. 331, certiorari denied 74 So. 1005, 199 Ala. 698; Brown v. State, 72 So. 757, 15 Ala. App. 180, writ of certiorari denied 73 So. 999, 198 Ala. 689; Madison v. State, 71 So. 706, 196 Ala. 590; Cunningham v. State, 69 So. 982, 14 Ala. App. 1; Burton v. State, 69 So. 913, 194 Ala. 2; James v. State, 69 So. 569, 193 Ala. 55, Ann. Cas. 1918B, 119; Ezzell v. State, 68 So. 578, 13 Ala. App. 156; Ragsdale v. State, 67 So. 783, 12 Ala. App. 1; Maxwell v. State, 67 So. 772, 12 Ala. App. 212; McWilliams v. State, 67 So. 735, 12 Ala. App. 92; Henderson v. State, 65 So. 721, 11 Ala. App. 37; Hooten v. State, 64 So. 200, 9 Ala. App. 9; Clayton v. State, 64 So. 76, 185 Ala. 13; Eaton v. State, 63 So. 41, 8 Ala. App. 136; Brooks v. State, 62 So. 569, 8 Ala. App. 277, judgment reversed 64 So. 295, 185 Ala. 1; Dunn v. State, 62 So. 379, 8 Ala. App. 382; Jones v. State, 61 So. 434, 181 Ala. 63; Parker v. State, 60 So. 995, 7 Ala. App. 9; Hosey v. State, 59 So. 549, 5 Ala. App. 1; Kirby v. State, 59 So. 374, 5 Ala. App. 128; Gardner v. State, 58 So. 1001, 4 Ala. App. 131; Pope v. State, 57 So. 245, 174 Ala. 63; Montgomery v. State, 56 So. 92, 2 Ala. App. 25; Herndon v. State, 56 So. 85, 2 Ala. App. 118; Goodwin v. State, 56 So. 29, 1 Ala. App. 136; Cardwell v. State, 56 So. 12, 1 Ala. App. 1; Coates v. State, 56 So. 6, 1 Ala. App. 35; Bailey v. State, 53 So. 296, 390, 168 Ala. 4; Griffin v. State, 50 So. 962, 165 Ala. 29; Degg v. State, 43 So. 484, 150 Ala. 3; Tribble v. State, 40 So. 938, 145 Ala. 23; Teague v. State, 40 So. 312, 144 Ala. 42; Whatley v. State, 39 So. 1014, 144 Ala. 68; Nordan v. State, 39 So. 406,

[99] **Ill.** Chesney v. Meadows, 90 Ill. 430.

Iowa. Doyle v. Burns, 114 N. W. 1, 138 Iowa, 439.

Kan. Haines v. Goodlander, 84 P. 986, 73 Kan. 183.

Ky. Jones v. Jones, 43 S. W. 412, 102 Ky. 450, 19 Ky. Law Rep. 1516.

N. Y. Kennedy v. National Jewelers' Board of Trade, 162 N. Y. S. 635, 175 App. Div. 785; McKenna v. Snare & Triest Co., 133 N. Y. S. 107, 147 App. Div. 855.

143 Ala. 13; Ross v. State, 36 So. 718, 139 Ala. 144; Thayer v. State, 35 So. 406, 138 Ala. 39; Vaughn v. State, 30 So. 669, 130 Ala. 18; Willingham v. State, 30 So. 429, 130 Ala. 35; Mitchell v. State, 30 So. 348, 129 Ala. 23; Huskey v. State, 29 So. 838, 129 Ala. 94; Frost v. State, 27 So. 550, 124 Ala. 71; McLeroy v. State, 25 So. 247, 120 Ala. 274; King v. State, 25 So. 178, 120 Ala. 329; Durrett v. State, 62 Ala. 434.

Ark. McKinney v. State, 215 S. W. 723, 140 Ark. 529; Lee v. State, 172 S. W. 1025, 116 Ark. 588; Jackson v. State, 145 S. W. 559, 103 Ark. 21; Newton v. State, 37 Ark. 333.

Cal. People v. Layden, 153 P. 1164, 28 Cal. App. 805; People v. Morrell, 153 P. 977, 28 Cal. App. 729; People v. Converse, 153 P. 734, 28 Cal. App. 687; People v. Hawes, 98 Cal. 648, 33 P. 791.

Fla. Hall v. State, 83 So. 513, 78 Fla. 420, 8 A. L. R. 1234; Graham v. State, 73 So. 594, 72 Fla. 510; Hisler v. State, 42 So. 692, 52 Fla. 30; Wilson v. State, 36 So. 580, 47 Fla. 118; Baldwin v. State, 35 So. 220, 46 Fla. 115.

Ga. Harrell v. State, 49 S. E. 703, 121 Ga. 607; Hodgkins v. State, 89 Ga. 761, 15 S. E. 695.

Ill. People v. Pezutto, 99 N. E. 677, 255 Ill. 583; People v. Strauch, 93 N. E. 126, 247 Ill. 220; People v. Campbell, 84 N. E. 1035, 234 Ill. 391, 123 Am. St. Rep. 107, 14 Ann. Cas. 186; Clark v. People, 79 N. E. 941, 224 Ill. 554; Sanders v. People, 124 Ill. 218, 16 N. E. 81; Hoge v. People, 117 Ill. 35, 6 N. E. 796; Mullins v. People, 110 Ill. 42; People v. Whalen, 151 Ill. App. 16; Graff v. People, 108 Ill. App. 168, judgment affirmed 70 N. E. 299, 208 Ill. 312; Obermark v. People, 24 Ill. App. 259.

Ind. Leseuer v. State, 95 N. E. 239, 176 Ind. 448; Wachstetter v. State, 99 Ind. 290, 50 Am. Rep. 94.

Iowa. State v. Wilson, 144 N. W. 47, 166 Iowa, 309, rehearing denied 147 N. W. 739, 166 Iowa, 309.

Kan. State v. Adams, 132 P. 171, 89 Kan. 674.

Ky. Ware v. Commonwealth, 131 S. W. 269, 140 Ky. 534; Stuart v. Commonwealth, 105 S. W. 170, 31 Ky. Law Rep. 1343; Commonwealth v. Thomas, 104 S. W. 326, 31 Ky. Law Rep. 899; Tines v. Commonwealth, 77 S. W. 363, 25 Ky. Law Rep. 1233; Ray v. Commonwealth, 43 S. W. 221, 19 Ky. Law Rep. 1217; Commonwealth v. Gray, 30 S. W. 1015, 17 Ky. Law Rep. 354; Commonwealth v. Delaney, 29 S. W. 616, 16 Ky. Law Rep. 509; Commonwealth v. Hourigan, 89 Ky. 305, 12 S. W. 550; Arnold v. Commonwealth, 3 Ky. Law Rep. (abstract) 394.

La. State v. Mehojovich, 43 So. 660, 118 La. 1013.

Mass. Commonwealth v. Sherman, 124 N. E. 423, 234 Mass. 7; Commonwealth v. Borasky, 101 N. E. 377, 214 Mass. 313; Commonwealth v. Min Sing, 88 N. E. 918, 202 Mass. 121; Commonwealth v. Kronick, 82 N. E. 39, 196 Mass. 286; Commonwealth v. Cosseboom, 155 Mass. 298, 29 N. E. 463.

Mich. People v. Finley, 38 Mich. 482.

Mo. State v. Bowman, 213 S. W. 64, 278 Mo. 492; State v. Pate, 188 S. W. 139, 268 Mo. 431; State v. Lewis, 175 S. W. 60, 264 Mo. 420; State v. Rogers, 161 S. W. 770, 253 Mo. 399; State v. Raftery, 158 S. W. 585, 252 Mo. 72; State v. Holmes, 144 S. W. 417, 239 Mo. 469; State v. Chinn, 133 S. W. 1196, 153 Mo. App. 611; State v. Mitchell, 129 S. W. 917, 229 Mo. 683, 138 Am. St. Rep. 425; State v. Shelton, 122 S. W. 732, 223 Mo. 118; State v. Hibler, 149 Mo. 478, 51 S. W. 85; State v. Cantlin, 118 Mo. 100, 23 S. W. 1091.

Mont. State v. Jones, 80 P. 1095, 32 Mont. 442.

Neb. Chapman v. State, 86 N. W. 907, 61 Neb. 888.

Nev. State v. Ward, 19 Nev. 297, 10 P. 133.

N. J. State v. Labriola, 67 A. 386, 75 N. J. Law, 483.

Or. State v. Ausplund, 167 P. 1019, 86 Or. 121, judgment affirmed on rehearing 171 P. 395, 87 Or. 649.

Pa. Commonwealth v. Meads, 29 Pa. Super. Ct. 321.

Tex. Collins v. State, 178 S. W. 345, 77 Tex. Cr. R. 156; De Rossett v. State, 168 S. W. 531, 74 Tex. Cr. R. 235; Cunningham v. State, 166 S. W.

519, 73 Tex. Cr. R. 565; Gillespie v. State, 166 S. W. 135, 73 Tex. Cr. R. 585; Minter v. State, 159 S. W. 286, 70 Tex. Cr. R. 634; Tucker v. State, 150 S. W. 190, 67 Tex. Cr. R. 510; Barber v. State, 142 S. W. 577, 64 Tex. Cr. R. 96; Allen v. State, 141 S. W. 983, 64 Tex. Cr. R. 225; Harrelson v. State, 132 S. W. 783, 60 Tex. Cr. R. 534; Roquemore v. State, 129 S. W. 1120, 59 Tex. Cr. R. 568; Moore v. State, 128 S. W. 1115, 59 Tex. Cr. R. 361; Canon v. State, 128 S. W. 141, 59 Tex. Cr. R. 398; Wadkins v. State, 124 S. W. 959, 58 Tex. Cr. R. 110, 137 Am. St. Rep. 922, 21 Ann. Cas. 556; Brown v. State, 124 S. W. 101, 57 Tex. Cr. R. 570; Green v. State, 111 S. W. 933, 54 Tex. Cr. R. 3; Green v. State, 105 S. W. 205, 52 Tex. Cr. R. 44; Carroll v. State, 98 S. W. 859, 50 Tex. Cr. R. 485, 123 Am. St. Rep. 851, 14 Ann. Cas. 426; Preston v. State, 53 S. W. 127, 41 Tex. Cr. R. 300, rehearing denied 53 S. W. 881, 41 Tex. Cr. R. 300; Smith v. State (Cr. App.) 49 S. W. 583.

Va. Montgomery v. Commonwealth, 37 S. E. 1, 98 Va. 852.

Wash. State v. Sefrit, 144 P. 725, 82 Wash. 520.

W. Va. State v. Dodds, 46 S. E. 228, 54 W. Va. 289; State v. Morrison, 38 S. E. 481, 49 W. Va. 210; State v. Morgan, 35 W. Va. 260, 13 S. E. 385.

Illustrations of instructions improper within rule. In a murder prosecution, where the state's theory was that decedent was intoxicated and had created a disturbance among accused's tenants, but was departing peaceably and without disturbance when accused shot him, an instruction that, though decedent went upon accused's premises uninvited and created a disturbance, if he had ceased to make a disturbance and was leaving peaceably, accused could not shoot him for the previous disturbance, and, if he willfully, of his malice aforethought, shot decedent while he was leaving the premises because of the previous trouble, he would be guilty of murder, was erroneous as unduly emphasizing parts of the evidence. Gordon v. State, 49 So. 609, 95 Miss. 543. Where the court in its charge on manslaughter did not limit the provocation to the time of the killing, but directed the jury to consider all the facts in evidence in determining whether accused's mind was moved by that degree of anger, rage, sudden resentment, or terror, as to render it incapable of cool reflection, it was not error to refuse to specially charge that the jury should consider the threats made by decedent against accused, and thus select out of a large number of circumstances detailed in evidence a particular circumstance. Giles v. State, 132 S. W. 359, 60 Tex. Cr. R. 436. An instruction on a trial of a registered pharmacist for keeping a drug store for the unlawful sales of liquors that if he sells intoxicating liquors indiscriminately and for a beverage, he is guilty, and it is his duty to make such sales as the law permits "in perfect good faith—mark the language, not good faith, but perfect good faith"—is erroneous for emphasizing the requirement of good faith in making sales. People v. Thompson, 111 N. W. 96, 147 Mich. 444. In a prosecution for theft, where a letter claimed to have been written by defendant and placed in a room of the owner of the stolen property was introduced in evidence, wherein defendant admitted taking the ring and stated what disposition he made of it, etc., a requested charge that unless the jury believed that defendant wrote the letter and that it was intended for the owner of the ring, there being nothing in the letter indicating that fact, it should not be considered as in evidence, was erroneous, as singling out an isolated fact and charging the jury thereon; the court having elsewhere properly charged on the doctrine of reasonable doubt. Kauffman v. State, 109 S. W. 172, 53 Tex. Cr. R. 209.

Instructions held not objectionable within rule. In prosecution for abortion, an instruction that weight of expert testimony as to condition of an anatomical exhibit depended on whether or not a substitution or alteration had been effected, did not warrant a reversal on ground that it singled out and unduly emphasized that feature of matter. State v. Patterson, 181 P. 609, 105

§ 432. Applications of rule

It is error to single out certain facts and state their effect apart from the rest of the evidence,[1] and an instruction which does this

Kan. 9. On a prosecution for assault with intent to rape, where the fact that defendant induced prosecutrix to enter his buggy by a promise to take her home after she had refused was undisputed, and the defendant testified that his purpose in taking her to ride was to solicit her to intercourse, a charge that if the jury were satisfied beyond a reasonable doubt from the evidence that defendant induced prosecutrix to enter his buggy under the inducement that he would take her home, and that after he got her in the buggy he took hold of her with intent to have intercourse with her, and against her will, and with an intent to accomplish his object at all events, by his strength and power, against any resistance she might offer, then he was guilty of assault with intent to rape, whether he succeeded in his purpose or not, was not objectionable as giving undue prominence to the fact that defendant induced prosecutrix to enter his buggy under a promise to take her home. Donovan v. People, 74 N. E. 772, 215 Ill. 520.

[1] **Ala.** Brand v. State, 69 So. 379, 13 Ala. App. 390; Donald v. State, 67 So. 624, 12 Ala. App. 61; Maxwell v. State, 65 So. 732, 11 Ala. App. 53; Birmingham Ry., Light & Power Co. v. Hunnicutt, 57 So. 262, 3 Ala. App. 448; Rickert v. Touart, 56 So. 708, 174 Ala. 107; Flowers v. State, 56 So. 36, 1 Ala. App. 262; Birmingham Ry., Light & Power Co. v. Wright, 44 So. 1037, 153 Ala. 99; Aaron v. State, 39 Ala. 684.

Cal. People v. Sanders, 46 P. 153, 114 Cal. 216.

D. C. Bradford v. National Ben. Ass'n, 26 App. D. C. 268.

Idaho. State v. Jones, 154 P. 378, 28 Idaho, 428.

Ill. Logg v. People, 92 Ill. 598; Johnson v. City of Chicago, 189 Ill. App. 32; Chicago Union Traction Co. v. Ertrachter, 130 Ill. App. 602, judgment affirmed 81 N. E. 816, 228 Ill. 114; Faulkner v. Birch, 120 Ill. App. 281; Strehmann v. City of Chicago, 93 Ill. App. 206.

Kan. Warren Mortg. Co. v. Schick, 107 P. 536, 82 Kan. 90.

Ky. Williams v. Commonwealth, 9 Bush, 274; Maden v. Commonwealth, 4 Ky. Law Rep. 45.

Mass. Commonwealth v. Gay, 153 Mass. 211, 26 N. E. 571.

Miss. Stringer v. State, 38 So. 97.

Mo. State v. Shaffer, 161 S. W. 805, 253 Mo. 320; Hatfield v. Swift, 161 S. W. 359, 174 Mo. App. 705; Disbrow v. People's Ice, Storage & Fuel Co., 119 S. W. 1007, 138 Mo. App. 56; State v. Williams, 136 Mo. 293, 38 S. W. 75; Meyer v. Pacific R. R., 40 Mo. 151.

Or. Kellogg v. Ford, 139 P. 751, 70 Or. 213.

S. C. Finch v. Atlantic & C. Air Line Ry., 69 S. E. 208, 87 S. C. 190.

Tex. Hahn v. State, 165 S. W. 218, 73 Tex. Cr. R. 409; Brewster v. State (Cr. App.) 165 S. W. 224; Smith v. State, 164 S. W. 825, 73 Tex. Cr. R. 129; Mims v. State, 153 S. W. 321, 68 Tex. Cr. R. 432; Moore v. State, 128 S. W. 1115, 59 Tex. Cr. R. 361; Hawkins v. State, 126 S. W. 268, 58 Tex. Cr. R. 407, 137 Am. St. Rep. 970; Beard v. State, 123 S. W. 147, 57 Tex. Cr. R. 323; Green v. State, 120 S. W. 1002, 56 Tex. Cr. R. 599; Cordes v. State, 112 S. W. 943, 54 Tex. Cr. R. 204; Rice v. State, 94 S. W. 1024, 49 Tex. Cr. R. 569; Howard v. State, 18 Tex. App. 348.

W. Va. Parfitt v. Sterling Veneer & Basket Co., 69 S. E. 985, 68 W. Va. 438.

Instructions objectionable within rule. An instruction that testatrix had previously executed similar wills and was then of sound mind, and that such fact did not necessarily establish her sanity when executing the will in question. In re Clark's Estate (Cal.) 181 P. 639. Where defendant charged with larceny in compelling the delivery to her of money alleged to have been stolen from her, proved declarations tending to show

is properly refused.[2] Instructions singling out certain facts bearing on an issue, and telling the jury that they may or should consider such facts in determining such issue,[3] although the jury

the absence of felonious intent on her part, an instruction that absence of felonious intent was a question for the jury, but that "her mere declaration was not conclusive evidence thereof," was erroneous as giving undue prominence to the particular evidence. State v. Brandau, 76 Mo. App. 305.

Instructions not improper within rule. It being in evidence that deceased was killed with a knife, an instruction that an intention to kill might be inferred from the "use of a knife capable of inflicting a mortal wound," with which four or five wounds were made, so that deceased died almost immediately, but that, if death had resulted from some other cause, "the inference of the intent to kill might well be different," does not single out the evidence nor give it too much emphasis. Evans v. State, 62 Ala. 6.

Stating effect of particular fact "independently of any other testimony." Instructions to the jury as to the effect of a particular fact in the case, "independently of any other testimony," and other suggestions as to the insufficiency of such fact for a particular purpose, without other evidence, are not to be regarded as erroneous, although there was other evidence on the point in question, where the court in other parts of the charge distinctly referred such evidence to the jury, and there was no request for further or more specific instructions, nor any suggestion that the case had been so presented as to lead the jury to overlook or disregard such evidence. Wass v. Atwater, 33 Minn. 83, 22 N. W. 8.

Effect of direction to consider all the evidence. The court, after directing the jury to consider all the evidence, does not err in singling out certain matters, and saying that these in themselves are insufficient to establish either claim of contestant.

In re Goldthorp's Estate, 88 N. W. 944, 115 Iowa, 430.

[2] **U. S.** Coffin v. United States, 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109; (C. C. A. Mass.) Boston Elevated Ry. Co. v. Teele, 248 F. 424, 160 C. C. A. 434; (C. C. A. Tenn.) Louisville & N. R. Co. v. Bell, 206 F. 395, 124 C. C. A. 277.

Ala. Montgomery Moore Mfg. Co. v. Leeth, 50 So. 210, 162 Ala. 246; Hays v. State, 46 So. 471, 155 Ala. 40; Parrish v. State, 36 So. 1012, 139 Ala. 16.

Ark. Holland Banking Co. v. Booth, 180 S. W. 978, 121 Ark. 171.

Cal. People v. Owens, 56 P. 251, 123 Cal. 482; People v. Reed, 52 P. 835, 120 Cal. xvii.

Ill. Eckels v. Muttschall, 82 N. E. 872, 230 Ill. 462; Healy v. Chicago City Ry. Co., 196 Ill. App. 1; Schoch v. Egan, 144 Ill. App. 214.

Md. United Rys & Electric Co. v. Corbin, 72 A. 606, 109 Md. 442.

Mass. Jacobsen v. Simons, 111 N. E. 46, 222 Mass. 449; Nicholson v. Feindel, 107 N. E. 353, 219 Mass. 490; Roach v. Hinchcliff, 101 N. E. 383, 214 Mass. 267; Morrin v. Manning, 91 N. E. 308, 205 Mass. 205; Old Colony Trust Co. v. Bailey, 88 N. E. 898, 202 Mass. 283.

Mo. Boyce v. Chicago & A. Ry. Co., 96 S. W. 670, 120 Mo. App. 168.

Tex. Wolf Cigar Stores Co. v. Kramer, 109 S. W. 990, 50 Tex. Civ. App. 411.

Utah. Condie v. Rio Grande Western Ry. Co., 97 P. 120, 34 Utah, 237.

Wis. Hackett v. Wisconsin Cent. Ry. Co., 124 N. W. 1018, 141 Wis. 464.

[3] **Ala.** Chappell v. State, 73 So. 134, 15 Ala. App. 227; Strother v. State, 72 So. 566, 15 Ala. App. 106; Ragsdale v. State, 67 So. 783, 12 Ala. App. 1; Sandlin v. Anders, 65 So. 376, 187 Ala. 473; Smith v. State, 62 So. 184, 182 Ala. 38; Powell v. State, 59 So. 530, 5 Ala. App. 75; Pope v. State, 53 So. 292, 168 Ala. 33; McDonald v. State, 51 So. 629, 165 Ala. 85; Mon-

are also told that they should consider such facts along with all the other evidence,[4] are erroneous, and are properly refused.

teith v. State, 49 So. 777, 161 Ala. 18; Davis v. State, 44 So. 561, 152 Ala. 25; Kirby v. State, 44 So. 38, 151 Ala. 66; Griffin v. State, 43 So. 197, 150 Ala. 49; Montgomery St. Ry. v. Rice, 38 So. 857, 142 Ala. 674, 144 Ala. 610; Southern Bell Telephone & Telegraph Co. v. Mayo, 33 So. 16, 134 Ala. 641; Postal Tel. Cable Co. v. Jones, 32 So. 500, 133 Ala. 217; Winter v. State, 31 So. 717, 132 Ala. 32; Gilmore v. State, 28 So. 595, 126 Ala. 20; Hicks v. State, 26 So. 337, 123 Ala. 15; Jefferson v. State, 110 Ala. 89, 20 So. 434; Williams v. State, 98 Ala. 52, 13 So. 333; Hussey v. State, 86 Ala. 34, 5 So. 484.

Ark. Gilchrist v. State, 140 S. W. 260, 100 Ark. 330.

Cal. In re Martin's Estate, 151 P. 138, 170 Cal. 657; People v. Loomis, 149 P. 581, 170 Cal. 347.

Ill. Coon v. People, 99 Ill. 368, 39 Am. Rep. 28; Illinois Cent. R. Co. v. Whiteaker, 122 Ill. App. 333.

Iowa. Swiney v. American Express Co., 115 N. W. 212, 144 Iowa, 342.

Ky. International Harvester Co. of America v. Commonwealth, 146 S. W. 12, 147 Ky. 795, judgment reversed 34 S. Ct. 853, 234 U. S. 216, 58 L. Ed. 1284; International Harvester Co. of America v. Commonwealth, 144 S. W. 1064, 147 Ky. 564; Id., 147 S. W. 1199, 148 Ky. 572, judgment reversed 34 S. Ct. 853, 234 U. S. 216, 58 L. Ed. 1284; Parker v. Commonwealth, 51 S. W. 573, 21 Ky. Law Rep. 400; Elswick v. Commonwealth, 13 Bush, 155.

Miss. Lucas v. State, 67 So. 851, 109 Miss. 82.

Mo. State v. Malloch, 190 S. W. 266, 269 Mo. 235.

Tex. Stewart v. State, 153 S. W. 1150, 69 Tex. Cr. R. 337; Parnell v. State, 103 S. W. 907, 51 Tex. Cr. R. 620; Dobbs v. State, 100 S. W. 946, 51 Tex. Cr. R. 113; Galveston, H. & S. A. Ry. Co. v. Kutac, 76 Tex. 473, 13 S. W. 327.

Instructions held improper within rule. An instruction, that if accused attempted to corrupt witnesses for the state, or to pay them to absent themselves, and thus deprive the state of their testimony, it was the jury's duty to consider such matters in determining defendant's guilt or innocence. State v. Tawney, 105 P. 218, 81 Kan. 162, 135 Am. St. Rep. 355. Instructions, in a murder trial that, in determining whether accused's flight from the scene of the homicide was from a sense of guilt, the jury should consider the fact, if it was a fact, together with all the evidence in the case, that accused surrendered himself to a deputy sheriff, and that the fact, if it was a fact, that the state failed to prove a motive on accused's part for the homicide, was a circumstance to which the jury might look in connection with all the evidence. Way v. State, 46 So. 273, 155 Ala. 52. In murder prosecution, defended on ground of temporary insanity, instruction that jury, in determining whether defendant was overcome by sudden passion upon seeing deceased, should consider, if it found such facts, that defendant on that day attended to business affairs rationally, and immediately before and after homicide was observed to be calm and unconcerned, was improper, giving undue prominence to particular facts. Stephens v. State,

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[4] **Ala.** Stewart v. State, 34 So. 818, 137 Ala. 33; Birmingham Southern R. Co. v. Cuzzart, 31 So. 979, 133 Ala. 262.

Cal. Still v. San Francisco & N. W. Ry. Co., 98 P. 672, 154 Cal. 559, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177.

Ill. Scott v. People, 141 Ill. 195, 30 N. E. 329; Wallace v. City of Farmington, 83 N. E. 180, 231 Ill. 232.

Ky. Stokes' Ex'r v. Shippen, 13 Bush, 180.

Mo. Landrum v. St. Louis & S. F. R. Co., 112 S. W. 1000, 132 Mo. App. 717.

Contra, Engvall v. Des Moines City Ry. Co., 121 N. W. 12, 145 Iowa, 560; Gordon v. Burris, 54 S. W. 546, 153 Mo. 223.

In a criminal case an instruction should not single out a part only of the facts testified to and make guilt dependent on them alone,[5] and it is not the duty of the court to point out isolated items of evidence, and instruct the jury that these several items do not authorize conviction.[6] Where a charge asked isolates certain enumerated facts or circumstances, and invokes instructions of the court on them as circumstances to be specially weighed in the case, the court, if it gives the charge, should accompany it with a fair and candid statement of any facts and circumstances pointing in an opposite direction.[7] The above rule has been applied to instructions which single out the proof of motive or absence of motive,[8] and to instructions singling out and giving undue prominence to evidence on the defense of alibi[9] and on the good character of the defendant.[10] Under this rule an instruction that the jury may, on the issue of the insanity of the accused, consider his

176 P. 579, 20 Ariz. 37. A charge, in a carpenter's action for personal injuries by the roof of a building on which he was working falling upon him, that the jury should look to plaintiff's evidence, in connection with the other evidence, that he thought it was dangerous to remain under the roof while unfastening the last joist, in order to determine whether plaintiff acted prudently in removing the fastenings while under the roof. Louisville & N. R. Co. v. Handley, 56 So. 539, 174 Ala. 593. An instruction that in determining whether a motorman used ordinary care they could take into consideration "the darkness of the night, the presence of weeds or grass, the speed of the car, the natural excitement under which an ordinary person would labor in coming suddenly upon a person in so great a peril." Rice v. Jefferson City Bridge & Transit Co. (Mo.) 216 S. W. 746. A charge, in prosecution for carnal abuse of a 16 year old girl, that, in passing on prosecutrix's age, the jury could consider "her size, development, and mature appearance," with other circumstances. Clark v. State, 205 S. W. 975, 135 Ark. 569.

[5] Godwin v. State, 73 Miss. 873, 19 So. 712.

[6] Gatlin v. State, 49 S. W. 87, 40 Tex. Cr. R. 116.

[7] Barber v. State, 43 So. 808, 151 Ala. 56; Durrett v. State, 62 Ala. 434.

[8] Scott v. State, 159 S. W. 1095, 109 Ark. 391.

[9] People v. Bolik, 89 N. E. 700, 241 Ill. 394.

[10] **Ala.** Pippin v. State, 73 So. 340, 197 Ala. 613; De Wyre v. State, 67 So. 577, 190 Ala. 1; Clayton v. State, 64 So. 76, 185 Ala. 13; Reid v. State, 61 So. 324, 181 Ala. 14; Robinson v. State, 58 So. 121, 4 Ala. App. 1; Collins v. State, 58 So. 80, 3 Ala. App. 64; Bell v. State, 54 So. 116, 170 Ala. 16; Dorsey v. State, 110 Ala. 38, 20 So. 450.

Ark. Fowler v. State, 197 S. W. 568, 130 Ark. 365.

Cal. People v. Piner, 105 P. 780, 11 Cal. App. 542.

Neb. Sweet v. State, 106 N. W. 81, 75 Neb. 263.

Ohio. State v. Hare, 100 N. E. 825, 87 Ohio St. 204.

Instructions improper within rule. An instruction, in a criminal case, that, if accused has proven a good character, the same may be sufficient to create a reasonable doubt of his guilt, though no such doubt would have existed but for the good character, is properly refused, because it gives too much prominence to a particular fact in evidence, and pretermits a consideration of that evidence in connection with all the evidence. Pate v. State, 43 So. 343, 150 Ala. 10.

general conduct, condition, appearance, and language is properly refused.[11] On the other hand, an instruction in a criminal case should not single out evidence of circumstances against the defendant, and give it a marked prominence by calling the attention of the jury thereto and directing them to consider it in determining the question of his guilt.[12] Thus an instruction in a homicide case admonishing the jury to reach a determination on the evidence, including the dying declaration of the deceased, is improper.[13]

It is error to single out and group certain parts of the evidence favorable to one party, to the disparagement or ignoring of other relevant and material facts favorable to his adversary,[14] and in a criminal prosecution it is error for the court to bring out the strong points of the evidence for the state, or to forcibly impress the jury with the circumstances tending to implicate the accused, without at the same time making a corresponding statement of the points insisted upon by the defendant and giving similar emphasis to the evidence on his behalf.[15] An instruction which lays greater stress upon the duty of the jury to convict if the facts constituting the offense charged are proven beyond a reasonable doubt than upon their duty to acquit if they are not so proven is erroneous.[16]

[11] State v. Driggers, 66 S. E. 1042, 84 S. C. 526, 137 Am. St. Rep. 855, 19 Ann. Cas. 1166.

[12] McAdory v. State, 62 Ala. 154; Holt v. State, 62 Ga. 314; State v. Rutherford, 53 S. W. 417, 152 Mo. 124.

[13] Jones v. Com., 216 S. W. 607, 186 Ky. 283.

[14] Griswold v. Horne, 165 P. 318, 19 Ariz. 56, L. R. A. 1918A, 862; Flowers v. Flowers, 92 Ga. 688, 18 S. E. 1006; McBride v. Des Moines City Ry. Co., 109 N. W. 618, 134 Iowa, 398; Demara v. Rhode Island Co. (R. I.) 103 A. 708; Coman v. Wunderlich, 99 N. W. 612, 122 Wis. 138.

Stating substance of testimony of witness. When the court attempts to state to the jury the substance of a witness' testimony, it should state that which supports the theories of both parties, and not give undue prominence to that favorable to one party only. Banner v. Schlessinger, 109 Mich. 262, 67 N. W. 116.

[15] **Ga.** Baldwin v. State, 47 S. E. 558, 120 Ga. 188; Brantley v. State, 41 S. E. 695, 115 Ga. 229.

Mich. People v. Clarke, 105 Mich. 169, 62 N. W. 1117; People v. Murray, 40 N. W. 29, 72 Mich. 10.

Miss. Prine v. State, 73 Miss. 838, 19 So. 711.

N. Y. People v. Becker, 104 N. E. 396, 210 N. Y. 274.

S. C. State v. Johnson, 67 S. E. 453, 85 S. C. 265.

Instructions not erroneous within rule. Where the court in its charge directed an acquittal if the jury believed accused's theory, a charge, following a statement of the respective theories of the state and accused, that the above were the insistences of the state and of accused, that the jury need not accept either or any part of them, but that if the state's theory was a reasonable deduction from all the evidence taken as a whole, and the same established the guilt of accused beyond a reasonable doubt, a verdict of guilty should be rendered, was not objectionable as giving undue prominence to the state's theory. Cooper v. State, 138 S. W. 826, 123 Tenn. 37.

[16] State v. Jones, 147 N. W. 822, 126 Minn. 45.

The principle which authorizes the court, in all proper cases, to advise the jury with reference to the relative value of certain species or classes of evidence does not authorize one item of the evidence to be singled out and made the subject of special commendation.[17] Thus an instruction that uncontradicted physical facts at variance with oral testimony are entitled to the greater consideration is erroneous.[18] So, where the written examination of a witness is put in evidence by the state, in a criminal prosecution, it gives too much prominence to it to charge that such evidence should be regarded as evidence in the case, and should be considered like the evidence of other witnesses testifying before the jury.[19] So an instruction is erroneous which unduly impresses the jury with the weight of dying declarations,[20] and it is improper to charge that the theory of the law in admitting dying declarations is that a person would be just as sure to make a truthful statement when he is in the article of death as if under the obligation of an oath.[21] It is only proper to single out the confession of defendant in the instructions for the purpose of submitting any issue as to whether warning was given to the defendant before he made his confession and as to whether it was voluntary.[22]

§ 433. Singling out testimony of particular witnesses

Singling out particular witnesses for purpose of instructing as to credibility, see ante, §§ 183, 184.
Singling out party for comment as to credibility as witness, see ante, § 165.
Singling out accused for comment as to credibility as witness, see ante, § 168.

As an offshoot of the above rule it can be laid down as a general principle that it is improper to give undue prominence to the testimony of particular witnesses, by singling them out for comment as to their testimony, or by authorizing the jury to reach certain conclusions if their testimony is believed,[23] and such

[17] In re Knox's Will, 98 N. W. 468, 123 Iowa, 24.

[18] Gharst v. St. Louis Transit Co., 91 S. W. 453, 115 Mo. App. 403.

[19] Wilson v. State (Tex. Cr. App.) 36 S. W. 587.

[20] Sewell v. State, 83 S. E. 934, 142 Ga. 798; Pyle v. State, 62 S. E. 540, 4 Ga. App. 811; State v. Summers, 92 S. E. 328, 173 N. C. 775.

[21] Darby v. State, 84 S. E. 724, 16 Ga. App. 171; Baker v. State, 77 S. E. 884, 12 Ga. App. 553.

[22] Jordan v. State, 101 S. W. 247, 51 Tex. Cr. R. 145.

[23] **Ala.** Olive v. State, 63 So. 36, 8 Ala. App. 178; Boswell v. State, 56 So. 21, 1 Ala. App. 178; Wingate v. State, 55 So. 953, 1 Ala. App. 40; Johnson v. State, 55 So. 321, 1 Ala. App. 102; Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130; Gibson v. J. Snow Hardware Co., 94 Ala. 346, 10 So. 304; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; East Tennessee V. & G. R. Co. v. Deaver, 79 Ala. 216; Adams v. Thornton, 78 Ala. 489, 56 Am. Rep. 49; Jordan v. Pickett, 78 Ala. 331.

Conn. Johnson County Sav. Bank v. Walker, 72 A. 579, 82 Conn. 24.

Ga. Black v. Thornton, 30 Ga. 361.

Ill. Grube v. Nichols, 36 Ill. 92; Tanner v. Clapp, 139 Ill. App. 353;

an instruction is properly refused.[24] To say that the case depends

Chicago B. & Q. R. Co. v. Kuster, 22 Ill. App. 188.

Iowa. State v. Asbury, 154 N. W. 915, 172 Iowa, 606, Ann. Cas. 1918A, 856.

Mich. J. Richardson & Co. v. Noble, 107 N. W. 274, 143 Mich. 546.

Minn. State v. Yates, 109 N. W. 1070, 99 Minn. 461.

Miss. Brown v. State, 32 Miss. 433.

Mo. Dungan v. St. Louis & S. F. R. Co., 165 S. W. 1116, 178 Mo. App. 164; State v. Chinn, 133 S. W. 1196, 153 Mo. App. 611: Spohn v. Missouri Pac. Ry. Co., 87 Mo. 74; Iron Mountain Bank of St. Louis v. Murdock, 62 Mo. 70; Meyer v. Pacific R. Co., 45 Mo. 137.

N. C. Wallace v. Norfolk Southern R. Co., 93 S. E. 731, 174 N. C. 171; State v. Horne, 88 S. E. 433, 171 N. C. 787; Starling v. Selma Cotton Mills, 88 S. E. 242, 171 N. C. 222; Bowman v. Fidelity Trust & Development Co., 87 S. E. 46, 170 N. C. 301; State v. Rogers, 93 N. C. 523.

Or. Church v. Melville, 17 Or. 413, 21 P. 387.

Tex. Farnandes v. Schiermann, 55 S. W. 378, 23 Tex. Civ. App. 343.

Wash. Sexton v. School Dist. No. 34 of Spokane County, 9 Wash. 5, 36 P. 1052.

W. Va. Storrs v. Feick, 24 W. Va. 606.

Instructions objectionable within rule. A charge that the evidence of the engineer should be fairly and impartially weighed by his intelligence, his manner, the consistency of his story, its probability or improbability, and all other tests which do or do not convince, and, if the jury believed that his evidence was true, they should find for defendant. Southern Ry. Co. v. Reaves, 29 So. 594, 129 Ala. 457. It is not error to refuse to instruct to acquit if there is a reasonable doubt whether accused was present at another place as testified by him, when the alleged offense was committed; such an instruction being calculated to give undue prominence to defendant's testimony. Lodge v. State, 26 So. 200, 122 Ala. 107.

Ignoring important facts in case. It is improper to put a particular witness into undue prominence by charging the jury to find according to their belief in his evidence, where such a charge tends to ignore important facts in the case. Chase v. Buhl Iron Works, 55 Mich. 139, 20 N. W. 827.

Instructions held not erroneous within rule. A contention that the court erred in giving undue prominence to the testimony of one particular witness was without merit, where his name was mentioned in the charge but once, and that on an issue which was answered as a proposition of law under an instruction of the court. Lance v. Butler, 47 S. E. 488, 135 N. C. 419. Where, in an action for ejection from a car, a number of disinterested witnesses gave contradictory testimony, and different from that of the passenger, as to what occurred between the passenger and the conductor, it was not error to instruct the jury to consider the probability or improbability of such testimony, as singling out this phase of the case to defendant's prejudice. Bowsher v.

[24] **Ala.** Davis v. State, 44 So. 545, 152 Ala. 82; Louisville & N. R. Co. v. Perkins, 39 So. 305, 144 Ala. 325; Wells v. State, 31 So. 572, 131 Ala. 48; Louisville & N. R. Co. v. Morgan, 22 So. 20, 114 Ala. 449.

Colo. City and County of Denver v. Monroe, 121 P. 684, 21 Colo. App. 312.

Ill. Donahue v. Egan, 85 Ill. App. 20; Johnston v. Hirschberg, 85 Ill. App. 47.

Ky. Paducah Water Supply Co. v. Paducah Lumber Co., 14 Ky. Law Rep. (abstract) 141.

Mich. Silverstone v. London Assur. Corporation, 142 N. W. 776, 176 Mich. 525; People v. Pope, 108 Mich. 361, 66 N. W. 213.

Miss. Mississippi Cent. R. Co. v. Hardy, 41 So. 505, 88 Miss. 732.

Neb. Souchek v. Karr, 120 N. W. 210, 83 Neb. 649.

N. C. Cogdell v. Southern Ry. Co., 40 S. E. 202, 129 N. C. 398; State v. Shields, 110 N. C. 497, 14 S. E. 779.

upon the truth or falsity of the evidence of a single witness, although he may have possessed extraordinary opportunities to know of the matter concerning which he testifies, is generally to give too much prominence to a part of the case only.[25] While, however, it is always advisable for the court to avoid the mention of witnesses by name, the circumstances may be such, in some instances, that such mention will not be prejudicial to the party complaining thereof.[26]

Chicago, B. & Q. R. Co., 84 N. W. 958, 113 Iowa, 13. Where, on the trial of two defendants, indicted for an affray, each gave testimony tending to excuse himself and incriminate the other, and the court charged the jury to acquit one of the defendants if they believed his version, and to convict both if they believed a third witness' version; but that, if all the evidence did not satisfy them that defendant fought willingly, they should acquit him, it was held not erroneous, as giving undue prominence to the testimony of one witness conflicting with others. State v. Weathers, 98 N. C. 685, 4 S. E. 512. Where expert witnesses for defendant railroad company testified that the speed at which a train was running was not equal to the rate prohibited by ordinance, which was contradicted by plaintiff's witnesses, who were his fellow passengers, and also engaged in the same business, and a general instruction stated, inter alia, that the jury, in determining the credibility of each witness, might take into consideration "his relationship to the parties in this suit," it was held that the instruction is not objectionable on the ground that it singles out and covertly attacks defendant's witnesses, who were its employés, since it applies as well to the possible relationship between plaintiff and his witnesses. Chicago & A. R. Co. v. Winters, 51 N. E. 901, 175 Ill. 293. In an action for personal injuries by a married woman, in which plaintiff's husband testified in her behalf, an instruction that a husband is a competent witness to testify in behalf of his wife, and that, if the testimony given by him appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, the jury have no right to disregard the testimony of such witness merely from the fact that he is related by marriage to the plaintiff, was not erroneous as tending to give undue emphasis to his testimony. North Chicago St. R. Co. v. Wellner, 69 N. E. 6, 206 Ill. 272.

Emphasizing testimony of accomplice. Where only one witness was an accomplice, an instruction that accused might be convicted on the uncorroborated testimony of an accomplice, and, if the jury believed that the testimony of the witness was true, they could act on it as true, and that the jury should act on the testimony of an accomplice with caution, etc., was not erroneous as attaching undue importance to the testimony of the accomplice. People v. Frankenberg, 86 N. E. 128, 236 Ill. 408. Where there is but one accomplice who testifies in a prosecution for larceny, an instruction that a conviction may be had upon the uncorroborated testimony of such accomplice (naming her) is not erroneous because it singles out the testimony of a particular witness. People v. Thompson, 113 N. E. 322, 274 Ill. 214. In prosecution for robbery, a charge on issue whether defendant was present, stating his denial and his reason for being at another place, and that it conflicted with the testimony of the accomplice, referring to defendant's interest and his relation to a "gang," with an argumentative statement as to the credit to be given to the accomplice's testimony, was prejudicial to defendant, as giving undue emphasis and credit to testimony of the accomplice. State v. Dallas, 176 N. W. 491, 145 Minn. 92.

[25] Taubert v. Taubert, 114 N. W. 763, 103 Minn. 247; Murphy v. Jones (Pa.) 6 A. 726.

[26] Dyas v. Southern Pac. Co., 73 P. 972, 140 Cal. 296; State v. McIver, 94

§ 434. Limitations of rule

The court may direct the attention of the jury to the real issues in the case,[27] or to certain features of the evidence, making no attempt to give particular prominence to any part,[28] and, as explained in a preceding section,[29] the court may tell the jury that they may consider certain matters in determining the credibility of witnesses.[30]

The mere fact that an instruction is based upon a hypothetical state of facts authorized by the evidence does not render it liable to the objection that it gives undue prominence to a part of the evidence,[31] and the rule that instructions must not give undue prominence to a particular theory is subject to the one that each party to a cause is entitled to instructions hypothetically outlining the evidence and state of the case upon which he relies for obtaining a verdict, and directing the jury to find for the party in whose favor they find the facts constituting either the cause of action or the defense.[32] Undue prominence is not given to the contentions of a party merely by stating them at greater length than those of his opponent,[33] and when the theory of each party, as well as the testimony in support of it, is fairly presented, one party cannot complain that the testimony of the other assumes more prominence in the charge, if this is due to the nature and quality of the testimony itself.[34]

The fact that an instruction gives special prominence to particular evidentiary facts is not cause for reversal, if the facts so emphasized are of controlling importance,[35] and the general rule

S. E. 682, 175 N. C. 761; Ward v. Brown, 44 S. E. 488, 53 W. Va. 227.

[27] Clark Pressed Brick Co. v. Ainsworth, 194 S. W. 852, 129 Ark. 583.

[28] State v. Stewart, 212 S. W. 853, 278 Mo. 177; Secard v. Rhinelander Lighting Co., 133 N. W. 45, 147 Wis. 614.

[29] Ante, §§ 153–156.

[30] Hale v. State, 26 So. 236, 122 Ala. 85.

[31] Crowell v. People, 60 N. E. 872, 190 Ill. 508; Black v. Commonwealth, 156 S. W. 1043, 154 Ky. 144; Central Pass. Ry. Co. v. Chatterson, 14 Ky. Law Rep. 663; Fletcher v. Louisville & N. R. Co., 49 S. W. 739, 102 Tenn. 1.

[32] **Ill.** Chicago & N. W. Ry. Co. v. Snyder, 117 Ill. 376, 7 N. E. 604; Raxworthy v. Helsen, 191 Ill. App. 457; Chicago City Ry. Co. v. Math, 114 Ill. App. 350.

Ky. Louisville & N. R. Co. v. King's Adm'r, 115 S. W. 196, 131 Ky. 347; Goldstein's Adm'r v. Louisville Ry. Co., 115 S. W. 194.

Mo. Gardner v. Metropolitan St. Ry. Co., 152 S. W. 98, 167 Mo. App. 605.

[33] Smith v. State, 101 S. E. 764, 24 Ga. App. 654; Phinizy v. Bush, 70 S. E. 243, 135 Ga. 678; Millen & S. W. R. Co. v. Allen, 61 S. E. 541, 130 Ga. 656; Macon, D. & S. R. Co. v. Joyner, 59 S. E. 902, 129 Ga. 683.

[34] Irvin v. Kutruff, 152 Pa. 609, 25 A. 796, 31 Wkly. Notes Cas. 485.

[35] Boswell v. Thompson, 49 So. 73, 160 Ala. 306; Harding v. St. Louis Nat. Stockyards, 149 Ill. App. 370, judgment affirmed 90 N. E. 205, 242 Ill. 444; State v. May, 57 S. E. 366, 62 W. Va. 129.

does not prevent the court, in charging on a particular issue, from singling out a particular fact which is the only fact adduced upon such issue,[36] nor does it prevent the court from submitting to the jury whether certain material facts may be inferred from testimony given,[37] nor from charging singly with respect to a particular substantive defense,[38] nor from instructing on the legal effect of evidence offered in bar of a defense,[39] nor from singling out evidence for the purpose of limiting its effect.[40]

Since the charge must cover every phase of the case, if one of these phases depends on certain particular facts or group of facts, these may be alluded to, in order to convey to the jury a practical idea of the law of the case.[41] The court may tell the jury not to accord to certain opinion evidence undue weight, as being that of experts or of persons especially qualified to testify, but that it is entitled to such consideration as is due the testimony of competent witnesses in ordinary cases,[42] and in some jurisdictions an instruction which calls attention to particular facts, ignoring others, is not therefore improper, if it does not have the effect of limiting the evidence to be considered in the finding of any fact in the case.[43]

A charge stating a correct proposition of law with reference to the presumption arising from certain facts, although such facts are undisputed, is not objectionable as giving undue prominence to such presumption.[44] Where there is circumstantial evidence as well as direct evidence in a criminal prosecution, an instruction that the jury can convict on circumstantial evidence alone is not erroneous, as singling out particular evidence.[45]

A supplemental instruction, covering an issue concerning which the main charge is silent,[46] or a new instruction on a particular issue,

[36] Pelly v. Denison & S. Ry. Co. (Tex. Civ. App.) 78 S. W. 542.

[37] Marion v. State, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; Scheuer v. Manitowoc & Northern Traction Co., 159 N. W. 901, 164 Wis. 333.

[38] Sheridan v. Chicago & Oak Park Elevated R. Co., 153 Ill. App. 70.

[39] Stewart v. Sparkman, 75 Mo. App. 106.

[40] **Ala.** Jackson v. State, 57 So. 594, 5 Ala. App. 306; Hale v. State, 26 So. 236, 122 Ala. 85; Smith v. State, 7 So. 52, 88 Ala. 73.

Cal. People v. Neary, 104 Cal. 373, 37 P. 943.

Ill. People v. Casey, 83 N. E. 278, 231 Ill. 261.

Neb. Thomas v. Shea, 134 N. W. 933, 90 Neb. 823, Ann. Cas. 1913B, 695.

[41] Harris v. State, 92 S. E. 224, 19 Ga. App. 741; State v. Irvine, 52 So. 567, 126 La. 434.

[42] Oldfather v. Ericsson, 112 N. W. 356, 79 Neb. 1.

[43] State v. Williams, 92 N. W. 652, 118 Iowa, 494; State v. Watson, 81 Iowa, 380, 46 N. W. 868.

[44] Smith v. State, 124 S. W. 679, 57 Tex. Cr. R. 585.

[45] People v. Fox, 110 N. E. 26, 269 Ill. 300.

[46] Missouri, K. & T. Ry. Co. of Texas v. Coffey (Tex. Civ. App.) 68 S. W. 721.

given at the request of the jury,[47] does not make the issue so covered unduly prominent.

The argument of counsel may be such as to warrant the court in emphasizing that portion of its instructions, showing the fallacy and impropriety of such argument.[48] Allusion to a particular witness may be rendered proper by the character of the contentions of counsel with respect to his testimony,[49] and it may be proper to refer to the testimony of a particular witness for the purpose of identifying a certain feature of the evidence.[50]

Where there is no material conflict in the testimony, and the testimony of the defendant presents his case in the most favorable light to himself, the court may properly single out his testimony and charge the jury, in a proper case, that if they believe the statement of the defendant the plaintiff is entitled to a verdict;[51] and it is not improper, where plaintiff, to avoid a continuance, stipulates that certain facts are true, to charge that the jury should take such facts as true.[52]

Summarizing the matter contained in voluminous and complicated records introduced in evidence does not give undue weight to such evidence.[53]

Instructions erroneous as unduly emphasizing certain matters will not work a reversal, where the complaining party suffers no harm therefrom.[54]

§ 435. Effect of repetition

In submitting issues of fact to the jury, the trial judge may state the rules of law appurtenant to the case both in the abstract and in the concrete, without giving undue prominence to the matter in question.[55] However, the repetition of an instruction involving a particular point, while not necessarily objectionable as giving undue prominence to it,[56] may be so, as shown in another

[47] Lumsden v. Chicago, R. I. & T. Ry. Co., 73 S. W. 428, 31 Tex. Civ. App. 604.

[48] Benjamin v. Walton, 183 P. 529, 181 Cal. 115; Neff v. City of Cameron, 111 S. W. 1139, 213 Mo. 350, 18 L. R. A. (N. S.) 320, 127 Am. St. Rep. 606.

[49] Walker v. State, 73 S. E. 368, 137 Ga. 398.

[50] Rollins v. Schawacker, 153 Mo. App. 284, 133 S. W. 409.

[51] White v. Barnes, 112 N. C. 323, 16 S. E. 922.

[52] Galveston, H. & S. A. Ry. Co. v. Lynes (Tex. Civ. App.) 65 S. W. 1119.

[53] Hubert v. New York, N. H. & H. R. Co., 96 A. 967, 90 Conn. 261.

[54] Whatley v. State, 89 So. 1014, 144 Ala. 68; Jacobi v. State, 32 So. 158, 133 Ala. 1; Auto Light & Mfg. Co. v. 35% Automobile Supply Co., 189 Ill. App. 543; Kankakee & S. R. Co. v. Horan, 23 Ill. App. 259; State v. Hibler, 51 S. W. 85, 149 Mo. 478.

[55] San Antonio & A. P. Ry. Co. v. Martin, 108 S. W. 981, 49 Tex. Civ. App. 197.

[56] Ulloa v. State, 163 S. W. 732, 73 Tex. Cr. R. 41.

place,[57] and the court should be on its guard against emphasizing particular matters by frequently recurring to them in the charge.[58]

§ 436. Duty to avoid distinguishing certain matters by arbitrary or mechanical devices

The practice of underscoring particular words in an instruction is objectionable, as giving undue weight to them.[59] There is no merit, however, in an objection that part of an instruction is written with a pen, while the remainder is typewritten,[60] or that certain instructions are printed upon a regular printing press, while others are typewritten,[61] and it does not constitute reversible error to emphasize an instruction by placing it at the head of the court's charge.[62] It is not improper for the court to mark instructions given on its own initiative, so as to indicate that such is the case.[63]

K. Time for Giving Instructions

Right or duty of court to give instructions after submission of cause to jury, see post, § 444.
Proper time for making special requests for instructions, see post, §§ 462–466.

§ 437. Limitation of time by statute or rule of court

In the absence of any statutory provision on the subject, the court may fix the time for giving instructions by rule,[64] but fre-

[57] Ante, § 416.

[58] **Ark.** Furlow v. United Oil Mills, 149 S. W. 69, 104 Ark. 489, 45 L. R. A. (N. S.) 372.

Ill. Gehrig v. Chicago & A. R. Co., 201 Ill. App. 287; Richter v. Village of Maywood, 191 Ill. App. 475; Nelson v. Chicago City Ry. Co., 163 Ill. App. 98.

Tex. Rodgers v. Texas & P. Ry. Co. (Civ. App.) 172 S. W. 1117; Ft. Worth & R. G. Ry. Co. v. Crannell (Civ. App.) 149 S. W. 351; McCullough Hardware Co. v. Burdett (Civ. App.) 142 S. W. 612; Continental Oil & Cotton Co. v. Thompson (Civ. App.) 136 S. W. 1178; Waggoner v. Sneed, 118 S. W. 547, 53 Tex. Civ. App. 278; Malone v. Texas & P. Ry. Co., 109 S. W. 430, 49 Tex. Cr. R. 398; Herring v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 108 S. W. 977, writ of error dismissed Galveston, H. & S. A. R. Co. v. Herring, 113 S. W. 521, 102 Tex. 100; Ætna Ins. Co. of Hartford, Conn., v. Brannon (Civ. App.) 101 S. W. 1020; Adams v. Weakley, 80 S. W. 411, 35 Tex. Civ. App. 371; Lee v. State, 72 S. W. 195, 44 Tex. Cr. R. 460; Irvine v. State, 20 Tex. App. 12.

[59] State v. Cater, 69 N. W. 880, 100 Iowa, 501.

Printing abstract propositions in larger type. The fact that certain instructions on abstract propositions of law, given for the people in a prosecution for robbery, are printed in larger type than the remaining portion of the charge, is not reversible error. Featherstone v. People, 62 N. E. 684, 194 Ill. 325.

[60] Kinyon v. Chicago & N. W. Ry. Co., 92 N. W. 40, 118 Iowa, 349, 96 Am. St. Rep. 382; State v. Kelly, 73 Mo. 608.

[61] People v. Dressen, 158 Ill. App. 139.

[62] State v. Clark, 163 N. W. 250, 180 Iowa, 477.

[63] Bracey v. McGary, 106 A. 622, 134 Md. 267.

[64] State v. Cobbs, 40 W. Va. 718, 22 S. E. 310.

Discretion of court. The order in which requested instructions shall be given, whether before or after the

quently such time is regulated by statute. In one jurisdiction where the court, in civil cases, is required to give special requests before the arguments of counsel, and its general charge after such arguments, it is held that the court has no discretion to give general instructions after the evidence is closed,[65] and that the failure to give special requests at the time specified by the statute is not cured by giving them in the general charge after the arguments of counsel,[66] and that if a request made before argument correctly states the law and is pertinent to one or more of the issues in the case, and the same subject has not been covered by other charges given before argument, it will be error to refuse such request before argument, although the language of the request is not exactly what the court would have selected.[67] In this jurisdiction the rule in criminal cases is that the court is authorized, but not required, at the conclusion of the evidence and upon the request of the state or the accused, to charge the jury before argument upon the points of law requested and pertinent to the case.[68]

While the court has the right to reserve its decision as to what instructions shall be given to the jury until the evidence is all in,[69] it is not error for the trial judge, in the absence of any regulation to the contrary, to instruct the jury, before any evidence is introduced, as to their duties.[70] Under the regulations existing in some of the states, the instructions of the court are required to be given before the arguments of counsel or before their conclusion.[71]

§ 438. Mandatory character of such regulations

In one state a statutory provision requiring the court to instruct the jury before argument is deemed to be mandatory,[72] except in a prosecution for a misdemeanor.[73] As a general rule, however, regulations as to the time of giving instructions will not prevent the court from giving additional instructions in open

general charge of the court, or instructions given at the request of the opposite party, is a matter within the discretion of the trial court. Knight v. State, 32 So. 110, 44 Fla. 94.

[65] Cleveland & E. Electric R. Co. v. Hawkins, 60 N. E. 558, 64 Ohio St. 391.

[66] Root v. Incorporated Village of Monroeville, 16 Ohio Cir. Ct. R. 617, 4 O. C. D. 53.

[67] Chesrown v. Bevier (Ohio) 128 N. E. 94.

[68] Wertenberger v. State, 124 N. E. 243, 99 Ohio St. 353.

[69] People v. McCallam, 103 N. Y. 587, 9 N. E. 502.

[70] State v. McGee, 33 S. E. 353, 55 S. C. 247, 74 Am. St. Rep. 741; Ryan v. State, 83 Wis. 486, 53 N. W. 836.

[71] Foster v. Turner, 31 Kan. 58, 1 P. 145.

[72] International & G. N. Ry. Co. v. Parke (Tex. Civ. App.) 169 S. W. 397.

[73] Robison v. State, 179 S. W. 1157, 77 Tex. Cr. R. 556.

court after the cause has been fully argued, and before the jury retire or before the rendition of their verdict, where the demands of justice require them.[74] Under this principle additional instructions may be given after the arguments of counsel for the purpose of correcting or qualifying any statement of counsel which is liable to mislead the jury[75] or for the purpose of curing misconduct therein,[76] and the action of the court in directing the jury to return an answer to a special issue does not violate a requirement with respect to giving instructions before the arguments of counsel.[77]

The giving of an instruction at an improper time will not work a reversal, if it cannot be harmful,[78] and delay of the court until several days after the case is submitted to the jury in telling them that a verdict may be returned by a less number than twelve is not prejudicial.[79]

L. Length and Number of Instructions

§ 439. Rule against multiplying instructions

Instructions should not be unnecessarily voluminous,[80] but should be clear and brief, in order that the jury may readily understand them.[81] The practice of requesting an unnecessarily

[74] **Ark.** Slim and Shorty v. State, 186 S. W. 308, 123 Ark. 583.

Ga. Perdue v. State, 54 S. E. 820, 126 Ga. 112.

Ky. Paducah Traction Co. v. Sine, 111 S. W. 356, 33 Ky. Law Rep. 792.

Mo. City of Charleston v. Coker, 184 S. W. 1181, 195 Mo. App. 159; Joplin Waterworks Co. v. City of Joplin, 76 S. W. 960, 177 Mo. 496; Boggess v. Metropolitan St. Ry. Co., 118 Mo. 328, 23 S. W. 159, 24 S. W. 210; State v. Bickel, 7 Mo. App. 572.

Okl. Rhea v. Territory, 105 P. 314, 3 Okl. Cr. 230.

See Wood v. State, 64 Miss. 761, 2 So. 247.

Instructions requested during closing argument. Where certain instructions requested by the state during defendant's closing argument were not submitted to defendant's attorneys, and they were given no opportunity either to refer or reply to them, it was error for the court to give them. Boykin v. State, 38 So. 725, 86 Miss. 481.

[75] Kellogg v. Lewis, 28 Kan. 535; Weant v. Southern Trust & Deposit Co., 77 A. 289, 112 Md. 463.

[76] Yore v. Mueller Coal, Heavy Hauling & Transfer Co., 49 S. W. 855, 147 Mo. 679.

[77] Richardson v. Wilson (Tex. Civ. App.) 178 S. W. 566.

[78] Cluskey v. City of St. Louis, 50 Mo. 89.

[79] Ashland Coal, Iron & Railway Co. v. Wallace's Adm'r, 42 S. W. 744, 101 Ky. 626, 19 Ky. Law Rep. 849.

[80] **Cal.** In re Keithley's Estate, 66 P. 5, 134 Cal. 9.

Colo. Rio Grande Southern R. Co. v. Campbell, 96 P. 986, 44 Colo. 1.

Ill. Fisher v. Stevens, 16 Ill. 397; Casey v. J. W. Reedy Elevator Mfg. Co., 166 Ill. App. 595.

Mo. Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149.

Va. Southern Ry. Co. v. Hansbrough's Adm'x, 60 S. E. 58, 107 Va. 733.

[81] Moore v. Damron, 164 S. W. 103, 157 Ky. 799.

large number of instructions is condemned by the courts on the grounds that they are calculated to confuse the jury, that they cannot be critically examined by the court, and that they afford greater opportunities for error,[82] and on the further ground that the jury is liable to obtain the impression that the court is instructing strongly in favor of the party at whose instance such instructions are given,[83] and it is not error for the court, so long as it does not act arbitrarily,[84] to place a reasonable limit upon the number of instructions which the trial judge will consider in behalf of either party.[85]

[82] **Fla.** Florida East Coast Ry. Co. v. Knowles, 67 So. 122, 68 Fla. 400; Atlantic Coast Line R. Co. v. Whitney, 61 So. 179, 65 Fla. 72; Gracy v. Atlantic Coast Line R. Co., 42 So. 903, 53 Fla. 350.

Ill. People v. Popovich, 121 N. E. 729, 286 Ill. 405; Lichtenstein v. L. Fish Furniture Co., 111 N. E. 729, 272 Ill. 191, Ann. Cas. 1918A, 1087; People v. Hotz, 103 N. E. 1007, 261 Ill. 239; People v. Warfield, 103 N. E. 979, 261 Ill. 293, reversing judgment 172 Ill. App. 1; City of Salem v. Webster, 61 N. E. 323, 192 Ill. 369; Chatelle v. Illinois Cent. R. Co., 210 Ill. App. 475; Lovas v. Independent Breweries Co., 199 Ill. App. 60; Thompson v. Sprague, 197 Ill. App. 197; Nix v. Brunswick-Balke-Collender Co., 191 Ill. App. 503; Duggan v. Wells Bros. Co., 191 Ill. App. 499; La Salle County Carbon Coal Co. v. Eastman, 99 Ill. App. 495.

Mich. Brown v. McCord & Bradfield Furniture Co., 32 N. W. 441, 65 Mich. 360; Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am. Rep. 558.

Mo. Friend v. Jones (App.) 185 S. W. 1159; Barrie v. St. Louis Transit Co., 96 S. W. 233, 119 Mo. App. 38; Crawshaw v. Sumner, 56 Mo. 517.

R. I. Faccenda v. Rhode Island Co., 110 A. 601.

W. Va. McCray v. Town of Fairmont, 33 S. E. 245, 46 W. Va. 442.

Duty of appellate court. It is not reasonable to require a critical examination of many requested instructions, and neither under such circumstances should an appellate court examine critically those refused in order to discover one that might have been appropriately given. If the case were fairly submitted under the instructions given, nothing more should be required. Bergeman v. Indianapolis & St. L. R. Co., 104 Mo. 77, 15 S. W. 992.

[83] Bartholomew v. Illinois Valley Ry. Co., 154 Ill. App. 512; Mutual Benefit Life Ins. Co. v. French, 2 Cin. R. 321, 13 Ohio Dec. 927.

[84] **Ill.** Chicago Union Traction Co. v. Hanthorn, 71 N. E. 1022, 211 Ill. 367; Chicago City Ry. Co. v. O'Donnell, 70 N. E. 294, 208 Ill. 267, rehearing denied 70 N. E. 477, 208 Ill. 267, reversing judgment 108 Ill. App. 385; Kravitz v. Chicago City Ry. Co., 210 Ill. App. 287; Daily v. Smith-Hippen Co., 111 Ill. App. 319; The Fair v. Hoffmann, 101 Ill. App. 500, judgment affirmed 70 N. E. 622, 209 Ill. 330; Chicago Union Traction Co. v. Ludlow, 108 Ill. App. 357; Cobb Chocolate Co. v. Knudson, 107 Ill. App. 668, judgment affirmed 69 N. E. 816, 207 Ill. 452; Chicago Union Traction Co. v. Mommsen, 107 Ill. App. 353.

Unreasonable limit. Where defendant at the proper time requested 40 instructions as to the law, it was error for the court to arbitrarily refuse to examine more than 20 instructions and decide whether they contained propositions of law proper to be submitted to the jury. Crane Co. v. Hogan, 81 N. E. 1032, 228 Ill. 338.

[85] Chicago & A. R. Co. v. Kelly, 25 Ill. App. 17, affirmed 127 Ill. 637, 21 N. E. 203; Yazoo & M. V. R. Co. v. Dees, 83 So. 613, 121 Miss. 439; O'Neil v. Dry Dock, E. B. & B. R. Co., 129 N. Y. 125, 29 N. E. 84, 26

§ 440. Effect of length or brevity of instructions

The number of instructions requested may be such that it will be proper for the court on that ground alone to refuse all of them,[86] and an instruction which is of such inordinate length as to confuse the jury will be ground for reversal.[87] However, neither the length nor the brevity of instructions is necessarily prejudicial to a party.[88]

The fact that a charge is somewhat brief and without amplification is not in itself a ground for complaint,[89] and, on the other hand, the mere fact that a charge is rather lengthy, or might have been somewhat shorter and more compact, does not make it erroneous,[90] where the court cannot say that a fairly intelligent jury would be likely to mistake the real issues submitted,[91] and a charge composed of a large number of instructions, which are short and clear and of a character to enlighten the jury, is preferable to a charge composed of a few that are long, diffuse, and complicated.[92]

Am. St. Rep. 512, distinguishing Chapman v. McCormick, 86 N. Y. 479, and affirming O'Neil v. Dry Dock, E. B. & B. R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. 84; Craddock Lumber Co. v. Jenkins, 97 S. E. 817, 124 Va. 167. See Marquez v. Koch, 161 S. W. 648, 176 Mo. App. 143.

[86] **U. S.** MacFadden v. United States, 165 F. 51, 91 C. C. A. 89, certiorari denied 29 S. Ct. 693, 214 U. S. 511, 53 L. Ed. 1062.

D. C. Ryan v. Washington & G. R. Co., 8 App. D. C. 542.

Ill. Canon v. Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; Chicago City Ry. Co. v. Sandusky, 99 Ill. App. 164, judgment affirmed 64 N. E. 990, 198 Ill. 400; Chicago Athletic Ass'n v. Eddy Electric Mfg. Co., 77 Ill. App. 204.

Md. Maryland Steel Co. v. Engleman, 61 A. 314, 101 Md. 661.

Mo. Cutts v. Davison (App.) 184 S. W. 921; Castle v. Wilson (App.) 183 S. W. 1106; Doan v. St. Louis, K. & N. W. Ry. Co., 43 Mo. App. 450; Flynn v. St. Louis & S. F. Ry. Co., 43 Mo. App. 424; Norton v. St. Louis & H. Ry. Co., 40 Mo. App. 642; McAllister v. Barnes, 35 Mo. App. 668; Kinney v. City of Springfield, 35 Mo. App. 97; City of Hannibal v. Richards, 35 Mo. App. 15; Desberger v. Harrington, 28 Mo. App. 632.

Contra, Andrews v. Runyon, 65 Cal. 629, 4 P. 669; McCaleb v. Smith, 22 Iowa, 242.

[87] Bartz v. Chicago City Ry. Co., 116 Ill. App. 554; Sidway v. Missouri Land & Live Stock Co., 63 S. W. 705, 163 Mo. 342; Hanson v. Kent & Purdy Paint Co., 129 P. 7, 30 Okl. 583.

[88] Graham's Adm'r v. Illinois Cent. R. Co., 215 S. W. 60, 185 Ky. 370; State v. Steele, 126 S. W. 406, 226 Mo. 583; Mosso v. E. H. Stanton Co., 148 P. 594, 85 Wash. 499.

[89] Jones v. Lanham, 93 S. E. 399, 147 Ga. 241.

[90] **Iowa.** Smith v. Sioux City, 93 N. W. 81, 119 Iowa, 50.

Kan. Park View Hospital Co. v. Randolph Lodge, No. 216, I. O. O. F., 162 P. 302, 99 Kan. 488.

Mo. Laird v. Keithley, 201 S. W. 1138; Naylor v. Chinn, 82 Mo. App. 160.

Neb. Coffey v. Omaha & C. B. St. Ry. Co., 112 N. W. 589, 79 Neb. 286.

Wash. Rust v. Washington Tool & Hardware Co., 172 P. 846, 101 Wash. 552.

[91] Alaska S. S. Co. v. Pacific Coast Gypsum Co., 138 P. 875, 78 Wash. 247.

[92] Chicago City Ry. Co. v. Ahler, 107 Ill. App. 397.

M. Necessity of Written Instructions

Necessity that requests for instructions be in writing, see post, §§ 485, 486.

1. *Rule in Absence of Statutory Regulation*

§ 441. Instructions may be oral

In the absence of any statutory provisions to the contrary, it is proper for the court to charge the jury orally,[93] although it is considered to be the better practice to reduce instructions to writing,[94] particularly in criminal cases.[95] Where it is within the discretion of the court to give oral instructions, they may be partly oral and partly in writing.[96]

§ 442. Right or duty of party desiring to except to instructions

Where the court exercises its power to give oral instructions, it is the right,[97] or duty, of one who desires to except to an instruction to have it reduced to writing.[98]

2. *Rule under Statutes*

§ 443. In general

In the majority of the states legislation has been enacted which has modified or taken away altogether the common-law power of the court to give oral instructions, both in civil[99] and in criminal cases.[1] In some jurisdictions such statutes have only had

[93] Rosenkovitz v. United Rys. & Electric Co. of Baltimore City, 70 A. 108, 108 Md. 306; Hussey v. Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772; Marden v. Wheelock, 1 Mont. 49; Newton v. Consolidated Const. Co., 150 N. W. 348, 184 Mich. 63; Sheahan v. Barry, 27 Mich. 217.

[94] Mutual Life Ins. Co. of Baltimore v. Rain, 70 A. 87, 108 Md. 353.

[95] Munson v. State, 213 S. W. 916, 141 Tenn. 522.

[96] Warren Bros. Co. v. Wright (C. C. A. W. Va.) 239 F. 71, 152 C. C. A. 121.

[97] Smith v. Crichton, 33 Md. 103.

[98] Keithler v. State, 10 Smedes & M. (Miss.) 192.

[99] **Colo.** Lee v. Stahl, 9 Colo. 208, 11 P. 77; Montellius v. Atherton, 6 Colo. 224.

Fla. Southern Exp. Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Doggett v. Jordan, 2 Fla. 541.

Ga. Bowden v. Achor, 95 Ga. 243, 22 S. E. 254.

Ill. Daily v. Boudreau, 83 N. E. 218, 231 Ill. 228; Hughes v. Eldorado Coal & Mining Co., 197 Ill. App. 259; Elgin City Banking Co. v. Chicago, M. & St. P. Ry. Co., 160 Ill. App. 364; Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill. App. 322.

Ind. Molt v. Hoover, 82 N. E. 535, 40 Ind. App. 552.

Iowa. Parris v. State, 2 G. Greene, 449.

Mo. Belk v. Stewart, 142 S. W. 485, 160 Mo. App. 706; Peck v. Springfield Traction Co., 110 S. W. 659, 131 Mo. App. 134.

Neb. Hartwig v. Gordon, 37 Neb. 657, 56 N. W. 324.

[1] **Ala.** Richardson v. State, 75 So. 629, 16 Ala. App. 81.

Fla. McKinney v. State, 76 So. 333, 74 Fla. 25.

the effect of requiring requested instructions to be reduced to writing,[2] but, under many of these statutes, a request for written instructions or an objection to oral instructions by a party will make it error for the court to charge orally,[3] and under other statutes the giving of oral instructions is authorized only when written instructions are expressly waived by the parties,[4] and it is a general rule under such statutes, that the giving of oral instructions

Iowa. State v. Birmingham, 74 Iowa, 407, 38 N. W. 121.

Kan. State v. Huber, 8 Kan. 447.

Ky. Ferguson v. Commonwealth, 132 S. W. 1030, 141 Ky. 457; Coppage v. Commonwealth, 3 Bush, 532.

Mont. State v. Tudor, 131 P. 632, 47 Mont. 185.

N. M. Leonardo v. Territory, 1 N. M. 291.

Okl. Rea v. State, 105 P. 386, 3 Okl. Cr. 281, rehearing denied 106 P. 982, 3 Okl. Cr. 281.

Tenn. Huddleston v. State, 1 Baxt, 109.

Tex. Coley v. State, 150 S. W. 789, 68 Tex. Cr. R. 14; Winfrey v. State, 56 S. W. 919, 41 Tex. Cr. R. 538.

Wis. Penberthy v. Lee, 51 Wis. 261, 8 N. W. 116.

[2] Baer v. Rooks (C. C. A. Ind. T.) 50 Fed. 898, 2 C. C. A. 76; Gulf, C. & S. F. R. Co. v. Childs, 49 Fed. 358, 1 C. C. A. 297; Gulf, C. & S. F. R. Co. v. Campbell, 49 Fed. 354, 1 C. C. A. 293.

[3] **Colo.** Tyler v. McKenzie, 95 P. 943, 43 Colo. 233.

Conn. Allen v. Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Ga. Forrester v. Cocke, 65 S. E. 1063, 6 Ga. App. 829; Homer v. State, 65 S. E. 701, 6 Ga. App. 667; Strickland v. State, 65 S. E. 300, 6 Ga. App. 536; Central of Georgia Ry. Co. v. Perkerson, 41 S. E. 1018, 115 Ga. 547.

Ill. Concord Apartment House Co. v. Alaska Refrigerator Co., 78 Ill. App. 682; Harvey v. Keegan, 78 Ill. App. 475.

Ind. Stephenson v. State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216; Shafer v. Stinson, 76 Ind. 374; Davis v. Foster, 68 Ind. 238.

Iowa. Head v. Langworthy, 15 Iowa, 235; Stratton v. Paul, 10 Iowa, 139.

Kan. Scruton v. Hall, 50 P. 964, 6 Kan. App. 714; Jenkins v. Levis, 23 Kan. 255.

Ky. Traders' Deposit Bank v. Henry, 49 S. W. 536, 20 Ky. Law Rep. 1506, 105 Ky. 707; Louisville & N. R. Co. v. Banks, 33 S. W. 627.

La. Kellar v. Belleaudeau, 5 La. Ann. 609.

N. C. Sawyer v. Roanoke R. & Lumber Co., 55 S. E. 84, 142 N. C. 162; Jenkins v. Wilmington & W. R. Co., 110 N. C. 438, 15 S. E. 193; Drake v. Connelly, 107 N. C. 463, 12 S. E. 251.

Ohio. Householder v. Granby, 40 Ohio St. 430; Hardy v. Turney, 9 Ohio St. 400.

Okl. Boggs v. United States, 65 P. 927, 10 Okl. 424, 11 Okl. 139; Id., 63 P. 969, 10 Okl. 424.

Tex. Sharman v. Newsome & Johnston (Civ. App.) 101 S. W. 1020.

Wash. McIntosh v. Sawmill Phœnix, 94 P. 930, 49 Wash. 152.

In Texas, under an earlier statute than the present one, the requirement of written instructions was held to be merely directory, and the omission to put a charge in writing was no ground for a reversal of judgment. Reid v. Reid, 11 Tex. 585; Boone v. Thompson, 17 Tex. 605; Toby v. Heidenheimer, 1 White & W. Civ. Cas. Ct. App. § 795; Gulf, C. & S. F. Ry. Co. v. Holt, Id. § 835.

[4] Forszen v. Hurd, 126 N. W. 224, 20 N. D. 42; Gordon Jones Const. Co. v. Lopez (Tex. Civ. App.) 172 S. W. 987; Dalton v. Dalton (Tex. Civ. App.) 143 S. W. 241; Gonzales v. State, 110 S. W. 740, 53 Tex. Cr. R. 430; Schwartzlose v. Mehlitz (Tex. Civ. App.) 81 S. W. 68.

in a criminal case without the consent of the defendant is error;[5] such rule applying even in a prosecution for a misdemeanor.[6]

Such statutory provisions are regarded as mandatory in some jurisdictions,[7] and error follows from a refusal to comply with their requirements, regardless of whether injury results therefrom.[8] In one jurisdiction, however, where the statute has been construed to be mandatory, it has been held that the appellate court cannot reverse because of the refusal of the trial court to comply with a request to instruct in writing, unless the reviewing court can see that the party making such request has been prejudiced by such refusal.[9] In Tennessee, where the statute has been construed to be an imperative direction to the courts to reduce to writing every word of their charge in all felony cases, it is nevertheless held that the statute is to be considered in connection with a later statute forbidding a reversal of any case for any error in the procedure of the trial court, unless the reviewing court is of the opinion, after an examination of the entire record, that the er-

[5] **Cal.** People v. Max, 45 Cal. 254; People v. Prospero, 44 Cal. 186; People v. Trim, 37 Cal. 274; People v. Woppner, 14 Cal. 437; People v. Ah Fong, 12 Cal. 345; People v. Demint, 8 Cal. 423; People v. Payne, 8 Cal. 341; Same v. Beeler, 6 Cal. 246.

Fla. Long v. State, 11 Fla. 295.

Ind. Leseuer v. State, 95 N. E. 239, 176 Ind. 448; Feriter v. State, 33 Ind. 283; Widner v. State, 28 Ind. 394.

La. State v. Porter, 35 La. Ann. 535; State v. Gilmore, 26 La. Ann. 599.

Miss. Stewart v. State, 50 Miss. 587.

Neb. Ehrlich v. State, 44 Neb. 810, 63 N. W. 35.

N. M. Territory v. Lopez, 3 N. M. (Gild.) 156, 2 P. 364.

N. C. State v. Black, 78 S. E. 210, 162 N. C. 637.

Okl. Swaggart v. Territory, 50 P. 96, 6 Okl. 344.

Tex. Harkey v. State, 33 Tex. Cr. R. 100, 25 S. W. 291, 47 Am. St. Rep. 19; Clark v. State, 31 Tex. 574; Melton v. State, 12 Tex. App. 488; Williams v. State, 5 Tex. App. 615; Trippett v. State, Id. 595; Jordan v. State, Id., 422; Gibbs v. State, 1 Tex. App. 12.

[6] Chesapeake & O. Ry. Co. v. Commonwealth, 210 S. W. 793, 184 Ky. 1; Allen v. Commonwealth, 146 S. W. 762, 148 Ky. 327; Edwards v. State (Tex. Cr. App.) 69 S. W. 144.

[7] **Ark.** Arnold v. State, 74 S. W. 513, 71 Ark. 367.

Ind. Bradway v. Waddell, 95 Ind. 170.

Kan. Jenkins v. Levis, 23 Kan. 255; City of Atchison v. Jansen, 21 Kan. 560; State v. Potter, 15 Kan. 302.

Mont. State v. Fisher, 59 P. 919, 23 Mont. 540.

Tenn. Newman v. State, 6 Baxt. 164.

In Pennsylvania, the failure of the judge to file the points and answers, and charge, as directed by the statute does not render the judgment erroneous, nor entitle either party to a reversal. Scheuing v. Yard, 88 Pa. 286; Kerr v. O'Connor, 63 Pa. 341; Patterson v. Kountz, 63 Pa. 246.

[8] Territory v. Perea, 1 N. M. 627; Territory v. Rivera, 1 N. M. 640; McIntosh v. Sawmill Phœnix, 94 P. 930, 49 Wash. 152.

[9] Deets v. National Bank of Pittsburg, 46 P. 306, 57 Kan. 288.

ror complained of affected the merits.[10] Only the party aggrieved can take advantage of a violation of the statutory requirement.[11]

§ 444. Scope of such provisions

Such statutory requirements forbid an oral instruction which is in the nature of an argument upon the facts and the duty of the jury to agree upon a verdict,[12] apply to statements of rules of law governing the matters in issue or the amount of recovery,[13] govern an instruction to disregard a particular count or counts of a complaint,[14] and make it error to read to the jury portions of the pleadings,[15] or the statute upon which the action or prosecution is based,[16] instead of embodying them in the written instructions; and a statement made by the court, after questioning a witness, as to the character of his acts,[17] or a charge during the arguments of counsel for the purpose of correcting statements made by the latter,[18] may be such as to be required to be in writing.

So such requirements apply to the giving of special requests to charge which are not a part of the record in the case, and it is not sufficient for the court to simply state in its charge that at a certain point therein, indicated by a notation, it read certain pray-

[10] Munson v. State, 213 S. W. 918, 141 Tenn. 522.

[11] Hogel v. Lindell, 10 Mo. 483.

[12] City of Abingdon v. Meadows, 28 Ill. App. 442.

[13] Bradway v. Waddell, 95 Ind. 170.

[14] Gardner-Wilmington Coal Co. v. Knott, 115 Ill. App. 515.

[15] Woodruff v. Hensley, 60 N. E. 312, 26 Ind. App. 592.

The earlier cases in Indiana held that it was not reversible error for the court to read the different pleadings to the jury in connection with his charge, though the instructions were requested to be in writing. Collins v. Williams, 52 N. E. 92, 21 Ind. App. 227.

In Iowa it is held that, if a pleading is read as a part of the charge, though not included in it, the error is not prejudicial when the charge contains full instructions as to the issues. Hall v. Carter, 74 Iowa, 364, 37 N. W. 956; Palmer v. State, 29 Ark. 248.

[16] Chicago & E. R. Co. v. Murphy, 101 N. E. 829, 54 Ind. App. 351; Sellers v. City of Greencastle, 134 Ind. 645, 34 N. E. 534; Bottorff v. Shelton, 79 Ind. 98; Garrison v. State. 114 S. W. 128, 54 Tex. Cr. R. 600.

Contra, People v. Mortier, 58 Cal. 262; State v. Mortimer, 20 Kan. 93; State v. Stewart, 9 Nev. 120.

In Georgia the trial judge may read statutory provisions to the jury without copying them in his charge, Burns v. State, 15 S. E. 748, 89 Ga. 527. But when he undertakes to comply with the requirement that his charge be in writing by noting in his written instructions the sections of the statutes which he may read to the jury, it must unequivocally appear from the charge that the sections were in fact read as noted. Hays v. State, 74 S. E. 314, 10 Ga. App. 823.

In Michigan it has been held, under a statute which did not provide for the taking of the written instructions to the jury room, but only that they be filed, that the reading of a general law and a reference to it in the written instructions constituted a compliance with the spirit of the statute requiring such instructions. Swartwout v. Michigan Air Line R. Co., 24 Mich. 389.

[17] State v. Potter, 102 S. W. 668, 125 Mo. App. 465.

[18] State v. Shipley, 174 Mo. 512, 74 S. W. 612.

ers or requests.[19] So such requirements apply to a submission of special issues to the jury,[20] and preclude the court from orally instructing the jury as to the method they are to pursue in arriving at the amount of a verdict,[21] or from orally instructing the jury in a criminal case as to what punishment they are authorized to inflict,[22] or from verbally instructing the jury not to discuss the fact that defendant did not testify.[23]

It has been held that, when a request is made that instructions be reduced to writing, it is bad practice for the court to make oral comments or suggestions, even though they do not amount to an instruction.[24]

§ 445. Modifications and explanations

The general rule is that such statutes can be invoked to prevent the court from orally qualifying or modifying a written instruction given,[25] and where counsel, demanding that the whole charge be put in writing, also presents certain requests, which are given with modifications, the modifications should also be reduced to

[19] Whitaker v. State, 75 S. E. 258, 11 Ga. App. 208. certified questions answered 75 S. E. 254. 138 Ga. 139.

[20] Adams v. Burrell (Tex. Civ. App.) 127 S. W. 581.

[21] Aurora Trust & Savings Bank v. Fidler, 200 Ill. App. 233.

[22] Ellis v. People, 159 Ill. 337, 42 N. E. 873; Littell v. State, 133 Ind. 577, 32 N. E. 417.

[23] Winfrey v. State, 209 S. W. 151, 84 Tex. Cr. R. 579.

[24] Chamness v. Cox, 30 N. E. 901, 131 Ind. 118.

[25] **Ala.** Edgar v. State, 43 Ala. 45.

Cal. People v. Dèmint, 8 Cal. 423; People v. Payne, Id. 341.

Colo. Dorsett v. Crew, 1 Colo. 18.

Fla. Morrison v. State, 28 So. 97, 42 Fla. 149.

Ga. Campbell v. Miller, 38 Ga. 304, 95 Am. Dec. 389.

Ill. Ray v. Wooters, 19 Ill. 82.

Ind. Provines v. Heaston, 67 Ind. 482.

Mich. O'Donnell v. Segar, 25 Mich. 367.

Ohio. Rupp v. Shaffer, 21 Ohio Cir. Ct. R. 643, 12 O. C. D. 154.

Tenn. Columbia Veneer & Box Co. v. Cottonwood Lumber Co., 41 S. W. 351, 99 Tenn. 122.

Matters not constituting modification of instruction within rule. Where, in a prosecution for assault with a pistol, the court charged, at defendant's request, that if there was a probability of defendant's innocence, and unless the evidence excluded every reasonable supposition but that of defendant's guilt, he should be acquitted, and that if any individual juror is not convinced of defendant's guilt beyond all reasonable doubt and to a moral certainty, and there is a reasonable supposition of defendant's innocence, he should be acquitted, and added that such charges were given in connection with the general charge, and all mean that the jury could not convict until satisfied beyond all reasonable doubt of defendant's guilt. such latter statement did not amount to a qualification of the written charges prohibited by the statute. Holmes v. State, 34 So. 180, 136 Ala. 80. Where court after having read to jury all written charges asked by defendant, stated they were not to be taken to explain, vary, or contradict general charge, but in connection with it such statement was not improper as qualification of written charges. Pillar v. State, 74 So. 398, 15 Ala. App. 576.

writing,[26] and even verbal explanations may be of such a character as to be excluded by a request for a written charge.[27] But the simple withdrawal of an instruction by the court is not a violation of a statute which prohibits the modifying, qualifying, or explaining of instructions otherwise than in writing.[28]

§ 446. Limitations of statutory rule

The above statutory requirements are to be reasonably construed with reference to the purposes to be secured thereby.[29] Their restrictive effect does not extend to remarks of the court not addressed to the jury,[30] and not every direction given or every statement or explanation made to the jury is regarded as an instruction required to be in writing within such statutes.[31]

[26] City Bank of Macon v. Kent, 57 Ga. 283.

[27] **Ark.** Mazzia v. State, 51 Ark. 177, 10 S. W. 257.

Cal. People v. Payne, 8 Cal. 341.

Ill. Burns v. People, 45 Ill. App. 70.

Ind. Meredith v. Crawford, 34 Ind. 399; Tenbrook v. Brown, 17 Ind. 410; Laselle v. Wells, 17 Ind. 33; Lung v. Deal, 16 Ind. 349; Kenworthy v. Williams, 5 Ind. 375; Townsend v. Chapin, 8 Blackf. (Ind.) 328.

Kan. State v. Potter, 15 Kan. 302.

Ky. Payne v. Commonwealth, 1 Metc. 370.

Contra, Morris v. State, 25 Ala. 57.

[28] Chicago & E. I. R. Co. v. Zapp, 110 Ill. App. 553, judgment affirmed 70 N. E. 623, 209 Ill. 339; Bochat v. Knisely, 144 Ill. App. 551.

See, also, post, § 456, note 16.

Withdrawal of instruction inadvertently given. Where an erroneous instruction has been inadvertently given, and has been formally withdrawn from the consideration of the jury in any way, so the jury understand it is no longer to be considered by them in determining the case, it is no longer an instruction, and its withdrawal cannot be treated as a qualification, modification, or explanation of a given instruction, or a violation of the statutory rule. Devine v. City of Chicago, 178 Ill. App. 39.

Effect of remarks of court accompanying withdrawal of instruction. Where, after giving and reading an instruction to the jury, the court, desiring to withdraw it, addressing the jury orally, referring to this instruction, said: "Shall I read it to you once more, gentlemen of the jury, or will you bear in mind that the instruction last read is withdrawn? Will that be sufficient?" and to this the jurors replied, "Yes, sir; that will be sufficient" it was held that the oral instruction was error. North Chicago St. R. Co. v. Johnson, 84 Ill. App. 670.

[29] Walton v. Wild Goose Min. & Trading Co., 123 F. 209, 60 C. C. A. 155.

[30] Illinois Cent. R. Co. v. Souders, 79 Ill. App. 41; Hasbrouck v. City of Milwaukee, 21 Wis. 217.

[31] **Ala.** Malachi v. State, 89 Ala. 134, 8 So. 104.

Ark. Arkansas Lumber & Contractors' Supply Co. v. Benson, 123 S. W. 367, 92 Ark. 392.

Colo. Bush v. People, 187 P. 528, 68 Colo. 75; Irving v. People, 95 P. 940, 43 Colo. 260.

Fla. Barton v. State, 73 So. 230, 72 Fla. 408.

Ga. Walker v. State, 72 S. E. 531, 10 Ga. App. 85.

Ill. Kizer v. People, 71 N. E. 1035, 211 Ill. 407; Hinckley v. Horazdowsky, 23 N. E. 338; O'Donnell v. People, 110 Ill. App. 250, judgment affirmed Gallagher v. Same, 71 N. E. 842, 211 Ill. 158; Jenkins & Reynolds Co. v. Lundgren, 85 Ill. App. 494; Hallermann v. Baltimore & O. S. W.

As a general rule statements made to the jury will be regarded as instructions, for the purposes of such statutes, only when they

Ry. Co., 77 Ill. App. 404; Carlyle Canning Co. v. Baltimore & O. S. W. Ry. Co., 77 Ill. App. 396.

Ind. Wall v. State, 10 Ind. App. 530, 38 N. E. 190; Lehman v. Hawks, 121 Ind. 541, 23 N. E. 670; Pate v. Wright, 30 Ind. 476, 95 Am. Dec. 705.

Iowa. State v. Hogan, 88 N. W. 1074, 115 Iowa, 455.

Ky. Aiken v. Commonwealth, 68 S. W. 849, 24 Ky. Law Rep. 523; Green v. Commonwealth, 33 S. W. 100.

Mich. O'Donnell v. Segar, 25 Mich. 367.

Mo. State v. Crofton, 197 S. W. 136, 271 Mo. 507; State v. Dewitt, 53 S. W. 429, 152 Mo. 76; State v. Moore, 117 Mo. 395, 22 S. W. 1086.

Neb. Grammer v. State, 172 N. W. 41, 103 Neb. 325.

Nev. State v. Waterman, 1 Nev. 543.

Tex. McGaughey v. State, 169 S. W. 287, 74 Tex. Cr. R. 529; Bush v. State (Cr. App.) 70 S. W. 550.

Directions, statements, or remarks not within scope of statute. A direction to the jury to reject evidence, as to the form of verdict or the like. Bradway v. Waddell, 95 Ind. 170. Statements by the court in ruling on an objection to an opening statement, in which the purposes of the opening statement in general and in relation to the cause on trial are referred to. Frick v. Kabaker, 90 N. W. 498, 116 Iowa, 494. Where the court was requested to instruct in writing, and the court before reading the written instructions stated, "The plaintiff has requested me to give you some instructions which are in writing, and I will read them first and read them as the law," it did not amount to the giving of oral instruction. Dodd v. Moore, 91 Ind. 522. Where the jury sent two questions in writing to the judge, who orally instructed them that the questions had nothing to do with the case, and that it was their duty to determine the case under the evidence and instructions already given, this oral refusal further to instruct was no violation of the statutory requirement that instructions must be in writing, as it was merely a refusal to give further instructions. Sullivan v. Collins, 18 Iowa, 228. In a prosecution for illegal sale of liquor, an election by the state as to the transaction on which it relies for conviction, if it be in writing, need not be copied into the instructions, and may be read to the jury at the time the charge is delivered, without violating the statute requiring instructions to be in writing and to be filed with the papers. State v. Younger, 78 P. 429, 70 Kan. 226. Oral remarks of the court after reading an instruction containing a statement of the charge against accused and his plea of guilty that the information is not evidence, and that the instruction is merely to inform the jury of the nature of the crime charged. State v. Marion, 124 P. 125, 68 Wash. 675. A general remark by the court in regard to the length of the trial, and an apology for his impatience during its progress, though made in connection with a charge to the jury, is not a part thereof, which is necessary to be reduced to writing at the request of either party. Hasbrouck v. Milwaukee, 21 Wis. 217.

Technical violation of statute. Although it may be a technical violation of such a statute it is not reversible error for the trial judge, who did not notice the absence of the official reporter from the courtroom, to give additional oral instructions to the jury on their return into the courtroom, especially where appellant's attorney admits that he did not call the trial judge's attention to the reporter's absence, because he intended to take advantage of the error in case the verdict went against him. Stringham v. Cook, 75 Wis. 589, 44 N. W. 777. The fact that the court said to the jury, not in writing, after the argument of counsel: "Gentlemen of the jury. You will bear in mind that you are to try this case according to the law and evidence. Remember you

embody a proposition of law or touch the merits of the case,[32] and ordinarily admonitions made by the court during the progress of the trial and before the close of the evidence are not required to be in writing.[33] It is not reversible error to state the contentions of the parties orally or to supplement slight omissions, at least in the absence of any suggestion of prejudice or error.[34]

Such statutory rule does not apply to remarks to the jurors on their voir dire examination, explaining what will or will not disqualify them,[35] nor does it apply to directions to the jury with reference to visiting the scene of an accident,[36] nor to remarks made in connection with rulings on the admissibility of evidence,[37] nor to a statement during the trial calling the attention of the jury to the purpose for which certain evidence is admitted,[38] nor to a direction to the jury to disregard certain evidence,[39] nor to a recapitulation of the evidence,[40] nor to a direction to disregard certain remarks of counsel or of the court,[41] nor to a direction to the jury

have been sworn to try this case according to the law and evidence. That is all. Now you can retire to your room and answer the questions propounded"—could not have prejudiced the legal rights of appellant. Huntzicker's Adm'r v. Pennsylvania Co., 6 Ky. Law Rep. (abstract) 662.

[32] **Ill.** Burns v. People, 45 Ill. App. 70.

Ind. Hatfield v. Chenoweth, 56 N. E. 51, 24 Ind. App. 343; Collins v. Williams, 52 N. E. 92, 21 Ind. App. 227.

Kan. State v. Potter, 15 Kan. 302.

N. C. State v. Dewey, 51 S. E. 937, 139 N. C. 556.

Okl. Boggs v. United States, 65 P. 927, 10 Okl. 424, 11 Okl. 139; Id., 63 P. 969, 10 Okl. 424.

Wash. State v. Jensen (Wash.) 195 P. 238.

[33] Wendling v. Commonwealth, 137 S. W. 205, 143 Ky. 587.

[34] State v. Khoury, 62 S. E. 638, 149 N. C. 454.

[35] Oberbeck v. Mayer, 59 Mo. App. 289.

[36] Pioneer Fireproof Const. Co. v. Sunderland, 58 N. E. 928, 188 Ill. 341, affirming judgment 87 Ill. App. 213.

[37] Bloomer v. Sherrill, 11 Ill. 483; Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146; Farmer v. Thrift, 94 Iowa, 374, 62 N. W. 804.

[38] Providence Washington Ins. Co. v. Wolf, 80 N. E. 26, 168 Ind. 690, 120 Am. St. Rep. 395; Littell v. State, 33 N. E. 417, 133 Ind. 577; State v. Thompson (Wash.) 194 P. 553.

[39] **Ill.** Western Coal & Min. Co. v. Norvell, 212 Ill. App. 218.

Ind. Madden v. State, 47 N. E. 220, 148 Ind. 183; Stanley v. Sutherland, 54 Ind. 339.

Iowa. State v. Brennan, 169 N. W. 744, 185 Iowa, 73; Krause v. Redman, 112 N. W. 91, 134 Iowa, 629; State v. Bigelow, 70 N. W. 600, 101 Iowa, 430.

Ky. Metcalfe v. Commonwealth, 86 S. W. 534, 27 Ky. Law Rep. 704.

Mo. State v. Good, 132 Mo. 114, 33 S. W. 790.

Neb. Consaul v. Sheldon, 35 Neb. 247, 52 N. W. 1104.

Tex. Winfield v. State (Cr. App.) 54 S. W. 584.

[40] State v. Dixon, 62 S. E. 615, 149 N. C. 460; Sawyer v. Roanoke R. & Lumber Co., 55 S. E. 84, 142 N. C. 162; Phillips v. Wilmington & W. R. Co., 41 S. E. 805, 130 N. C. 582.

Contra, McClay v. State, Smith (Ind.) 215; McClay v. State, 1 Ind. 385.

[41] Hayes v. Wagner, 77 N. E. 211, 220 Ill. 256, affirming judgment 113 Ill. App. 299; Ohio & M. Ry. Co. v. Wangelin, 152 Ill. 138, 38 N. E. 760,

as to the manner in which they shall proceed,[42] nor to directions as to the duties of the jury in relation to their answers to special interrogatories,[43] nor to an instruction directing a verdict.[44]

Where a question to the court by a juror is propounded, the general rule is that, if the court can answer it by a simple affirmation or denial, so as not to involve the making of an independent statement of a rule of law, the court may answer such question verbally,[45] and it is held that an answer by the court in response to a question by a juror after the jury has been charged is not required to be in writing,[46] and that informing the jury, in response to their inquiry on returning into court for that purpose, that they could recommend mercy, but that their recommendation would not be binding, is not an additional charge required to be in writing.[47]

The court is not prevented by such statutes from orally reminding the jury of their duties as jurors, and impressing upon them the importance of arriving at a verdict if they can fairly and honestly agree.[48] It is quite generally held that oral statements to the jury as to the form of their verdict are not within the above statu-

affirming 43 Ill. App. 324; State v. Smith, 109 N. W. 115, 132 Iowa, 645.

Contra, Pecht v. State, 192 S. W. 243, 80 Tex. Cr. R. 452.

[42] White-Kingsland Mfg. Co. v. Herdrich, 98 Ill. App. 607.

[43] Lett v. Eastern Moline Plow Co., 91 N. E. 978, 46 Ind. App. 56; Trentman v. Wiley, 85 Ind. 33; McCallister v. Mount, 73 Ind. 559.

[44] Lacy Bros. & Kimball v. Morton, 89 S. W. 842, 76 Ark. 603; Geer v. Dancer, 97 S. E. 406, 148 Ga. 465; Young v. Burlington Wire Mattress Co., 44 N. W. 693, 79 Iowa, 415; Grant v. Connecticut Mut. Life Ins. Co., 29 Wis. 125.

In Georgia, earlier holdings, in the cases of Harris v. McArthur, 90 Ga. 216, 15 S. E. 758, and Citizens' Bank of Bainbridge v. Fort, 83 S. E. 235, 142 Ga. 611, to the effect that a direction of a verdict must be in writing, are expressly overruled by the case cited in support of the text.

In Illinois, it is held that while it is the better practice, when a peremptory instruction is given to find for one of the parties, to give a written instruction, a failure to do so does not constitute reversible error (Fisher v. Dunn, 200 Ill. App. 63), where the facts are uncontradicted and clearly require the verdict directed (Sears v. C. C. Emerson & Co., 182 Ill. App. 522; Derby v. Peterson, 128 Ill. App. 494).

[45] State v. Potter, 15 Kan. 302.

[46] Millard v. Lyons, 25 Wis. 516.

A judgment will not be reversed because the court orally answered a question asked by the jury after they had retired, where it could not have prejudiced the plaintiff in error. Walton v. Wild Goose Mining & Trading Co. (C. C. A. Alaska) 123 F. 209, 60 C. C. A. 155.

[47] Dowling v. State, 67 S. E. 697, 7 Ga. App. 613.

[48] Moore v. City of Platteville, 78 Wis. 644, 47 N. W. 1055.

In Tennessee, however, the statute which provides that it shall be the duty of the judge, on the request of either party, to reduce every word in his charge to writing before delivering it to the jury, and all subsequent instructions shall in like manner be reduced to writing before being delivered, is held to apply to oral statements by the judge to the jury, before delivering his written charge, as to their duty to try the cause on the sworn testimony. Equitable Fire Ins. Co. v. Trustees C. P. Church at Fosterville, 91 Tenn. 135, 18 S. W. 121.

tory rule,[49] if such a statement does not contain any directions as to the law of the case or any comment on the evidence.[50]

Oral directions to the jury as to their conduct in the jury room,[51] or an oral admonition with respect to rumored misconduct on the part of the jury,[52] or with respect to the authority of less than twelve jurors to render a verdict,[53] or an oral direction in a criminal case, after the jury have brought in a general verdict of guilty, to return and find the degree of the offense,[54] are held not to be violations of the statutory requirement. So, after the jury have retired and deliberated on their verdict, the court may call them in and verbally question them as to the possibility of their agreeing on a verdict and send them back to the jury room.[55]

The oral repetition of an instruction originally given in writing is not improper.[56] In one jurisdiction the statutory provision is held to impose merely the duty to have the instructions in writing and subject to the inspection of counsel before the trial ends, and not to require them to be in writing before being given to the jury.[57]

[49] **Ill.** Conness v. Indiana, I. & I. R. Co., 62 N. E. 221, 193 Ill. 464; Illinois Cent. R. Co. v. Wheeler, 149 Ill. 525, 36 N. E. 1023; Economy Light & Power Co. v. Hiller, 113 Ill. App. 103, judgment affirmed 71 N. E. 1096, 211 Ill. 568.

Ind. Indianapolis & N. W. Traction Co. v. Henderson, 79 N. E. 539, 39 Ind. App. 324; Peelle v. State, 68 N. E. 682, 161 Ind. 378.

Kan. State v. Evans, 136 P. 270, 90 Kan. 795, judgment affirmed 140 P. 892, 92 Kan. 468.

Neb. Williams v. State, 95 N. W. 1014, 69 Neb. 402.

Tex. Ragsdale v. State, 134 S. W. 234, 61 Tex. Cr. R. 145.

Wis. State v. Glass, 50 Wis. 218, 6 N. W. 500, 36 Am. Rep. 845.

Contra, Burns v. State, 89 Ga. 527, 15 S. E. 748.

In Illinois it has been held that in a criminal case it is error to orally direct the jury as to the form of their verdict (Helm v. People, 57 N. E. 886, 186 Ill. 153), although the appellate court has held that such an oral direction is not a ground for reversal (People v. Shapiro, 207 Ill. App. 130).

Form of verdict already found and presented. A statute requiring the charge of the court in capital cases to be in writing, refers to charges on the merits given to the jury before they retire to consider their verdict, and does not apply to mere directions to the jury as to the form of the verdict, which they have already found and presented to the court. Mathis v. State, 34 So. 287, 45 Fla. 46.

[50] Herron v. State, 46 N. E. 540, 17 Ind. App. 161; Sturgis v. State, 102 P. 57, 2 Okl. Cr. 362; Douglas v. Territory, 98 P. 1023, 1 Okl. Cr. 583.

[51] State v. Lewis, 159 P. 415, 52 Mont. 495.

[52] Maryland Casualty Co. v. Seattle Electric Co., 134 P. 1097, 75 Wash. 430.

[53] Baxter v. Magill, 105 S. W. 679, 127 Mo. App. 392.

It is sufficient to instruct orally in the absence of objection that 9 or more jurors could make a verdict, but, if less than 12 made the verdict, those agreeing thereto must sign it. Cravens v. Merritt, 199 S. W. 785, 178 Ky. 727.

[54] People v. Bonney, 19 Cal. 426.

[55] United States v. Densmore, 75 P. 31, 12 N. M. 99.

[56] State v. Labore, 103 P. 106, 80 Kan. 664.

[57] Reed v. Rogers, 204 S. W. 973, 134 Ark. 528.

§ 447. Waiver of benefits of rule

The parties may waive the benefits conferred upon them by the above statutory provisions, and when the court, pursuant to their consent, gives oral instructions, they cannot afterwards object to them;[58] this rule applying in criminal cases,[59] and even to a minor defendant in a criminal case.[60] To be effectual, such waiver must be an express one under some statutes,[61] and under such statutes the mere failure of a defendant in a criminal case to request instructions in writing will not relieve the court from the duty of so charging.[62] But in a number of jurisdictions, or under particular statutory provisions, the statutory right of the parties will be deemed waived when the court is not requested to reduce its instructions to writing[63] and no exception is taken to the giving of oral instructions.[64]

[58] **Ga.** Continental Nat. Bank of New York v. Folsom, 67 Ga. 624.

Ill. Bates v. Ball, 72 Ill. 108; Downey v. Abel, 87 Ill. App. 530; Best v. Wilson, 48 Ill. App. 352.

Ind. Chamness v. Cox, 131 Ind. 118, 30 N. E. 901.

Neb. Fitzgerald v. Fitzgerald, 16 Neb. 413, 20 N. W. 269.

S. D. Davis v. C. & J. Michel Brewing Co., 140 N. W. 694, 31 S. D. 284.

Wash. Smith v. Bowers, 143 P. 316, 82 Wash. 80; Wheeler v. Hotel Stevens Co., 127 P. 840, 71 Wash. 142, Ann. Cas. 1914C, 576.

Scope of stipulation waiving written instructions. Where at the conclusion of the testimony in an action it was stipulated by the parties that the court might instruct the jury orally in the case; such instructions to be of the same force and effect as though they were written out and read by the court to the jury in the usual manner, and no objection was made or exception or other action taken because the oral instructions were not reduced to writing, filed with the clerk, and given to the jury, it was held that the stipulation waiving the giving of the instructions in the usual manner, and agreeing to their being given orally, also waived any right of the complaining party to have them reduced to writing, filed with the clerk, and given to the jury during its deliberation of the case. Kuhn v. Nelson, 85 N. W. 56, 61 Neb. 224.

[59] **Colo.** Kingsbury v. People, 99 P. 61, 44 Colo. 403.

Ind. Leseuer v. State, 95 N. E. 239, 176 Ind. 448.

Ky. Allen v. Commonwealth, 146 S. W. 762, 148 Ky. 327; Ferguson v. Commonwealth, 132 S. W. 1030, 141 Ky. 457; Harris v. Commonwealth, 132 S. W. 148, 141 Ky. 70.

Tex. Vick v. State (Cr. App.) 69 S. W. 156.

Wash. State v. Andrews, 127 P. 1102, 71 Wash. 181.

Contra, State v. Cooper, 45 Mo. 64.

[60] Cutter v. People, 56 N. E. 412, 184 Ill. 395.

[61] State v. Fisher, 59 P. 919, 23 Mont. 540; People v. Bonds, 1 Nev. 33; Sharman v. Newsome, 101 S. W. 1020, 46 Tex. Civ. App. 111.

[62] Rumage v. State (Tex. Cr. App.) 55 S. W. 64.

[63] **Ala.** Blackmon v. State, 77 So. 347, 201 Ala. 53.

Ark. O'Neal v. Richardson, 92 S. W. 1117, 78 Ark. 132.

[64] Bowling v. Floyd, 48 P. 875, 5 Kan. App. 879; Howe v. Miller, 65 S. W. 353, 23 Ky. Law Rep. 1610; Ferrero v. State, 166 P. 101, 64 Okl. 44.

The reading of a passage from a text-book, instead of embodying it in the written charge, it not being seasonably objected to for that cause, is not error. Josselyn v. McAllister, 22 Mich. 300.

In some jurisdictions, if the defendant in a prosecution for a misdemeanor desires instructions in writing, he should place them in writing and submit them to the court.[65]

§ 448. Manner and time of preferring requests for written instructions

To put the court in error in giving oral instructions under the statutes requiring written instructions on the request of a party, such request must be distinctly made,[66] and a request limited to certain instructions will not impose a duty upon the court to reduce its entire charge to writing.[67] On the other hand, a request that the entire charge be placed in writing will include supplemental instructions asked by the jury after their retirement.[68] In the absence of any statutory provision to the contrary, an oral request for written instructions will be sufficient to preclude the court from charging orally.[69]

To be effective, such request must be made at a proper time,[70] and to comply with this rule it should be made in time to enable the court to give such requests due consideration and to conveniently reduce its charges to written form;[71] such reasonable

Colo. Bradford v. People, 22 Colo. 157, 43 P. 1013.

Fla. Luster v. State, 23 Fla. 339, 2 So. 690.

Ind. Sutherland v. Hankins, 56 Ind. 343; Goodwine v. Miller, 32 Ind. 419.

Kan. Davis v. Wilson, 11 Kan. 74.

Ky. Risk v. Ewing, 60 S. W. 923, 22 Ky. Law Rep. 1485.

La. State v. Melton, 37 La. Ann. 77.

Okl. Bucher v. Showalter, 145 P. 1143, 44 Okl. 690; Hopkins v. Dipert, 69 P. 883, 11 Okl. 630.

Or. State v. Goff, 142 P. 564, 71 Or. 352.

Pa. Sgier v. Philadelphia & R. Ry. Co., 103 A. 730, 260 Pa. 343.

Wyo. Curran v. State, 70 P. 577, 12 Wyo. 553.

Where a request for written instructions is refused, and the court suggests that, as the question is simply one of fact, it will instruct the jury orally, to which no objection is made, appellant must be regarded as acquiescing in the giving of the instructions orally. Westerfield v. Baldwin, 16 Ky. Law Rep. (abstract) 318.

[65] Odom v. State, 200 S. W. 833, 82 Tex. Cr. R. 580; Greer v. State, 136 S. W. 451, 62 Tex. Cr. R. 81; Bivens v. State (Cr. App.) 97 S. W. 86; Bush v. State (Cr. App.) 70 S. W. 550; Hill v. State, 67 S. W. 506, 43 Tex. Cr. R. 583; Bennett v. State (Tex. Cr. App.) 50 S. W. 945; Murray v. State, 44 S. W. 830, 38 Tex. Cr. R. 677; Carr v. State, 5 Tex. App. 153; Killman v. State, 2 Tex. App. 222, 28 Am. Rep. 432.

[66] Ferguson v. Fox's Adm'r, 1 Metc. (Ky.) 83.

[67] Phillips v. Wilmington & W. R. Co., 41 S. E. 805, 130 N. C. 582.

[68] State v. Young, 111 N. C. 715, 16 S. E. 543.

[69] Citizens' Bank of Bainbridge v. Fort, 83 S. E. 678, 15 Ga. App. 427.

[70] **Ind.** Chance v. Indianapolis & W. Gravel Road Co., 32 Ind. 472; Boggs v. Clifton, 17 Ind. 217; Cortner v. Amick, 13 Ind. 463; Newton v. Newton, 12 Ind. 527.

Kan. Connor v. Wilkie, 1 Kan. App. 492, 41 P. 71.

Va. Booth v. Commonwealth, 4 Grat. 525.

[71] Manning v. Gasharie, 27 Ind. 399; Newton v. Newton, 12 Ind. 527; McJunkins v. State, 10 Ind. 140;

time being generally at or before the close of the evidence,[72] or before argument begins.[73] A rule of court, however, that such request must be made before the trial begins is unreasonable, and will not be enforced by the appellate court.[74]

The fact that counsel for a party, in the presence of the adverse party, requests written instructions, and afterwards, when it is too late for the latter to make such a request,[75] or without the knowledge of such adverse party,[76] withdraws such request, will not enable the latter to complain on appeal of the action of the court in instructing orally, since if he desires written instructions he should prefer his own request.

N. Matters Bearing on Requisites of Written Instructions

§ 449. Sufficiency of reduction of instructions to writing

Statutes requiring instructions to be in writing are held to be substantially complied with by writing them in pencil,[77] or by presenting them in printed form,[78] and where instructions are written in English, an oral translation of them into a foreign tongue, which is the language of the jury, is not a violation of the statute.[79]

It is not necessary that the reduction of instructions to writing should be done by the trial judge personally,[80] and the court may adopt as its main charge instructions prepared by the counsel for one of the parties.[81]

Error in giving oral instructions may be corrected by withdrawing them, afterwards reducing them to writing, and then reading them to the jury, with the direction to disregard those first given,[82] and in some jurisdictions it is considered that where the court, immediately after giving an oral instruction, reduces it to writing and gives it to the jury in time to be taken with them

Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74.

[72] St. Louis & S. F. Ry. Co. v. Dawson, 53 P. 892, 7 Kan. App. 466; Jenkins v. Levis, 23 Kan. 255; Atchison T. & S. F. R. Co. v. Franklin, 23 Kan. 74, following Manning v. Gasharie, 27 Ind. 399; Boggs v. Clifton, 17 Ind. 217; Newton v. Newton, 12 Ind. 527; McJunkins v. State, 10 Ind. 140.

[73] Ashley-Price Lumber Co. v. Henry, 98 S. E. 185, 23 Ga. App. 93.

[74] Laselle v. Wells, 17 Ind. 33; Patterson v. Ball, 19 Wis. 243.

[75] Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475.

[76] Henke v. Babcock, 64 P. 755, 24 Wash. 556.

[77] Harvey v. Tama County, 53 Iowa, 228, 5 N. W. 130.

[78] State v. Fooks, 65 Iowa, 196, 21 N. W. 561; State v. Kelly, 9 Mo. App. 512.

[79] Territory v. Romine, 2 N. M. 114.

[80] Barkman v. State, 13 Ark. 705.

[81] Kansas City, M. & O. Ry. Co. of Texas, v. Harral (Tex. Civ. App.) 199 S. W. 659.

[82] People v. Garcia, 25 Cal. 531.

on retiring,[83] or so that they can have the written instructions with them on the final consideration of their verdict,[84] there is a sufficient compliance with the statute, or at least that there is no prejudicial error.[85] In other jurisdictions such subsequent reduction to writing does not cure the original error of giving oral instructions,[86] and sending to the jury after they have retired to consider of their verdict a transcript of the stenographic notes of an oral instruction will not cure the error in giving it,[87] nor will the filing after verdict of what purports to be a copy of the charge given.[88]

In some jurisdictions the court may give oral instructions, if they are taken down by the court stenographer.[89] In one jurisdiction an oral charge, taken down under the direction of the court by a stenographer, or by a stenographer in the employ of both parties to report the proceedings, who is virtually under the direction of the court, is a charge in writing within such statutes;[90] but in other jurisdictions the taking down of oral instructions by the court stenographer is held not to be a compliance with the statute.[91] It is held that the plain intent of the statute is to require

[83] Landt v. McCullough, 75 N. E. 1069, 218 Ill. 607; Green v. Lewis, 13 Ill. 642.

[84] Spence v. Commonwealth, 204 S. W. 80, 181 Ky. 206; White v. Commonwealth, 130 S. W. 796, 140 Ky. 9.

[85] National Lumber Co. v. Snell, 47 Ark. 407, 1 S. W. 708; Swaggart v. Territory, 50 P. 96, 6 Okl. 344.

[86] Dixon v. State, 13 Fla. 636; State v. Harding, 81 Iowa, 599, 47 N. W. 877; State v. Bennington, 44 Kan. 583, 25 P. 91.

[87] Jarnecke v. Chicago Consol. Traction Co., 150 Ill. App. 248.

[88] Territory v. Dorman, 1 Ariz. 56, 25 P. 516; Same v. Duffield, 1 Ariz. 58, 25 P. 476.

[89] People v. Curtis, 76 Cal. 57, 17 P. 941; State v. Preston, 38 P. 694, 4 Idaho, 215.

Under the California statute permitting such practice, the failure of the reporter to take down certain oral statements of the court, not affecting nor in any way qualifying the charge which is taken down, is not cause for reversal. People v. Leary, 39 P. 24, 105 Cal. 486; People v. Cox, 18 P. 332, 76 Cal. 281.

[90] State v. Erickson, 103 P. 796, 54 Wash. 472; Schon v. Modern Woodmen of America, 99 P. 25, 51 Wash. 482; Sturgeon v. Tacoma Eastern R. Co., 98 P. 87, 51 Wash. 124; Collins v. Huffman, 93 P. 220, 48 Wash. 184.

Direction of court. To relieve the court of the duty of charging in writing, under the Washington statute providing that on request of either party the charge must be in writing, provided that, when a stenographic report is taken, this shall be considered as a charge in writing, the stenographer must be one who is under the direction of the court, and can be required to furnish a copy of the instructions; and it is not enough that two stenographers, one employed on behalf of the prosecuting attorney, and the other by the defendant, are present taking a report. State v. Mayo, 85 P. 251, 42 Wash. 540, 7 Ann. Cas. 881.

[91] **Ark.** Burnett v. State, 81 S. W. 382, 72 Ark. 398.

Ga. Brindle v. State, 88 S. E. 460, 17 Ga. App. 741.

Ind. Leseuer v. State, 95 N. E. 239, 176 Ind. 448; Shafer v. Stinson, 76 Ind. 374.

Kan. Wheat v. Brown, 3 Kan. App. 431, 43 P. 807; Rich v. Lappin, 43 Kan. 666, 23 P. 1038.

Mont. State v. Fisher, 59 P. 919, 23 Mont. 540.

In Colorado a statute providing

that the charge be in writing when delivered and that it be read to the jury as written.[92] An oral charge is not rendered proper by the fact that it has been reduced to writing before delivery,[93] and error of the court, after being requested to charge in writing, in giving a part of the charge orally, is not cured by directing the jury to disregard what was said orally.[94]

The requirement of written instructions is held in some jurisdictions to preclude the court from reading from the printed statutes.[95] In other jurisdictions this may be done,[96] or the court may read a portion of its charge from a report of the published decisions of the court of last resort.[97]

§ 450. Numbering instructions

In some jurisdictions the court may be required to number its instructions,[98] and this is the better practice.[99] In one jurisdiction such a duty does not arise in the absence of a request by one of the parties for such a numbering,[1] and the failure of the court to comply with the statutory requirements will not justify a reversal, where no rights are adversely affected by such failure.[2]

§ 451. Signing and sealing

The requirement is general that written instructions should be authenticated by the signature of the trial judge,[3] and in some ju-

that instructions shall be given in writing before argument does not allow the giving of parol instructions, though the same be taken by a stenographer, and afterwards transcribed, and given to the jury on retiring, Crawford v. Brown, 21 Colo. 272, 40 P. 692, affirming Brown v. Crawford, 2 Colo. App. 235, 29 P. 1137.

Where, however, a request for written instructions was made when the court was about to instruct the jury orally, and the instructions as given were transcribed by the official stenographer, and delivered to counsel and the jury, the refusal to give written instructions was not error. Union St. Ry. Co. v. Stone, 54 Kan. 83, 37 P. 1012.

[92] Dixon v. State, 13 Fla. 636; State v. Fisher, 59 P. 919, 23 Mont. 540.

[93] Territory v. Kennedy, 1 Ariz. 505, 25 P. 517.

[94] Fields v. Carlton, 75 Ga. 554; McClay v. State, Smith (Ind.) 215.

[95] Smurr v. State, 88 Ind. 504; Manier v. State, 6 Baxt. (Tenn.) 595; Garrison v. State, 114 S. W. 128, 54 Tex. Cr. R. 600; Wilson v. State, 15 Tex. App. 150.

[96] Palmore v. State, 29 Ark. 248; People v. Mortier, 58 Cal. 262; Walton v. State, 86 S. E. 1072, 17 Ga. App. 375; Walker v. State, 68 S. E. 873, 8 Ga. App. 214; Burns v. State, 89 Ga. 527, 15 S. E. 748; State v. Mortimer, 20 Kan. 93; State v. Stewart, 9 Nev. 120.

[97] State v. Roy, 43 So. 59, 118 La. 485.

[98] Sherlock v. First Nat. Bank, 53 Ind. 73.

[99] Weightnovel v. State, 35 So. 856, 46 Fla. 1.

[1] McIver v. Williamson-Halsell-Frazier Co., 92 P. 170, 19 Okl. 454, 13 L. R. A. (N. S.) 696.

[2] Miller v. Preston, 4 N. M. 314, 17 P. 565; Atchison, T. & S. F. Ry. Co. v. Calhoun, 89 P. 207, 18 Okl. 75, 11 Ann. Cas. 681.

[3] Burroughs v. State, 17 Fla. 643; Baker v. State, 17 Fla. 406; Dennerline v. Gable, 73 Ind. 210; Smith v. State, 1 Tex. App. 408.

risdictions the statutory requirement of signing by the judge is deemed imperative,[4] at least in criminal cases,[5] and the omission of such signature will constitute ground for reversal, and a nunc pro tunc entry will not cure a failure to sign.[6]

As a general rule the mere failure or delay of the trial judge to sign his instructions will not constitute reversible error in a civil case,[7] and in some jurisdictions will not necessarily constitute fatal error in a criminal case.[8]

A requirement of certification of the instructions by the trial judge is complied with by his signature.[9] The sealing of instructions is now generally dispensed with.[10]

§ 452. Filing instructions

In some jurisdictions the written charge must be filed with the clerk of court as soon as it has been read to the jury, and failure to comply with this requirement constitutes reversible error.[11]

O. Presence of Parties and Right to Inspect Instructions

§ 453. Presence of parties or their counsel during charge

In civil cases the charge of the court,[12] and all subsequent instructions and explanations touching the duties of the jury,[13] should be given in open court, in the presence of the parties or their counsel, in some of the states there being statutory provisions requiring the presence of counsel during the charge,[14] and in some jurisdictions instructions erroneously given in the absence of counsel will be conclusively presumed prejudicial.[15] There is authority, however, to the effect that, since it is the duty of the parties or their counsel to be present during the entire trial of the cause, an

[4] Hadley v. Atkinson, 84 Ind. 64.

[5] Payne v. State, 202 S. W. 958, 83 Tex. Cr. R. 287; McLain v. State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 911; Williams v. State, 18 Tex. App. 409.

[6] Bottorff v. Bottorff, 91 N. E. 617, 45 Ind. App. 692.

[7] Halley v. Tichenor, 94 N. W. 472, 120 Iowa, 164; McDonald v. Axtell (Tex. Civ. App.) 218 S. W. 563; Parker v. Chancellor, 78 Tex. 524, 15 S. W. 157; Dillingham v. Bryant (Tex. App.) 14 S. W. 1017.

[8] White v. State, 26 Fla. 602, 7 So. 857; State v. McCombs, 13 Iowa, 426; State v. Davis, 48 Kan. 1, 28 P. 1092; State v. Buffington, 20 Kan. 599, 27 Am. Rep. 193.

[9] Hubbard v. State, 2 Tex. App. 506.

[10] Weightnovel v. State, 35 So. 856, 46 Fla. 1; Denmark v. State, 31 So. 269, 43 Fla. 182.

[11] Ashley-Price Lumber Co. v. Henry, 98 S. E. 185, 23 Ga. App. 93.

[12] Helwig v. Wayne Circuit Judge, 73 Mich. 258, 41 N. W. 268; Campbell v. Beckett, 8 Ohio St. 210; Seagrave v. Hall, 6 O. C. D. 497, 10 Ohio Cir. Ct. R. 395.

[13] Smith v. McMillen, 19 Ind. 391.

[14] People v. Trim, 37 Cal. 274.

[15] Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 So. 540.

absent party cannot complain if instructions are given to the jury in his absence,[16] and it has been held that it is not reversible error for a court to give further instructions in explanation of its previous charge, in compliance with a request from the jury, although counsel for neither of the parties is present, where such instructions are given in open court, during a regular session, when counsel might reasonably have been expected to be in attendance.[17]

The above rule requiring the presence of the attorneys during the giving of the charge does not apply to instructions not relating to any statement of the law nor to the merits of the case.[18]

In criminal cases it is error to charge the jury in the absence of the defendant,[19] or to re-read the instructions in his absence, although they are read exactly as first given.[20]

§ 454. Right to inspect instructions

While not a universal requirement,[21] it is the duty of the court in some jurisdictions in criminal cases, before reading its instructions to the jury, to submit them to counsel for inspection, that they may offer such suggestions as they may think proper,[22] and such duty is held to require the court, after having eliminated certain parts of his charge on the objection of defendant, to again submit the charge to defendant's counsel before reading it to the jury.[23]

[16] Rizzoli v. Kelley, 44 A. 64, 68 N. H. 3.

[17] Aerheart v. St. Louis I. M. & S. Ry. Co. (C. C. A. Mo.) 99 F. 907, 40 C. C. A. 171.

[18] Varn v. Gonzales (Tex. Civ. App.) 193 S. W. 1132.

[19] State v. Meagher, 49 Mo. App. 571; State v. Blackwelder, 61 N. C. 38.

[20] Kinnemer v. State, 49 S. W. 815, 66 Ark. 206.

[21] State v. Saunders, 44 La. Ann. 973, 11 So. 583.

[22] **N. M.** James v. Hood, 142 P. 162, 19 N. M. 234.

Okl. Russell v. State (Cr. App.) 194 P. 242; Fowler v. State, 126 P. 831, 8 Okl. Cr. 130.

Tex. Harris v. State, 172 S. W. 975, 76 Tex. Cr. R. 126; Goode v. State, 171 S. W. 714, 75 Tex. Cr. R. 550; Link v. State, 104 S. W. 987, 73 Tex. Cr. R. 82.

[23] Czernicki v. State, 211 S. W. 223, 85 Tex. Cr. R. 169.

CHAPTER XXXIV

INSTRUCTIONS CORRECTING, EXPLAINING, OR WITHDRAWING OTHER INSTRUCTIONS

§ 455. Power or duty of trial court.
456. Manner of correction or withdrawal.

Cure of erroneous instruction by its withdrawal, see post, § 539.

§ 455. Power or duty of trial court

The trial court may, at any time before the discharge of the jury, modify or revoke its instructions, when convinced of error therein,[1] or may withdraw a charge at the request of the party in whose favor it was made,[2] and it is not error for the court to withdraw a proper instruction, the subject-matter of which is covered by other instructions given.[3] Such power of the court does not depend on the consent of the parties to the suit.[4] Thus it is not

[1] **Ark.** Carlock v. Spencer, 7 Ark. 12.

Ga. Smith v. State, 90 S. E. 475, 146 Ga. 36; Southern Ry. Co. v. Parham, 73 S. E. 763, 10 Ga. App. 531.

Ill. Chilson v. People, 79 N. E. 934, 224 Ill. 535; Daube v. Kuppenheimer, 195 Ill. App. 99, judgment affirmed 112 N. E. 61, 272 Ill. 350; Wells v. Ipperson, 48 Ill. App. 580.

Ind. Broadstreet v. McKamey, 83 N. E. 773, 41 Ind. App. 272; Buntin v. State, 68 Ind. 38.

Kan. State v. Wells, 54 Kan. 161, 37 P. 1005.

Ky. Eppenheimer v. Commonwealth, 7 Ky. Law Rep. (abstract) 229.

Me. State v. Derry, 108 A. 568, 118 Maine, 431.

Md. Chesapeake Stevedoring Co. v. Hufnagel, 87 A. 4, 120 Md. 53; United Rys. & Electric Co. of Baltimore v. Carneal, 72 A. 771, 110 Md. 211; Butler v. Gannon, 53 Md. 333; Sittig v. Birkestack, 38 Md. 158.

Mich. Blumeno v. Grand Rapids & I. R. Co., 59 N. W. 594, 101 Mich. 325.

Mo. Carroll v. Wiggains (App.) 199 S. W. 280.

Neb. Hibner v. Westover, 110 N. W. 732, 78 Neb. 161.

N. Y. People v. Benham, 55 N. E. 11, 160 N. Y. 402.

Okl. Long v. Kendall, 87 P. 670, 17 Okl. 70.

S. C. State v. Lightsey, 43 S. C. 114, 20 S. E. 975.

Tenn. Green v. State, 97 Tenn. 50, 36 S. W. 700.

Tex. Nowlin v. State, 175 S. W. 1070, 76 Tex. Cr. R. 480; Bailey v. State (Cr. App.) 38 S. W. 992.

Withdrawal by judge other than the trial judge. Where manifestly erroneous instructions are given by the trial judge, and, after the submission of the cause, the judge, on leaving the county seat, requests another judge of the district to receive the verdict, and also to recall the jury and withdraw the erroneous instructions, and the judge so requested does so, the withdrawal of the instructions is not so irregular as to constitute reversible error. Renner v. Thornburg, 82 N. W. 950, 111 Iowa, 515.

[2] Harrison v. McGehee, 24 Ga. 530.

[3] Lautman v. Pepin, 59 N. E. 1075, 26 Ind. App. 427.

[4] Eldridge v. Hawley, 115 Mass. 410.

error to modify an instruction which assumes a controverted fact, so as to make it conditional on a finding of such fact,[5] and the trial court may correct its mistake in the use of a word,[6] and instructions which are misleading or not sufficiently clear may be explained by other instructions.[7] When so requested, it is the duty of the trial judge to give instructions correcting errors in its charge.[8]

§ 456. Manner of correction or withdrawal

It is not improper for the court to correct an instruction by drawing a line across a part thereof desired to be stricken out.[9] When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake,[10] and when the court withdraws an instruction, the attention of the jury should be specifically called to the change.[11] Thus, where the court expresses an opinion as to what a witness has testified to, which is directly opposed to the fact, the court should not only withdraw his statement from the jury, but expressly admit that he was wrong as to his remembrance of the testimony of the witness.[12]

[5] Jones v. Harris, 40 A. 791, 186 Pa. 469, 42 Wkly. Notes Cas. 362.

[6] Falkner v. Behr, 75 Ga. 671.

[7] Louisville & N. R. Co. v. Bogue, 58 So. 392, 177 Ala. 349; Kramer v. Compton, 52 So. 351, 166 Ala. 216; K. B. Koosa & Co. v. Warten, 48 So. 544, 158 Ala. 496; Glatfelter v. Security Ins. Co. of New Haven, Conn., 167 N. W. 572, 102 Neb. 464.

[8] Pollak v. Davidson, 87 Ala. 551, 6 So. 312; Zamore v. Boston Elevated Ry. Co., 84 N. E. 858, 198 Mass. 594; Watson v. Boswell, 61 S. W. 407, 25 Tex. Civ. App. 379.

Error in instruction given by consent of both parties. Where a party asks for an instruction, and it is granted upon the concession of the other party, it becomes the duty of the court afterwards to withdraw it, if it is found not to express the law applicable to the case. Northern Central Ry. Co. v. State, 29 Md. 420, 96 Am. Dec. 545.

[9] State v. Leete, 174 N. W. 253, 187 Iowa, 305; Same v. Newcomber, 174 N. W. 255.

[10] Louisville & N. R. Co. v. Johnson (C. C. A. Ill.) 81 F. 679, 27 C. C. A. 367; People v. Goodrode, 94 N. W. 14, 132 Mich. 542.

Illustrations of instructions insufficient to correct error. In a prosecution for perjury, error in charging that defendant would be guilty if he falsely testified that he had not "heard" of the existence of a certain bribery fund, where the perjury assigned in the indictment was a denial of "knowledge," was not cured by cautioning them that what defendant had read in the papers would not be knowledge. State v. Faulkner, 75 S. W. 116, 175 Mo. 546.

[11] New Albany Woolen Mills v. Meyers, 43 Mo. App. 124.

Sufficiency of withdrawal of instruction. A statement by the trial judge that he will not undertake to state certain evidence is sufficient to withdraw his previous erroneous statement thereof. American Mining & Smelting Co. v. Converse, 56 N. E. 594, 175 Mass. 449.

[12] People v. Jacobs, 90 N. E. 1092, 243 Ill. 580.

An erroneous instruction may be withdrawn from the jury by a direction that it is withdrawn and is to be disregarded by the jury,[13] and if the jury is told that certain instructions are withdrawn and other instructions are to take their place, it is not necessary to expressly admonish the jury to disregard the instructions so withdrawn.[14]

Where the trial court promptly corrects an erroneous statement of a rule of law and gives the jury the proper rule, the error is sufficiently retracted.[15] A mere withdrawal of an instruction after the jury has retired need not be in writing.[16]

[13] State v. Hood, 59 S. E. 971, 63 W. Va. 182, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964.

[14] Goldsmith v. First Nat. Bank, 96 N. E. 503, 50 Ind. App. 11.

[15] Massie v. State, 101 S. E. 703, 24 Ga. App. 548; State v. Baldwin, 100 S. E. 345, 178 N. C. 693.

[16] Robinson v. State, 106 N. E. 533, 182 Ind. 329.

See, also, ante, § 445, note 28.

CHAPTER XXXV

GIVING ADDITIONAL INSTRUCTIONS AFTER RETIREMENT OF JURY

§ 457. Power and duty of court.
458. Right of parties to request additional instructions on return of jury for further instructions.
459. Giving additional instructions on report by jury of inability to agree.
460. What further instructions may be given.
461. Manner of giving additional instructions after retirement of jury.
462. Presence of parties or their counsel.
463. Presence of defendant and his counsel in criminal prosecution.

§ 457. Power and duty of court

The general rule is that the court may, in the exercise of a sound discretion, either on its own motion[1] or at the request of the parties or of the jury, in some cases under statutory provision therefor, recall the jury, after they have retired to consider their verdict, and give them additional instructions, for the purpose of refreshing their recollection as to the evidence given in the case,[2] or to correct, or withdraw, or supply omissions in, instructions previously given,[3] or to explain instructions already given.[4]

[1] **U. S.** Allis v. United States, 15 S. Ct. 36, 155 U. S. 123, 39 L. Ed. 91.
Cal. People v. Perry, 65 Cal. 568, 4 P. 572.
Fla. Coleman v. State, 17 Fla. 206.
Ind. Hogg v. State, 7 Ind. 551.
Mich. People v. Hoffman, 105 N. W. 838, 142 Mich. 531.
Mo. State v. Furgerson, 53 S. W. 427, 152 Mo. 92.
Tex. Flores v. State, 53 S. W. 346, 41 Tex. Cr. R. 166.
In Texas, under a former statute, the court could not in a criminal case give additional instructions after the jury had retired, except on the request of the jury and the consent of the accused. Benevides v. State, 20 S. W. 369, 31 Tex. Cr. R. 173, 37 Am. St. Rep. 799; Myers v. State, 8 Tex. App. 321; Garza v. State, 3 Tex. App. 287.
In Kentucky, under statutory provisions, the court should not, after the retirement of the jury, give them further instructions except at their request. Brown v. Commonwealth, 224 S. W. 362, 188 Ky. 814.
In Washington, the giving by the court on its own motion of additional instructions after the retirement of the jury is error, although not necessarily a reversible one. State v. Hessel, 191 P. 637, 112 Wash. 53.

[2] People v. Shuler, 98 N. W. 986, 136 Mich. 161; Bonawitz v. De Kalb, 89 N. W. 379, 2 Neb. (Unof.) 534.
Discretion of court as to how fully evidence shall be restated, see Byrne v. Smith, 24 Wis. 68.

[3] **Ark.** Hamilton v. State, 36 S. W. 1054, 62 Ark. 543; McDaniel v. Crosby, 19 Ark. 533.
Colo. Hayes v. Williams, 30 P. 352, 17 Colo. 465.
Ga. Patterson v. State, 50 S. E. 489, 122 Ga. 587.
Ill. Shaw v. Camp, 43 N. E. 608, 160 Ill. 425; City of Joliet v. Looney, 42 N. E. 854, 159 Ill. 471.
Ind. Sage v. Evansville & T. H. R. Co., 33 N. E. 771, 134 Ind. 100; McClelland v. Louisville & N. A. Ry.

[4] City of Covington v. Bostwick (Ky.) 82 S. W. 569.

This discretion of the court with regard to the giving of additional instructions is a large one, and it may supplement the original charge, whenever confident that the ends of justice will be served by so doing.[5] On the other hand, in the absence of a controlling statutory provision, the refusal of the court, after the retirement of the jury, to give additional instructions, cannot ordinarily be made a ground of exception on appeal,[6] and in some jurisdictions statutory provisions, forbidding the giving of further instructions after the argument begins, are held to justify a denial by the court of the request of the jury for additional instructions.[7]

However, in some cases, it may be the duty of the court to give additional instructions after the jury have retired, to cure omissions or oversights in instructions already given,[8] or to correct an erroneous statement with regard to matters of evidence,[9] or to assist the jury to a better comprehension of instructions previously given.[10] In some jurisdictions it is said to be the duty of the court, on the request of the jury, to recharge them on any point upon which they may desire additional light,[11] and in some juris-

Co., 94 Ind. 276; Hartman v. Flaherty, 80 Ind. 472; Farley v. State, 57 Ind. 331.

Mass. Rainger v. Boston Mut. Life Ass'n, 44 N. E. 1088, 167 Mass. 109; Nichols v. Munsel, 115 Mass. 567; Florence Sewing Machine Co. v. Grover & Baker Sewing Machine Co., 110 Mass. 70, 14 Am. Rep. 579.

Minn. State v. Brown, 12 Minn. 538 (Gil. 448).

Miss. Clarke v. Pierce, 34 So. 4, 82 Miss. 462.

Mo. Pace v. Roberts, 78 S. W. 52, 103 Mo. App. 662; Willmott v. Corrigan Consol. St. Ry. Co., 17 S. W. 490, 106 Mo. 535.

Neb. Jessen v. Donahue, 96 N. W. 639, 4 Neb. (Unof.) 838; McClary v. Stull, 62 N. W. 501, 44 Neb. 175.

N. H. Rizzoli v. Kelley, 44 A. 64, 68 N. H. 3.

Ohio. Solomon v. Reis, 3 O. C. D. 184, 5 Ohio Cir. Ct. R. 375.

S. C. Jones v. Swearingen, 42 S. C. 58, 19 S. E. 947.

S. D. Williams v. Chicago & N. W. Ry. Co., 78 N. W. 949, 11 S. D. 463.

Wis. Dresser v. Lenima, 100 N. W. 844, 122 Wis. 387.

See Choctaw, O. & G. Ry. Co. v. Craig, 95 S. W. 168, 79 Ark. 53; Wilson v. State, 38 S. W. 1013, 37 Tex. Cr. R. 156; Caston v. State, 31 Tex. Cr. R. 304, 20 S. W. 585.

[5] Carter v. Becker, 77 P. 264, 69 Kan. 524.

[6] **Ark.** Norton v. Elkhorn Bank, 17 S. W. 362, 55 Ark. 59.

Mass. In re Phillips, 132 Mass. 233.

Mo. Pierce v. Michel, 60 Mo. App. 187.

N. H. Harvey v. Graham, 46 N. H. 175.

N. J. Jackson v. State, 49 N. J. Law, 252, 9 A. 740.

N. Y. People v. Parker, 32 N. E. 1013, 137 N. Y. 535; Ivey v. Brooklyn Heights R. Co., 71 N. Y. S. 633, 63 App. Div. 311.

Tex. Young v. Hahn (Civ. App.) 69 S. W. 203; Luke v. City of El Paso (Civ. App.) 60 S. W. 363.

W. Va. Tully v. Despard, 6 S. E. 927, 31 W. Va. 370.

[7] Southern Pac. Co. v. Wilson, 85 P. 401, 10 Ariz. 162.

[8] Yeldell v. Shinholster, 15 Ga. 189; Dowzelot v. Rawlings, 58 Mo. 75.

[9] Morris v. State, 41 So. 274, 146 Ala. 66.

[10] Duane v. Garritson, 58 S. W. 1063, 106 Tenn. 38.

[11] Phelps v. State, 75 Ga. 571.

dictions there are mandatory statutes requiring the court, at any time before the jury render their verdict, to give them, at their request, additional information as to points of law arising in the case.[12]

§ 458. Right of parties to request additional instructions on return of jury for further instructions

Usually the court need not give instructions not requested by the parties until after the jury, having once retired to deliberate upon their verdict, have returned into court for further instructions;[13] but in some jurisdictions the court is required to give such requests, if the new instructions given at the instance of the jury suggest other proper instructions necessary to expound the whole law of the case clearly and fully.[14]

§ 459. Giving additional instructions on report by jury of inability to agree

As a general rule, when the jury return into court in the presence of the parties and report that they are unable to agree, the court may, of its own motion, give them further correct instructions, so far as necessary to meet the difficulties in their minds,[15] and in some jurisdictions the parties have the right, when the jury thus returns into court, to ask for additional instructions.[16]

§ 460. What further instructions may be given

Additional instructions to the jury are proper and necessary when they disagree as to the law of the case,[17] and, within the discretion of the court, it may further charge the jury that they must take the law of the case from the court, and that it is their duty not to arbitrarily reject the testimony of any witness,[18] or as to the desirability of reaching a verdict, and as to the proper manner of procedure, where differences of opinion as to the facts exist.[19] So the jury may be recalled for the purpose of supplying the omission of the court to instruct as to the good character of the de-

[12] Cox v. Peltier, 65 N. E. 6, 159 Ind. 355; Jones v. Johnson, 61 Ind. 257; Milward Co. v. Luigart, 41 S. W. 568, 19 Ky. Law Rep. 701.

[13] State v. Maxent, 10 La. Ann. 743; Commonwealth v. Ford, 146 Mass. 131, 15 N. E. 153; State v. Smith, 83 P. 965, 47 Or. 485; Williams v. Commonwealth, 85 Va. 607, 8 S. E. 470.

See, also, post, § 475, note 19.

[14] Preston v. State, 26 So. 736, 41 Fla. 627. See Harper v. State, 109 Ala. 66, 19 So. 901; Keeble v. Black, 4 Tex. 69; State v. Cobbs, 40 W. Va. 718, 22 S. E. 310.

[15] State v. Chandler, 31 Kan. 201, 1 P. 787; State v. Miller, 100 Mo. 606, 13 S. W. 832, 1051; Hannon v. State, 70 Wis. 448, 36 N. W. 1.

[16] Fisher v. People, 23 Ill. 283; State v. Baptiste, 26 La. Ann. 134.

[17] State v. Pitts, 11 Iowa, 343.

[18] Marcus v. State, 89 Ala. 23, 8 So. 155.

[19] Varnum v. State (Ga. App.) 103 S. E. 742; State v. Tripp, 84 N. W. 546, 113 Iowa, 698.

fendant,[20] or to supply the omission to instruct on the law of habitual criminals,[21] or on the law of principal and accessory,[22] or on the different degrees of the offense charged,[23] or on the defense of alibi.[24]

The jury may be recalled for the purpose of withdrawing from their consideration an issue submitted by a former instruction and which is not in the case.[25] So the jury may be recalled to be instructed as to the form of their verdict.[26] Where the disagreement of the jury is merely as to the facts, the court may properly decline to give further instructions.[27]

Ordinarily the court, on being requested by the jury to give further instructions on any point, is not required to confine itself to such point.[28] The court may, however, decline to broaden its instructions in such a case beyond the scope of the inquiry of the jury,[29] and the general rule is that in any case it is not required to repeat its entire previous charge,[30] and in some jurisdictions, in criminal cases, no charge should be given when the jury asks for further instructions, except upon the subject of their interrogation.[31]

§ 461. Manner of giving additional instructions after retirement of jury

Where the court undertakes to give additional instructions after the jury have retired, they should be recalled and the instructions given in open court.[32] If such instructions are sent to the jury by the bailiff in charge, the consent of the parties must be secured.[33] The trial judge cannot, after adjourning court and going home, send further instructions to the jury.[34]

[20] Barber v. State, 37 S. E. 885, 112 Ga. 584.

[21] McDonald v. Commonwealth, 53 N. E. 874, 173 Mass. 322, 73 Am. St. Rep. 293.

[22] Gather v. State (Tex. Cr. App.) 81 S. W. 717.

[23] State v. Kessler, 49 P. 293, 15 Utah, 142, 62 Am. St. Rep. 911.

[24] Tooke v. State (Ga. App.) 102 S. E. 905.

[25] State v. Derry, 108 A. 568, 118 Me. 431.

[26] Pritchett v. State, 92 Ga. 65, 18 S. E. 536.

[27] State v. Maxwell, 42 Iowa, 208.

[28] People v. McKay, 55 P. 594, 122 Cal. 628.

[29] O'Shields v. State, 55 Ga. 696.

[30] Fordham v. State, 37 S. E. 391, 112 Ga. 228; Gravett v. State, 74 Ga. 191.

Where, however, the jury do not confine their request for the reading of instructions to any specific one, it will ordinarily be error to single out a particular instruction for reading. St. Louis, I. M. & S. R. Co. v. Reed, 115 S. W. 150, 88 Ark. 458.

[31] Wharton v. State, 45 Tex. 2.

[32] Low v. Freeman, 20 N. E. 242, 117 Ind. 341.

[33] **Ala.** Johnson v. State, 14 So. 627, 100 Ala. 55.

Ill. Chicago & A. E. R. Co. v. Robbins, 43 N. E. 332, 159 Ill. 598.

Ind. Smith v. McMillen, 19 Ind. 391.

Mich. Hopkins v. Bishop, 51 N.

[34] Rafferty v. People, 72 Ill. 37.

Under a statute providing that while the jury is out the court is deemed open for every purpose connected with the case submitted to them until a verdict is reached or the jury is discharged, additional instructions may be given on Sunday, if the jury are still deliberating on that day.[35]

The court may answer the inquiry of the jury concerning any point upon which they are in doubt, by referring them to its previous instructions, if they fully and correctly cover the point.[36] The statutory requirements as to reducing instructions to writing should be observed in giving additional instructions after the retirement of the jury,[37] subject to the same limitations and qualifications that govern in the case of instructions given before retirement.[38]

§ 462. Presence of parties or their counsel

In probably the majority of jurisdictions the court, on calling the jury back and giving them further instructions in open court, is not bound to have the parties or their counsel present or to notify them.[39] It is considered the better practice, however, to notify counsel,[40] and in some jurisdictions the court is under obligation in such a case to endeavor to secure the presence of the parties or their counsel.[41] In these jurisdictions it will not be error for the court

W. 902, 91 Mich. 328, 30 Am. St. Rep. 490.

Mo. Chouteau v. Jupiter Iron Works, 7 S. W. 467, 94 Mo. 388.

Neb. Martin v. Martin, 107 N. W. 580, 76 Neb. 335, 124 Am. St. Rep. 815, 14 Ann. Cas. 511.

Pa. Sommer v. Huber, 38 A. 595, 183 Pa. 162.

[35] People v. Odell, 1 Dak. 197, 46 N. W. 601.

[36] Savary v. State, 87 N. W. 34, 62 Neb. 166.

[37] Gile v. People, 1 Colo. 60; State v. Stoffel, 48 Kan. 364, 29 P. 685; Mallison v. State, 6 Mo. 399; Lawrence v. State, 7 Tex. App. 192.

[38] People v. Leary, 105 Cal. 486, 39 P. 24; People v. Jackson, 57 Cal. 316; State v. McLafferty, 47 Kan. 140, 27 P. 843.

[39] **U. S.** (C. C. Mass.) Fournier v. Pike, 128 F. 991.

Me. State v. Pike, 65 Me. 111.

Mass. McCoy v. Jordan, 69 N. E. 358, 184 Mass. 575; Kullberg v. O'Donnell, 33 N. E. 528, 158 Mass. 405, 35 Am. St. Rep. 507.

Mich. National Life & Trust Co. v. Omans, 100 N. W. 595, 137 Mich. 365.

Minn. Hudson v. Minneapolis, etc., R. Co., 46 N. W. 314, 44 Minn. 52.

N. H. Leighton v. Sargent, 31 N. H. 119, 64 Am. Dec. 323; Shapley v. White, 6 N. H. 172.

N. J. Cooper v. Morris, 7 A. 427, 48 N. J. Law, 607.

N. Y. Wiggins v. Downer, 67 How. Prac. 65; Cornish v. Graff, 7 N. Y. Civ. Proc. R. 204.

R. I. Alexander v. Gardiner, 14 R. I. 15.

Wis. Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 295, 7 Am. Rep. 81.

[40] Aerheart v. St. Louis, I. M. & S. Ry. Co., 99 F. 907, 40 C. C. A. 171; Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659; Heenan v. Howard, 81 Ill. App. 629; Traders' & Truckers' Bank v. Black, 60 S. E. 743, 108 Va. 59; Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 295, 7 Am. Rep. 81.

[41] **Ala.** Kuhl v. Long, 15 So. 267, 102 Ala. 563.

Cal. Redman v. Gulnac, 5 Cal. 148.

Ga. Bryant v. Simmons, 74 Ga. 405.

to give such instructions in the absence of counsel if their client is present.[42] The court should never go alone to the jury room and there give them further instructions. To do this constitutes fatal error.[43]

§ 463. Presence of defendant and his counsel in criminal prosecution

In criminal cases the general rule is that additional instructions given after the jury have retired must be so given in open court in the presence of the defendant,[44] and that the giving of such instructions in his absence will constitute fatal error, although his counsel is present.[45] A limitation of the above rule is held in some jurisdictions, in that the giving of such instructions in the absence of the defendant will not be cause for reversal, if such absence is not brought about by any act of the court,[46] as where defendant and his counsel cannot be found, so that they may be notified.[47] The rule requiring the presence of the accused does not apply to statements which cannot affect the verdict.[48]

While it is desirable that counsel for the prisoner should be present when such instructions are given, and in some jurisdictions statutory provision is made for giving notice to the prosecuting attorney and the counsel for the defendant of the intention of the court to give further instructions,[49] the absence of counsel in such case will not constitute reversible error.[50]

Iowa. Burton v. Neill, 118 N. W. 302, 140 Iowa, 141, 17 Ann. Cas. 532.

Mo. McPherson v. St. Louis & N. A. Ry. Co., 10 S. W. 846, 97 Mo. 253; Norton v. Dorsey, 65 Mo. 376.

Ohio. Seagrave v. Hall, 10 Ohio Cir. Ct. R. 395, 6 O. C. D. 497.

[42] Torque v. Carrillo, 25 P. 526, 1 Ariz. 336.

[43] Jones v. Johnson, 61 Ind. 257; Fish v. Smith, 12 Ind. 563; Read v. City of Cambridge, 124 Mass. 567, 26 Am. Rep. 690; Campbell v. Beckett, 8 Ohio St. 210.

[44] **Ala.** Johnson v. State, 100 Ala. 55, 14 So. 627.

Ark. Stroope v. State, 80 S. W. 749, 72 Ark. 379.

Ga. Wilson v. State, 87 Ga. 583, 13 S. E. 566.

Ind. Roberts v. State, 111 Ind. 340, 12 N. E. 500.

Ky. Bailey v. Commonwealth, 71 S. W. 632, 24 Ky. Law Rep. 1419.

La. State v. Frisby, 19 La. Ann. 143.

N. M. Territory v. Lopez, 3 N. M. 104, 2 P. 364.

Tex. Taylor v. State, 42 Tex. 504.

[45] **Ga.** Bonner v. State, 67 Ga. 510.

Kan. State v. Myrick, 38 Kan. 238, 16 P. 330.

Ohio. Jones v. State, 26 Ohio St. 208; Kirk v. State, 14 Ohio, 511.

Tenn. Witt v. State, 5 Cold. (45 Tenn.) 11.

Wash. Linbeck v. State, 1 Wash. St. 336, 25 P. 452.

[46] Tooke v. State (Ga. App.) 102 S. E. 905; Davis v. State, 50 S. E. 376, 122 Ga. 564.

[47] State v. Hale, 91 Iowa, 367, 59 N. W. 281.

[48] Holland v. People, 69 P. 519, 30 Colo. 94; State v. Olds, 76 N. W. 644, 106 Iowa, 110; State v. Jones, 29 S. C. 201, 7 S. E. 296.

[49] People v. Kennedy, 11 N. Y. S. 244, 57 Hun, 532; People v. Cassiano, 30 Hun (N. Y.) 388.

[50] People v. Mayes, 45 P. 860, 113 Cal. 618; State v. Dudoussat, 47 La. Ann. 977, 17 So. 685.

CHAPTER XXXVI

REQUESTS OR PRAYERS FOR INSTRUCTIONS

A. Necessity of Requests or Prayers

1. *To Authorize the Giving of Instructions*

§ 464. Disability of court to give any instructions in absence of request therefor.
465. Disability of court to give instructions on particular matters in absence of request.

2. *To Require the Giving of Instructions on the Substantial Issues of the Case*

466. Rule in civil cases.
467. Rule in criminal cases.

3. *Necessity of Requests to Make it Duty of Court to Give Further or More Specific Instructions*

468. General rule.
469. Specific applications of rule in civil cases.
470. Application of rule in criminal cases.
471. Qualifications of rule.

4. *Failure to Request Instructions as Precluding Party from Complaining of Positive Error or Misdirection in Those Given*

472. General rule.
473. What constitutes positive error.
474. Error in instructions induced by party.

B. Time of Making Requests

475. Rule in absence of specific regulation.
476. Regulation by statute or rule of court.
477. Prematurity of requests.
478. Tardiness of requests.
479. Operation and mandatory character of statutes or rules of court prescribing time for presenting requests.

C. Formal Matters Connected with Preparation of Requests

480. Requisites of requests in general.
481. Form and requisites of request for direction of verdict in criminal case.
482. Separating, numbering, and signing requests.
483. Submission of requests to opposing counsel.
484. Filing requests.

D. Necessity of Written Requests

485. Statement of rule.
486. Waiver of requirements of rule.

E. Presentation of Requests to Court

487. Necessary formalities connected with presenting requests to court.
488. Argument of requests.

F. Passing on Requests and Disposition Thereof

489. General considerations.
490. Time of passing on requests.

§ 491. Manner of giving requested instructions.
492. Comments and explanations by court on refusing requests.
493. Noting disposition of requests.
494. Inconsistent requests.

G. Power and Duty of Court with Respect to the Modification of, or the Substitution of Other Instructions for, Correct Requests

495. Rule that court may, on granting a correct request, vary its phraseology.
496. Rule that court should give or refuse a requested charge without alteration.
497. Power of court to substitute instructions of its own for correct instructions requested.
498. Manner of making modification.

H. Requests for Instructions Already Covered by Other Instructions

499. General rule.
500. Specific applications of rule.
501. Limitations of rule.

I. Erroneous Requests

502. Rule that such requests may be refused without attempt at correction.
503. Qualifications of rule.
504. Power of court to reform an erroneous request.
505. Effect of erroneous request as making it duty of court to give a proper charge.

A. Necessity of Requests or Prayers

Necessity of request for definitions, see ante, § 362.
Necessity of request for instruction on burden of proof, see ante, § 204.
Necessity of request for instructions on circumstantial evidence, see ante, § 230.
Necessity of request for instructions on presumptions, see ante, § 187.
Necessity of request for instruction to disregard certain evidence, see ante, § 292.

1. *To Authorize the Giving of Instructions*

§ 464. Disability of court to give any instructions in absence of request therefor

In one jurisdiction there is a statutory prohibition against the giving by the trial court on its own motion of instructions to the jury,[1] and in this jurisdiction it is error for the trial judge, of his own accord and without being requested so to do, to give instructions, although the subject-matter thereof be legal and applicable to the issues.[2] In other jurisdictions the rule is that the judge may, without being asked to do so, give such instructions as he thinks proper and conducive to justice.[3]

[1] Akroid v. State, 64 So. 936, 107 Miss. 51; Watkins v. State, 60 Miss. 323; Archer v. Sinclair, 49 Miss. 343; Edwards v. State, 47 Miss. 581.

[2] Davenport v. State, 83 So. 738, 121 Miss. 548; Lindsey Wagon Co. v. Nix, 67 So. 457, 108 Miss. 814; Williams v. State, 32 Miss. 389, 66 Am. Dec. 615.

[3] Brown v. People, 4 Gilman (Ill.)

§ 465. Disability of court to give instructions on particular matters in absence of request

In one jurisdiction, under a statute, the court is not authorized to charge upon the effect of evidence without having been requested so to do by a party.[4]

2. *To Require the Giving of Instructions on the Substantial Issues of the Case.*

§ 466. Rule in civil cases

In a number of jurisdictions it is not the duty of the trial court in civil cases to give instructions upon any question unless instructions covering such question are tendered and requested to be given.[5] In Missouri, where this rule prevails, it is held that, while it is the duty of the plaintiff to request instructions clearly presenting the law upon which he bases a claim to recover,[6] his failure to make such a request will nevertheless not constitute error,[7] since his right to move the court for instructions is a per-

439; Stumps v. Kelley, 22 Ill. 140; Carey v. Callan's Ex'r, 6 B. Mon. (Ky.) 44.

[4] Winford v. State, 75 So. 819, 16 Ala. App. 143.

[5] **Ariz.** United States v. Chung Sing, 36 P. 205, 4 Ariz. 217.

Ark. Choctaw, O. & G. R. Co. v. Baskins, 93 S. W. 757, 78 Ark. 355.

Fla. Carter v. Bennett, 4 Fla. 283.

Ill. Osgood v. Skinner, 71 N. E. 869, 211 Ill. 229, affirming judgment 111 Ill. App. 606; McKeown v. Dyniewicz, 83 Ill. App. 509.

Ky. Louisville & N. R. Co. v. Stephens, 220 S. W. 746, 188 Ky. 1; Ray v. Shemwell, 217 S. W. 351, 186 Ky. 442; Brown v. Gillespie, 10 Ky. Law Rep. (abstract) 634.

Md. Coates v. Sangston, 5 Md. 121.

Mo. Wall v. Weiler (App.) 200 S. W. 731; Kinsolving v. Kinsolving (App.) 194 S. W. 530; Stewart v. Mason (App.) 186 S. W. 578; De Ford v. Johnson (Sup.) 177 S. W. 577; Petershagen v. Star Clothing Co., 176 S. W. 466, 188 Mo. App. 581; Willis v. Miller, 175 S. W. 301, 189 Mo. App. 318; Carpenter v. Kansas City Southern Ry. Co., 175 S. W. 234, 189 Mo. App. 164; Sang v. City of St. Louis, 171 S. W. 347, 262 Mo. 454; Vannest v. Missouri, K. & T. Ry. Co., 168 S. W. 782, 181 Mo. App. 373; Wingfield v. Wabash R. Co., 166 S. W. 1037, 257 Mo. 347; Powell v. Union Pac. R. Co., 164 S. W. 628, 255 Mo. 420; Commerce Trust Co. v. White, 158 S. W. 457, 172 Mo. App. 537; National Stamping & Electric Works v. Wicks, 128 S. W. 775, 144 Mo. App. 249; Morgan v. Mulhall, 114 S. W. 4, 214 Mo. 451; Brown v. Globe Printing Co., 112 S. W. 462, 213 Mo. 611, 127 Am. St. Rep. 627; Sowders v. St. Louis & S. F. R. Co., 104 S. W. 1122, 127 Mo. App. 119; Hall v. St. Louis & S. Ry. Co., 101 S. W. 1137, 124 Mo. App. 661; Wilson v. Kansas City Southern Ry. Co., 99 S. W. 465, 122 Mo. App. 667.

N. M. Palatine Ins. Co., Limited, of Manchester, England, v. Santa Fe Mercantile Co., 82 P. 363, 13 N. M. 241.

Wis. Stuckey v. Fritsche, 77 Wis. 329, 46 N. W. 59.

[6] Sutter v. Metropolitan St. Ry. Co. (Mo.) 188 S. W. 65.

[7] Baughman v. Metropolitan St. Ry. Co. (Mo. App.) 177 S. W. 800; Williams v. Kansas City (Mo. App.) 177 S. W. 783; Kiser v. Metropolitan St. Ry. Co., 175 S. W. 98, 188 Mo. App. 169; Rickards v. Kansas City, 168 S. W. 845, 181 Mo. App. 336.

sonal privilege, which he may waive,[8] and that where the plaintiff does waive his right in this regard it is not error for the court to decline to instruct from his standpoint at the request of the defendant.[9] It is held, however, in this jurisdiction, that the court should, in the exercise of a sound discretion, charge the jury on the law of the case,[10] and it is also held in this jurisdiction, and in other jurisdictions where the court is not required to charge, except upon the request of the parties, that if it does undertake to give instructions it must cover all the issues and both sides of the controversy.[11]

In a number of other jurisdictions, in some cases under statute, the rule is, in civil actions, that the trial court is bound to see that the jury has a clear and intelligent understanding of the issues they are to pass on, that appropriate instructions should be given upon all the substantial issues, and that a failure to instruct thereon with reasonable fullness is prejudicial error, although no requests be made for additional instructions.[12]

[8] Sowders v. St. Louis & S. F. R. Co., 104 S. W. 1122, 127 Mo. App. 119.

[9] Marion v. St. Louis & S. F. R. Co., 104 S. W. 1125, 127 Mo. App. 129.

[10] McDonald v. Central Illinois Const. Co., 166 S. W. 1087, 183 Mo. App. 415.

[11] South Covington & C. St. Ry. Co. v. Core, 96 S. W. 562, 29 Ky. Law Rep. 836; Thornton v. Mersereau, 151 S. W. 212, 168 Mo. App. 1; Sinnamon v. Moore, 142 S. W. 494, 161 Mo. App. 168.

[12] **Ga.** Gainesville & N. W. R. Co. v. Galloway, 87 S. E. 1093, 17 Ga. App. 702; Seaboard Air Line Ry. v. Bostock, 58 S. E. 136, 1 Ga. App. 189; Evans & Pennington v. Nail, 57 S. E. 1020, 1 Ga. App. 42; Whelchel v. Gainesville & D. Electric Ry. Co., 42 S. E. 776, 116 Ga. 431; Phenix Ins. Co. v. Hart, 38 S. E. 67, 112 Ga. 765; Pryor v. Coggin, 17 Ga. 444.

Iowa. McSpadden v. Axmear, 181 N. W. 4; Freeby v. Town of Sibley, 167 N. W. 770, 183 Iowa, 827; Rusch v. Tjentland, 165 N. W. 999, 183 Iowa, 360. First Nat. Bank of Shenandoah v. Cook, 153 N. W. 169, 171 Iowa, 41; Soderburg v. Chicago, St. P., M. & O. Ry. Co., 149 N. W. 82, 167 Iowa, 123; Moran v. Martinson, 146 N. W. 841, 164 Iowa, 712; Capital City Brick & Pipe Co. v. City of Des Moines, 113 N. W. 835, 136 Iowa, 243; Owen v. Owen, 22 Iowa, 270.

Ind. Cleveland v. Emerson, 99 N. E. 796, 51 Ind. App. 339.

Mich. Pierson v. Smith, 178 N. W. 659, 211 Mich. 292; Wright v. Detroit, G. H. & M. Ry. Co., 77 Mich. 123, 43 N. W. 765, Barton v. Gray, 24 N. W. 638, 57 Mich. 622.

Neb. Larson v. Chicago & N. W. R. Co., 131 N. W. 201, 89 Neb. 247; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440; Sandwich Mfg. Co. v. Shiley, 15 Neb. 109, 17 N. W. 267.

S. C. Collins-Plass Thayer Co. v. Hewlett, 95 S. E. 510, 109 S. C. 245.

S. D. Wilson v. Commercial Union Ins. Co., 89 N. W. 649, 15 S. D. 322.

Tenn. Mariner v. Smith, 7 Baxt. 423.

Tex. Wallace v. Shapard, 94 S. W. 151, 42 Tex. Civ. App. 594. Compare Berry v. Texas & N. O. R. Co., 10 S. W. 726, 72 Tex. 620.

Vt. In re Bean's Will, 82 A. 734, 85 Vt. 452.

Illustrations of cases in which request not necessary. Where the petition, in an action for a personal injury negligently inflicted by defendants, charged a joint tort, and a de-

In another jurisdiction the rule is stated to be that the court need not charge, in the absence of a request for instructions, where the facts are simple,[13] but that the judge must of his own motion, with or without suggestion from the parties, submit such issues as are necessary to settle the material controversies arising under the pleadings.[14]

§ 467. Rule in criminal cases

In criminal cases the doctrine is in most jurisdictions,[15] in some jurisdictions a stricter rule being applied in criminal cases than that prevailing in civil cases,[16] that the court should give instructions necessary for the information of the jury, although no request is made therefor, and the court is required in a prosecution for felony to instruct the jury on all the law of the case,[17] or on the general principles of law pertinent to the case,[18] whether any request is made or not.

Thus this rule may be invoked to make it the duty of the court

fendant claimed that the codefendant, responsible for the injury, was an independent contractor, the question as to what is an independent contractor was an essential question, making it the duty of the court, independent of any requests, to state the law on the subject. Overhouser v. American Cereal Co., 105 N. W. 113, 128 Iowa, 580.

[13] Holly v. Holly, 94 N. C. 96.

[14] Mitchell v. Carolina Cent. R. Co., 32 S. E. 671, 124 N. C. 236, 44 L. R. A. 515.

[15] **Ga.** Tanner v. State, 88 S. E. 554, 145 Ga. 71; McLendon v. State, 82 S. E. 317, 14 Ga. App. 737; Sledge v. State, 26 S. E. 756, 99 Ga. 684.

N. C. State v. Merrick, 88 S. E. 501, 171 N. C. 788.

Tenn. Phipps v. State, 3 Cold. 344.

Tex. Woodall v. State, 126 S. W. 591, 58 Tex. Cr. R. 513; Miers v. State, 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; Sanders v. State, 41 Tex. 306; Marshall v. State, 40 Tex. 200; Cole v. State, 40 Tex. 147; Jackson v. State, 15 Tex. App. 84; Benevides v. State, 14 Tex. App. 378; Bennett v. Same, 12 Tex. App. 15; Sims v. State, 9 Tex. App. 586; Reed v. State, 9 Tex. App. 317; O'Mealy v. State, 1 Tex. App. 180.

Utah. Brannigan v. People, 24 P. 767, 3 Utah, 488.

Vt. State v. Clary, 78 A. 717, 84 Vt. 110, Ann. Cas. 1912D, 64.

[16] **Ky.** King v. Commonwealth, 220 S. W. 755, 187 Ky. 782; Thomas v. Commonwealth, 143 S. W. 409, 146 Ky. 790; French v. Commonwealth, 88 S. W. 1070, 28 Ky. Law Rep. 64; Williams v. Commonwealth, 7 Ky. Law Rep. (abstract) 745.

Mo. State v. Goode (Sup.) 220 S. W. 854; State v. Gaultney, 146 S. W. 1153, 242 Mo. 388; State v. Rufus, 51 S. W. 80, 149 Mo. 406; State v. Taylor, 118 Mo. 153, 24 S. W. 449; State v. Nelson, 118 Mo. 124, 23 S. W. 1088; State v. Henson, 106 Mo. 66, 16 S. W. 285; State v. Heinze, 66 Mo. App. 135.

[17] **Ky.** King v. Commonwealth, 220 S. W. 755, 187 Ky. 782; Wellman v. Commonwealth, 205 S. W. 328, 181 Ky. 346; Kinglesmith v. Commonwealth, 7 Ky. Law Rep. 744; Mackey v. Commonwealth, 4 Ky. Law Rep. 179, 80 Ky. 345.

Mo. State v. Lackey, 132 S. W. 602, 230 Mo. 707; State v. Banks, 73 Mo. 592; State v. Branstetter, 65 Mo. 149.

Neb. Carleton v. State, 61 N. W. 699, 43 Neb. 373.

[18] People v. Peck (Cal. App.) 185 P. 881.

to instruct on the issue of insanity as a defense in a criminal case.[19] The general rule is that, where the evidence raises the issue, the court should instruct on the law of self-defense, whether asked to do so or not,[20] and under a statute requiring the jury to be instructed on all questions of law arising in the case which are necessary for their information, it is held that such a charge is necessary where the issue of self-defense is presented by the evidence of the state, although such evidence is denied by, and inconsistent with, the evidence offered by the defendant himself.[21] But where, in a prosecution for homicide, the defendant claims he shot the deceased accidentally, and the issue of self-defense is not otherwise presented, the court need not instruct thereon, in the absence of a request to do so.[22] In some jurisdictions a request is not required to make it the duty of the court to charge that the venue must be proven.[23]

In Missouri, where the jury is required to instruct on its own motion on the law of the case in a criminal prosecution, such duty is held not to extend to instructions on collateral questions.[24] Within this rule the question whether extrajudicial statements of defendant were voluntarily made is a collateral one,[25] as is the question whether a statement by one defendant is binding on a codefendant.[26]

As a general rule, in a prosecution for a misdemeanor, it is only necessary to define the offense charged and state the punishment, and if any further instructions are desired by the accused they should be requested.[27]

[19] Thomas v. State, 40 Tex. 60.

[20] Collegenia v. State, 132 P. 375, 9 Okl. Cr. 425.

[21] State v. Bidstrup, 140 S. W. 904, 237 Mo. 273.

Rule in Michigan. Where, though the court charged on manslaughter as well as murder, accused denied that he did the killing and did not request a charge on self-defense, it was not necessary to charge on that subject. People v. Droste, 125 N. W. 87, 160 Mich. 66.

[22] State v. Davis, 58 S. W. 122, 104 Tenn. 501.

[23] Norris v. State, 155 S. W. 165, 127 Tenn. 437.

[24] State v. Baker, 175 S. W. 64, 264 Mo. 339; State v. Harris, 134 S. W. 535, 232 Mo. 317.

[25] State v. Simenson, 172 S. W. 601, 263 Mo. 264.

[26] State v. Taylor, 168 S. W. 1191, 261 Mo. 210.

[27] **Mo.** State v. Magruder (App.) 219 S. W. 701; State v. Clinkenbeard (App.) 185 S. W. 553.

Ohio. Myer v. State, 10 Ohio Cir. Ct. R. 226, 6 O. C. D. 477.

Tex. Stroud v. State (Cr. App.) 225 S. W. 256; Garrison v. State, 114 S. W. 128, 54 Tex. Cr. R. 600; High v. State (Cr. App.) 98 S. W. 849; Porter v. State (Cr. App.) 86 S. W. 1018; Clement v. State (Cr. App.) 86 S. W. 1016; Schrimsher v. State (Cr. App.) 80 S. W. 1013; Shaw v. State (Cr. App.) 73 S. W. 1046; Nicholson v. State, 71 S. W. 969, 44 Tex. Cr. R. 434; Efird v. State, 71 S. W. 957, 44 Tex. Cr. R. 447; Black v. State (Cr. App.) 47 S. W. 992; Arnold v. State (Cr. App.) 40 S. W. 591; Sparks v. State, 23 Tex. App. 447, 5 S. W. 135.

3. *Necessity of Requests to Make it Duty of Court to Give Further or More Specific Instructions*

§ 468. General rule

Where the instructions given are applicable to the evidence, and good as far as they go,[28] and set forth with reasonable fullness

[28] **U. S.** Northern Pac. R. Co. v. Mares, 128 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; (C. C. A. Mass.) Lindsey v. Testa, 200 F. 124, 118 C. C. A. 298; (C. C. A. Mo.) Hodge v. Chicago & A. Ry. Co., 121 F. 48, 57 C. C. A. 388; (C. C. A. Neb.) Frizzell v. Omaha St. Ry. Co., 124 F. 176, 59 C. C. A. 382; (C. C. A. Tex.) Texas & P. Ry. Co. v. Watson, 112 F. 402, 50 C. C. A. 230, affirmed 23 S. Ct. 681, 190 U. S. 287, 47 L. Ed. 1057.

Ala. Birmingham Ry., Light & Power Co. v. Wiggins, 54 So. 189, 170 Ala. 540; Virginia Bridge & Iron Co. v. Jordan, 42 So. 73, 143 Ala. 603, 5 Ann. Cas. 709; Ray v. Jackson, 90 Ala. 513, 7 So. 747; Skinner v. State, 30 Ala. 524; Hutchinson v. Dearing, 20 Ala. 798; Ewing v. Sanford, 19 Ala. 605; Hodges v. Branch Bank at Montgomery, 13 Ala. 455; Hunt v. Toulmin, 1 Stew. & P. 178.

Ariz. Arizona Pub. Co. v. Harris, 181 P. 373, 20 Ariz. 446; Weatherford v. Hanger, 146 P. 759, 16 Ariz. 427; Phœnix Ry. Co. v. Landis, 112 P. 844, 13 Ariz. 279, affirming judgment on rehearing 108 P. 247, 13 Ariz. 80.

Ark. Dent v. People's Bank of Imboden, 175 S. W. 1154, 118 Ark. 157, 1 A. L. R. 688; St. Louis, I. M. & S. Ry. Co. v. Drumright, 166 S. W. 938, 112 Ark. 452; Fancher v. Kenner, 161 S. W. 166, 110 Ark. 177; Jones v. Seymour, 130 S. W. 560, 93 Ark. 593; St. Louis, I. M. & S. Ry. Co. v. Glossup, 114 S. W. 247, 88 Ark. 225; Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 597.

Cal. Peluso v. City Taxi Co., 182 P. 808, 41 Cal. App. 297; Morgan v. Los Angeles Pac. Co., 108 P. 735, 13 Cal. App. 12; Viera v. Atchison, T. & S. F. Ry. Co., 101 P. 690, 10 Cal. App. 267; Crowley v. Strouse, 33 P. 456, 4 Cal. Unrep. 29; Scott v. Wood, 81 Cal. 398, 22 P. 871.

Colo. Ward v. Atkinson, 123 P. 120, 22 Colo. App. 134; Downing v. Tipton, 110 P. 70, 48 Colo. 364; Donley v. Bailey, 110 P. 65, 48 Colo. 373; Sandberg v. Borstadt, 109 P. 419, 48 Colo. 96; National Mut. Fire Ins. Co. v. Duncan, 98 P. 634, 44 Colo. 472, 20 L. R. A. (N. S.) 340; Whitehead v. Emmerich, 87 P. 790, 38 Colo. 13; Willard v. Williams, 50 P. 207, 10 Colo. App. 140.

Conn. Leone v. I. & F. Motor Car Co., 80 A. 520, 84 Conn. 463; Distin v. Bradley, 76 A. 991, 83 Conn. 466; Selleck v. Sugar Hollow Turnpike Co., 13 Conn. 453.

D. C. Prudential Ins. Co. of America v. Lear, 31 App. D. C. 184.

Fla. Pensacola Electric Co. v. Bissett, 52 So. 367, 59 Fla. 360.

Ga. Nisbet v. Vandiver, 101 S. E. 761, 24 Ga. App. 572; Social Circle Cotton Mill Co. v. Ransom, 99 S. E. 238, 23 Ga. App. 605; Camp v. Bagwell & Bagwell, 99 S. E. 234, 23 Ga. App. 690; Everett v. Ingram, 82 S. E. 562, 142 Ga. 145; Wilkes v. Groover, 75 S. E. 353, 138 Ga. 407; Bunn v. Hargraves, 60 S. E. 223, 3 Ga. App. 518; Southern Ry. Co. v. Thompson, 58 S. E. 1044, 129 Ga. 367; Wheelwright v. Akin, 92 Ga. 394, 17 S. E. 610; Rutledge v. Hudson, 80 Ga. 266, 5 S. E. 93; Poullain v. Poullain, 76 Ga. 420, 4 S. E. 92; City of Atlanta v. Brown, 73 Ga. 630; Fuller v. City of Atlanta, 66 Ga. 80; Durand v. Grimes, 18 Ga. 693; Ellis v. Smith, 10 Ga. 253.

Idaho. Barter v. Stewart Mining Co., 135 P. 68, 24 Idaho, 540.

Ill. Wilkinson v. Service, 94 N. E. 50, 249 Ill. 146, Ann. Cas. 1912A, 41; Hagen v. Schleuter, 86 N. E. 112, 236 Ill. 467, reversing Hagan v. Schlueter, 140 Ill. App. 84; E. B. Conover & Co. v. Baltimore & O. S. W. R. Co., 212 Ill. App. 29; Treptow v. Montgomery Ward & Co., 153 Ill. App. 422.

Ind. Elliott v. Elliott, 111 N. E.

the general principles applicable to the case, or to a particular is-

813, 61 Ind. App. 209; Chicago & E. R. Co. v. Hamerick, 96 N. E. 649, 50 Ind. App. 425, rehearing granted 97 N. E. 546; Citizens' Street Ry. Co. v. Abright, 42 N. E. 238, 14 Ind. App. 433; Keller v. Reynolds, 40 N. E. 76, 12 Ind. App. 383; Lake Erie & W. R. Co. v. McHenry, 37 N. E. 186, 10 Ind. App. 525; Eppert v. Hall, 133 Ind. 417, 31 N. E. 74; Morningstar v. Hardwick, 3 Ind. App. 431, 29 N. E. 929; Ricketts v. Richardson, 85 Ind. 508; Bishop v. Redmond, 83 Ind. 157; Fessler v. Crouse, 73 Ind. 64.

Iowa. Peterson v. McManus, 172 N. W. 460, 188 Iowa, 522; Stilwell v. Stilwell, 172 N. W. 177, 186 Iowa, 177; McMullen v. Harris, 147 N. W. 164, 165 Iowa, 703; Hoffman v. Cedar Rapids & M. C. Ry. Co., 139 N. W. 165, 157 Iowa, 655, Ann. Cas. 1915C, 905; Rockwell v. Ketchum, 128 N. W. 940, 149 Iowa, 507; O'Mara v. Jensma, 121 N. W. 518, 143 Iowa, 297; Lee v. Conrad, 117 N. W. 1096, 140 Iowa, 16; Aughey v. Windrem, 114 N. W. 1047, 137 Iowa, 315; Mitchell v. Chicago, R. I. & P. Ry. Co., 114 N. W. 622, 138 Iowa, 283; Capital City Brick & Pipe Co. v. City of Des Moines, 113 N. W. 835, 136 Iowa, 243; Vorhes v. Buchwald, 112 N. W. 1105, 137 Iowa, 721; Bowder v. Tiffany, 91 N. W. 895, 118 Iowa, 130; Dashiel v. Harshman, 85 N. W. 85, 113 Iowa, 283; Keyes v. City of Cedar Falls, 78 N. W. 227, 107 Iowa, 509; Wimer v. Allbaugh, 78 Iowa, 79, 42 N. W. 587, 16 Am. St. Rep. 422; Koehler v. Wilson, 40 Iowa, 183; McCausland v. Cresap, 3 G. Greene, 161.

Kan. Smith v. St. L. & S. F. R. Co., 148 P. 759, 95 Kan. 451; Anderson v. Heasley, 148 P. 738, 95 Kan. 572; Hamilton v. Atchison, T. & S. F. Ry. Co., 148 P. 648, 95 Kan. 353; Dighera v. Wheat, 116 P. 616, 85 Kan. 458.

Ky. Murphy v. Hagan, 173 S. W. 1146, 163 Ky. 407; Cincinnati, N. O. & T. P. Ry. Co. v. Martin, 142 S. W. 410, 146 Ky. 260; Louisville, H. & St. L. Ry. Co. v. Roberts, 139 S. W. 1073, 144 Ky. 820; Madisonville, H. & E. R. Co. v. Thomas, 130 S. W. 975, 140 Ky. 143; West Kentucky Coal Co. v. Davis, 128 S. W. 1074, 138 Ky. 667; Loughridge v. Ball, 118 S. W. 321; Louisville & N. R. Co. v. Simrall's Adm'r, 127 Ky. 55, 104 S. W. 1011, 31 Ky. Law Rep. 1269, petition for modification of opinion denied 104 S. W. 1199, 32 Ky. Law Rep. 240; Louisville & N. R. Co. v. Bullins, 15 Ky. Law Rep. (abstract) 752.

Me. Murchie v. Gates, 78 Me. 300, 4 A. 698.

Md. Capital Traction Co. v. Contner, 87 A. 904, 120 Md. 78.

Mass. Leahy v. Standard Oil Co. of New York, 112 N. E. 950, 224 Mass. 352; Cashman v. Proctor, 86 N. E. 284, 200 Mass. 272; Baldwin v. American Writing Paper Co., 82 N. E. 1, 196 Mass. 402; Cameron v. New England Telephone & Telegraph Co., 65 N. E. 385, 182 Mass. 310; Caswell v. Fellows, 110 Mass. 52; Hall v. Weir, 1 Allen, 261.

Mich. Schneider v. C. H. Little Co., 166 N. W. 912, 200 Mich. 361; Wood v. Standard Drug Store, 157 N. W. 403, 190 Mich. 654; In re Bailey's Estate, 153 N. W. 39, 186 Mich. 677; Taylor v. Indiana & Michigan Electric Co., 151 N. W. 739, 184 Mich. 578, Ann. Cas. 1915E, 294; Hammond v. Porter, 114 N. W. 64, 150 Mich. 328; Mahlat v. Codde, 64 N. W. 194, 106 Mich. 387; Pickard v. Bryant, 92 Mich. 430, 52 N. W. 788; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Rankin v. West, 25 Mich. 195.

Minn. Likum v. Porter, 154 N. W. 1070, 131 Minn. 274; Smith v. Great Northern Ry. Co., 153 N. W. 513, 132 Minn. 147, order modified 155 N. W. 1040, 132 Minn. 147; Blakely v. J. Neils Lumber Co., 151 N. W. 182, 128 Minn. 465; Campbell v. Canadian Northern Ry. Co., 144 N. W. 772, 124 Minn. 245; Krulic v. Petcoff, 142 N. W. 897, 122 Minn. 517, Ann. Cas. 1914D, 1056; Ferber v. State Bank of Pine Island, 133 N. W. 611, 116 Minn. 261; Hanson v. Hellie, 120 N. W. 341, 107 Minn. 375; Bailey v. Grand Forks Lumber Co., 119 N. W. 786, 107 Minn. 192; McCormick Harvesting Mach. Co. v. McNicholas, 69 N. W. 36, 66 Minn. 384; Clapp v. Minneapolis & St. L. Ry. Co., 36 Minn.

6, 29 N. W. 340, 1 Am. St. Rep. 629; Le Clair v. First Div. St. P. & P. R. Co., 20 Minn. 9 (Gil. 1); Egan v. Faendel, 19 Minn. 231 (Gil. 191); Jaspers v. Lano, 17 Minn. 296 (Gil. 273); Warner v. Myrick, 16 Minn. 91 (Gil. 81); Hunter v. Jones, 13 Minn. 307 (Gil. 282).

Miss. Yazoo & M. V. R. Co. v. Messina, 67 So. 963, 109 Minn. 143; Lindsey Wagon Co. v. Nix, 67 So. 459, 108 Miss. 814.

Mo. Dale v. Smith (App.) 185 S. W. 1183; Sontag v. Ude, 177 S. W. 659, 191 Mo. App. 617; Davis v. Metropolitan St. Ry. Co., 176 S. W. 1067, 188 Mo. App. 128; Eversole v. Wabash R. Co., 155 S. W. 419, 249 Mo. 523; Richardson v. Metropolitan St. Ry. Co., 147 S. W. 1126, 166 Mo. App. 162; Booker v. South-West Missouri R. Co., 128 S. W. 1012, 144 Mo. App. 273; Jenkins v. Clopton, 121 S. W. 759, 141 Mo. App. 74; Clack v. Kansas City Electrical Wire Subway Co., 119 S. W. 1014, 138 Mo. App. 205; Moore v. Missouri Pac. Ry. Co., 116 S. W. 440, 136 Mo. App. 210; Warrington v. Kallauner, 115 S. W. 492, 135 Mo. App. 5; Moss v. Missouri Pac. Ry. Co., 107 S. W. 422, 128 Mo. App. 385; Ghere v. Zey, 107 S. W. 418, 128 Mo. App. 362; Flaherty v. St. Louis Transit Co., 106 S. W. 15, 207 Mo. 318; Cornwell v. St. Louis Transit Co., 80 S. W. 744, 106 Mo. App. 135; Goetz v. Ambs, 27 Mo. 28; Johnson v. Vette, 77 Mo. App. 563; Haymaker v. Adams, 61 Mo. App. 581.

Mont. Schumacher v. Murray Hospital, 193 P. 397, 58 Mont. 447; Wallace v. Chicago, M. & P. S. Ry. Co., 157 P. 955, 52 Mont. 345; Kirk v. Smith, 138 P. 1088, 48 Mont. 489; Frederick v. Hale, 112 P. 70, 42 Mont. 153.

Neb. Van Dorn v. Kimball, 160 N. W. 953, 100 Neb. 590; Edwards & Bradford Lumber Co. v. Lamb, 145 N. W. 703, 95 Neb. 263; Stoeker v. Nathanson, 98 N. W. 1061, 5 Neb. (Unof.) 435, 70 L. R. A. 667; Republican Valley R. Co. v. Fink, 18 Neb. 89, 24 N. W. 691; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724; Republican Valley R. Co. v. Fellers, 16 Neb. 169, 20 N. W. 217; Burlington & M. R. R. Co. v. Schluntz, 14 Neb. 421, 16 N. W. 439; Sioux City R. Co. v. Brown, 13 Neb. 317, 14 N. W. 407.

N. H. Turner v. Cocheco Mfg. Co., 77 A. 999, 75 N. H. 521; Hooksett v. Amoskeag Mfg. Co., 44 N. H. 105; Goodrich v. Eastern R. R., 38 N. H. 390; Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319.

N. J. Lange v. New York, S. & W. R. Co., 99 A. 346, 89 N. J. Law, 604.

N. M. King v. Tabor, 110 P. 601, 15 N. M. 488.

N. Y. Dooley v. Press Pub. Co., 156 N. Y. S. 381, 170 App. Div. 492; Bresslin v. Star Co., 151 N. Y. S. 660, 166 App. Div. 89, affirming judgment 148 N. Y. S. 295, 85 Misc. Rep. 609; Zvonik v. Interurban St. Ry. Co. (Sup.) 88 N. Y. S. 399; Powell v. Jones, 42 Barb. 24.

N. C. Baggett v. Lanier, 100 S. E. 254, 178 N. C. 129; Cole v. Boyd, 95 S. E. 778, 175 N. C. 555; Webb. v. Rosemond, 90 S. E. 306, 172 N. C. 848; Marcom v. Durham & S. R. Co., 81 S. E. 290, 165 N. C. 259; Todd v. Mackie, 76 S. E. 245, 160 N. C. 352; Gay v. Mitchell, 60 S. E. 426, 146 N. C. 509; Kendrick v. Dellinger, 117 N. C. 491, 23 S. E. 438; Gwaltney v. Scottish Carolina Timber & Land Co., 115 N. C. 579, 20 S. E. 465; Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032; Morgan v. Lewis, 95 N. C. 296; Boykin v. Perry, 49 N. C. 325; Brown v. Morris, 20 N. C. 565.

N. D. McGregor v. Great Northern Ry. Co., 154 N. W. 261, 31 N. D. 471, Ann. Cas. 1917E, 141; Zilke v. Johnson, 132 N. W. 640, 22 N. D. 75, Ann. Cas. 1913E, 1005.

Ohio. Steen v. Friend, 20 Ohio Cir. Ct. R. 459, 11 O. C. D. 235; Cleveland, C., C. & St. L. Ry. Co. v. Richerson, 19 Ohio Cir. Ct. R. 385, 10 O. C. D. 326; Clark v. Clark, 16 Ohio Cir. Ct. R. 103, 8 O. C. D. 752; Cincinnati & H. Turnpike Co. v. Hester, 12 Ohio Cir. Ct. R. 350, 5 O. C. D. 690; Queen Ins. Co. v. Leonard, 9 Ohio Cir. Ct. R. 46, 6 O. C. D. 49.

Okl. Muskogee Electric Traction Co. v. Rye, 148 P. 100, 47 Okl. 142; Seay v. Plunkett, 145 P. 490, 44 Okl. 794; St. Louis & S. F. R. Co. v. Cro-

well, 127 P. 1063, 33 Okl. 773; Moore v. O'Dell, 111 P. 308, 27 Okl. 194.

Or. McGee v. Carlton Lumber Co., 151 P. 652, 77 Or. 446; Devroe v. Portland Ry., Light & Power Co., 131 P. 304, 64 Or. 547; Kincart v. Shambrook, 128 P. 1003, 64 Or. 27.

Pa. Yeager v. Anthracite Brewing Co., 102 A. 418, 259 Pa. 123; Eichenhofer v. City of Philadelphia, 98 A. 1065, 248 Pa. 365; Geiger v. Pittsburgh Rys. Co., 93 A. 342, 247 Pa. 287; Bright v. Ruthenian Greek Catholic Congregation, 92 A. 131, 246 Pa. 156; Irwin v. Pennsylvania R. Co., 75 A. 19, 226 Pa. 156; Serfass v. Driesbach, 141 Pa. 142, 21 A. 523; Frothingham v. Laflin & Rand Powder Co., 4 A. 720; Katzenberg v. Oberndorf, 70 Pa. Super. Ct. 567; Little v. Fearon, 49 Pa. Super. Ct. 634; Spring City Brick Co. v. Henry Martin Brick Mach. Mfg. Co., 39 Pa. Super. Ct. 7; McGrew v. Lippincott, 1 Pittsb. R. 444.

S. C. Stokes v. Murray, 87 S. E. 71, 102 S. C. 395; Cutter v. Mallard Lumber Co., 83 S. E. 595, 99 S. C. 231; Norton v. Columbia Electric St. Ry. Light & Power Co., 64 S. E. 962, 83 S. C. 26; Rochester v. Bull, 58 S. E. 766, 78 S. C. 249; Jennings v. Edgefield Mfg. Co., 52 S. E. 113, 72 S. C. 411; Sutton v. Clark, 38 S. E. 150, 59 S. C. 440, 82 Am. St. Rep. 848; Congdon v. Morgan, 13 S. C. 190.

Tenn. Chicago Guaranty Fund Life Soc. v. Ford, 58 S. W. 239, 104 Tenn. 533; Maxwell v. Hill, 89 Tenn. 584, 15 S. W. 253; East Tennessee, V. & G. R. Co. v. Topping, 10 Lea, 58; Thompson v. Commercial Bank, 3 Cold. 46.

Tex. City of San Antonio v. Newnam (Civ. App.) 218 S. W. 128; Wichita Valley Ry. Co. v. Somerville (Civ. App.) 179 S. W. 671; Phillip-Carey Co. v. Manes (Civ. App.) 177 S. W. 158; Planters' Oil Co. v. Keebler (Civ. App.) 170 S. W. 120; Ft. Worth & D. C. Ry. Co. v. Scheer (Civ. App.) 169 S. W. 1069; Ross v. Jackson (Civ. App.) 165 S. W. 513; Western Union Telegraph Co. v. Forest (Civ. App.) 157 S. W. 204; Pullman Co. v. Custer (Civ. App.) 140 S. W. 847; Lefkovitz v. Sherwood (Civ. App.) 136 S. W. 850; Lattimore v. Tarrant County, 124 S. W. 205, 57 Tex. Civ. App. 610; Williamson v. Chicago, R. I. & G. Ry. Co., 122 S. W. 897, 57 Tex. Civ. App. 502; Missouri, K. & T. Ry. Co. of Texas v. Williams (Civ. App.) 117 S. W. 1043; Jesse French Piano & Organ Co. v. Garza & Co., 116 S. W. 150, 53 Tex. Civ. App. 346; Pope v. Taliaferro, 115 S. W. 309, 51 Tex. Civ. App. 217; Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84; Gonzales v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 107 S. W. 896; Waters-Pierce Oil Co. v. Snell, 106 S. W. 170, 47 Tex. Civ. App. 413; Texas & N. O. R. Co. v. Scarborough (Civ. App.) 104 S. W. 408, judgment affirmed 108 S. W. 805, 101 Tex. 436; St. Louis, S. F. & T. Ry. Co. v. Knowles, 99 S. W. 867, 44 Tex. Civ. App. 172; Galveston, Houston & S. A. Ry. Co. v. Bonn, 99 S. W. 413, 44 Tex. Civ. App. 631; Galveston, H. & S. A. Ry. Co. v. Stoy, 99 S. W. 135, 44 Tex. Civ. App. 448; Peacock v. Coltrane, 99 S. W. 107, 44 Tex. Civ. App. 530; Galveston, H. & S. A. Ry. Co. v. Roberts (Civ. App.) 91 S. W. 375; Galveston, H. & S. A. Ry. Co. v. Fitzpatrick (Civ. App.) 91 S. W. 355; Freeman v. Slay (Civ. App.) 88 S. W. 404, reversed 91 S. W. 6, 99 Tex. 514; Oneal v. Weisman, 88 S. W. 290, 39 Tex. Civ. App. 592; San Antonio & A. P. Ry. Co. v. Dolan (Civ. App.) 85 S. W. 302; Missouri, K. & T. Ry. Co. of Texas v. Baker, 81 S. W. 67, 35 Tex. Civ. App. 542; Keas v. Gordy, 78 S. W. 385, 34 Tex. Civ. App. 310; Schwartzman v. Cabell (Civ. App.) 49 S. W. 113; Walker v. Pittman, 46 S. W. 117, 18 Tex. Civ. App. 519; Wright v. Solomon (Civ. App.) 46 S. W. 58; Western Union Tel. Co. v. Seals (Civ. App.) 45 S. W. 964; Pace v. American Freehold Land & Mtg. Co., 43 S. W. 36, 17 Tex. Civ. App. 506; City of Waxahachie v. Connor (Civ. App.) 35 S. W. 692; Reichstetter v. Bostick (Civ. App.) 33 S. W. 158; Burnham v. Logan, 88 Tex. 1, 29 S. W. 1067; Eddy v. Still, 3 Tex. Civ. App. 346, 22 S. W. 525; Adams v. Crenshaw, 74 Tex. 111, 11 S. W. 1082; French v. McGinnis, 69 Tex. 19, 9 S. W. 323; Neyland v. Bendy, 69 Tex. 711, 7 S. W. 497; Smyth v. Caswell, 67 Tex. 567, 4 S. W. 848;

sue,[29] a party desiring further or more specific instructions should

Hays v. Hays, 66 Tex. 606, 1 S. W. 895; Bast v. Alford, 20 Tex. 226.

Utah. Valiotis v. Utah-Apex Mining Co., 184 P. 802, 55 Utah, 151.

Vt. De Nottbeck v. Chapman, 108 A. 338, 93 Vt. 378; Magoon v. Before, 50 A. 1070, 73 Vt. 231.

Va. Adamson's Adm'r v. Norfolk & P. Traction Co., 69 S. E. 1055, 111 Va. 556.

Wash. Beach v. City of Seattle, 148 P. 39, 85 Wash. 379; Zolawenski v. City of Aberdeen, 129 P. 1090, 72 Wash. 95; Harris v. Brown's Bay Logging Co., 106 P. 152, 57 Wash. 8; Allend v. Spokane Falls & N. Ry. Co., 58 P. 244, 21 Wash. 324.

W. Va. Jaeger v. City Ry. Co., 78 S. E. 59, 72 W. Va. 307.

Wis. Barlow v. Foster, 136 N. W. 822, 149 Wis. 613; Monaghan v. Northwestern Fuel Co., 122 N. W. 1066, 140 Wis. 457; Anderson v. Horlick's Malted Milk Co., 119 N. W. 342, 137 Wis. 569; Grotjan v. Rice, 102 N. W. 551, 124 Wis. 253; Kelly v. Houghton, 59 Wis. 400, 18 N. W. 326; Murphy v. Martin, 58 Wis. 276, 16 N. W. 603; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Page v. Town of Sumpter, 53 Wis. 652, 11 N. W. 60; Lela v. Domaske, 48 Wis. 623, 4 N. W. 794; Karber v. Nellis, 22 Wis. 215; Hayward v. Ormsbee, 11 Wis. 3; Chappell v. Cady, 10 Wis. 111.

Wyo. Bunce v. McMahon, 6 Wyo. 24, 42 P. 23.

[29] **Ark.** North American Union v. Oliphint, 217 S. W. 1, 141 Ark. 346.

Colo. Ruby Chief Min. & Mill. Co. v. Prentice, 52 P. 210, 25 Colo. 4; Denver Tramway Co. v. Crumbaugh, 48 P. 503, 23 Colo. 363.

Conn. Wolfe v. Ives, 76 A. 526, 83 Conn. 174, 19 Ann. Cas. 752; French v. Town of Waterbury, 44 A. 740, 72 Conn. 435.

Ga. Fisher v. Shands, 102 S. E. 190, 24 Ga. App. 743; Ford v. Ford, 91 S. E. 42, 146 Ga. 164; Bishop v. Georgia Nat. Bank, 78 S. E. 947, 13 Ga. App. 38; Charleston & W. C. Ry. Co. v. Duckworth, 66 S. E. 1018, 7 Ga. App. 350; Morgan v. Chunn, 66 S. E. 965, 7 Ga. App. 263; Hamilton & Pritchett v. Jenkins, 66 S. E. 397, 7 Ga. App. 136; Savannah Electric Co. v. Jackson, 64 S. E. 680, 132 Ga. 559; Seaboard Air Line Ry. v. Bishop, 63 S. E. 785, 132 Ga. 37; Foote v. Kelley, 55 S. E. 1045, 126 Ga. 799; Holland v. Williams, 55 S. E. 1023, 126 Ga. 617; Savannah Electric Co. v. Mullikin, 55 S. E. 945, 126 Ga. 722; Central of Georgia Ry. Co. v. McClifford, 47 S. E. 590, 120 Ga. 90; Central of Georgia Ry. Co. v. Hardin, 40 S. E. 738, 114 Ga. 548; Southern Ry. Co. v. Loughridge, 39 S. E. 882, 114 Ga. 173; Kidd v. Huff, 31 S. E. 430, 105 Ga. 209.

Ill. Chicago & A. Ry. Co. v. Hatfield, 109 Ill. App. 556; Thode v. Peter Schoenhofen Brewing Co., 69 Ill. App. 403.

Ind. New Castle Bridge Co. v. Doty, 79 N. E. 485, 168 Ind. 259, transferred from appellate court 76 N. E. 557, 37 Ind. App. 84; Harness v. Steele, 64 N. E. 875, 159 Ind. 286; Tracy v. Hacket, 49 N. E. 185, 19 Ind. App. 133, 65 Am. St. Rep. 398; Summit Coal Co. v. Shaw, 44 N. E. 676, 16 Ind. App. 9; Fitzgerald v. Goff, 99 Ind. 28; Chamness v. Chamness, 53 Ind. 301; Burgett v. Burgett, 43 Ind. 78.

Iowa. Blackmore v. City of Council Bluffs, 176 N. W. 369; Wagner v. Kloster, 175 N. W. 840, 188 Iowa, 174; Bean v. Bickley, 174 N. W. 675, 187 Iowa, 689.

Kan. Judy v. Buck, 82 P. 1104, 72 Kan. 106; O'Brien v. Foulke, 77 P. 103, 69 Kan. 475; Roller v. James, 49 P. 630, 6 Kan. App. 919; Reamer v. Columbia, 47 P. 186, 5 Kan. App. 543; Kansas Loan & Trust Co. v. Love, 45 P. 953, 4 Kan. App. 188.

Ky. Illinois Cent. R. R. v. Jackson, 79 S. W. 1187, 117 Ky. 900, 25 Ky. Law Rep. 2087; Garrett v. Thomas, 57 S. W. 611, 22 Ky. Law Rep. 490; Bogard v. Johnstone, 53 S. W. 651, 21 Ky. Law Rep. 965; White v. Cole, 47 S. W. 759, 20 Ky. Law Rep. 858; Anderson v. Baird, 40 S. W. 923, 19 Ky. Law Rep. 444; Griffin v. Gorman, 13 Ky. Law Rep. (abstract) 879; Pierce v. Brown, 12 Ky. Law Rep. (abstract) 292; Louisville, N. A. &

request them, and in the absence of such a request he cannot complain of omissions in the charge, unless it plainly appears that the

C. R. Co. v. Davidson, 12 Ky. Law Rep. (abstract) 142.

Mich. Miller v. Shumway, 98 N. W. 385, 135 Mich. 654; Bokenfohr v. Bush, 75 N. W. 929, 117 Mich. 444; Record Pub. Co. v. Merwin, 72 N. W. 998, 115 Mich. 10.

Minn. Ellington v. Great Northern Ry. Co., 100 N. W. 218, 92 Minn. 470; Olson v. Aubolee, 99 N. W. 1128, 92 Minn. 312.

Miss. Bacon v. Bacon, 24 So. 968, 76 Miss. 458.

Mo. Thompson v. Bucholz, 81 S. W. 490, 107 Mo. App. 121; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668; State ex rel. Hospes v. Branch, 52 S. W. 390, 151 Mo. 622; Feary v. O'Neill, 50 S. W. 918, 149 Mo. 467, 73 Am. St. Rep. 440; Coleman v. Drane, 116 Mo. 387, 22 S. W. 801; Hall v. Jennings, 87 Mo. App. 627; Young v. Keller, 16 Mo. App. 551, memorandum; Cahill v. Liggett & Meyers Tobacco Co., 14 Mo. App. 596, memorandum; State ex rel. Tubbesing v. Haase, 6 Mo. App. 586, memorandum.

Mont. Kirk v. Montana Transfer Co., 184 P. 987, 56 Mont. 292; Kansier v. City of Billings, 184 P. 630, 56 Mont. 250; Gillies v. Clarke Fork Coal Min. Co., 80 P. 370, 32 Mont. 320.

Neb. McCormick Harvesting Mach. Co. v. Carpenter, 95 N. W. 617, 1 Neb. (Unof.) 273; Peterson v. State, 88 N. W. 549, 63 Neb. 251.

N. J. Camden & A. R. Co. v. Williams, 40 A. 634, 61 N. J. Law, 646.

N. Y. Felice v. New York Cent. & H. R. R. Co., 43 N. Y. S. 922, 14 App. Div. 345.

N. C. Buchanan v. Cranberry Furnace Co., 101 S. E. 518, 178 N. C. 643; Beck v. Sylva Tanning Co., 101 S. E. 498, 179 N. C. 123; Sears v. Atlantic Coast Line R. Co., 100 S. E. 433, 178 N. C. 285; Ives v. Atlantic & N. C. R. Co., 55 S. E. 74, 142 N. C. 131, 115 Am. St. Rep. 732, 9 Ann. Cas. 188; Cowles v. Lovin, 47 S. E. 610, 135 N. C. 488; Justice v. Gallert, 42 S. E. 850, 131 N. C. 393; Patterson v. Mills, 28 S. E. 368, 121 N. C. 258.

N. D. Huber v. Zeiszler, 164 N. W. 131, 37 N. D. 556; Ruddick v. Buchanan, 163 N. W. 720, 37 N. D. 132.

Okl. Muskogee Electric Traction Co. v. Eaton, 152 P. 1109, 49 Okl. 344; Chicago Live Stock Commission Co. v. Fix, 78 P. 316, 15 Okl. 37; Same v. Connally, 78 P. 318, 15 Okl. 45.

Or. Page v. Finley, 8 Or. 45.

Pa. Kaufman v. Pittsburg, C. & W. R. Co., 60 A. 2, 210 Pa. 440; Mineral R. & Min. Co. v. Auten, 41 A. 327, 188 Pa. 568, 43 Wkly. Notes Cas. 158; Leary v. Electric Traction Co., 36 A. 562, 180 Pa. 136; Poorman v. Smith's Ex'rs, 2 Serg. & R. 464; Craig v. Borough of Shippensburg, 11 Pa. Super. Ct. 490; Dougherty v. Loebelenz, 9 Pa. Super. Ct. 344, 43 Wkly. Notes Cas. 447.

S. C. Langley v. Southern Ry. Co., 101 S. E. 286, 113 S. C. 45; Smoothing Iron Heater Co. v. Blakely, 77 S. E. 945, 94 S. C. 224; Milam v. Southern Ry. Co., 36 S. E. 571, 58 S. C. 247; Rutherford v. Southern Ry. Co., 35 S. E. 136, 56 S. C. 446; Crosswell v. Connecticut Indemnity Ass'n, 28 S. E. 200, 51 S. C. 103; Long v. Southern Ry. Co., 27 S. E. 531, 50 S. C. 49; State v. Williams, 18 S. C. 605.

S. D. Lunschen v. Barnhart, 131 N. W. 501, 27 S. D. 449; Winn v. Sanborn, 75 N. W. 201, 10 S. D. 642.

Tenn. Nashville, C. & St. L. Ry. v. Heikens, 79 S. W. 1038, 112 Tenn. 378, 65 L. R. A. 298.

Tex. Missouri, K. & T. Ry. Co. of Texas v. Parrott, 96 S. W. 950, 43 Tex. Civ. App. 325; Turner v. Faubion, 81 S. W. 810, 36 Tex. Civ. App. 314; Galveston City Ry. Co. v. Chapman, 80 S. W. 856, 35 Tex. Civ. App. 551; Texas Cotton Products Co. v. Denny Bros. (Civ. App.) 78 S. W. 557; Western Union Tel. Co. v. Crawford (Civ. App.) 75 S. W. 843; Abilene Cotton Oil Co. v. Briscoe, 66 S. W. 315, 27 Tex. Civ. App. 157; International & G. N. R. Co. v. Harris (Civ. App.) 65 S. W. 885, judgment affirmed 67 S. W. 315, 95 Tex. 346; Mayfield v. Robinson, 55 S. W. 399, 22 Tex. Civ. App. 385; Gulf, W. T. & P. Ry. Co. v.

jury were misled by such omissions,[30] and where an instruction technically correct is couched in terms which in the opinion of a party are liable to be misunderstood or misapplied by the jury, it is his duty to call the attention of the court to the supposed defect, and present a suitable instruction, in default of which he cannot complain.[31]

Another statement of the above rule is that when the jury is instructed, and when the instructions given do not impliedly with-

Staton (Civ. App.) 49 S. W. 277; Graves v. Hillyer (Civ. App.) 48 S. W. 889; Van Zandt v. Brantley, 42 S. W. 617, 16 Tex. Civ. App. 420; Clary v. Myers (Civ. App.) 40 S. W. 633; Reynolds v. Weinman (Civ. App.) 40 S. W. 560; Tomson v. Heidenheimer, 40 S. W. 425, 16 Tex. Civ. App. 114; Muncy v. Mattfield (Civ. App.) 40 S. W. 345.

Wash. Hiscock v. Phinney, 142 P. 461, 81 Wash. 117, Ann. Cas. 1916E, 1044; Lownsdale v. Gray's Harbor Boom Co., 58 P. 663, 21 Wash. 542.

W. Va. Henry C. Werner Co. v. Calhoun, 46 S. E. 1024, 55 W. Va. 246.

Illustrations of omissions held not objectionable, in absence of request for further instructions. In suit for commissions claimed to have been earned by purchasing land for defendant, an instruction that, if plaintiff exceeded his authority by making a larger first payment, or paying more per acre, than authorized, and defendant knew all the material facts in connection with his acts, and accepted the benefits resulting, defendant by his conduct ratified plaintiff's unauthorized act, being the correct rule, if defendant desired an instruction as to what constituted material facts as to acts in excess of authority, he should have expressly called attention to the omission. Mahon v. Rankin, 102 P. 608, 54 Or. 328, rehearing denied 103 P. 53. Where, in an action for the death of a person at a crossing, the court charged that the trainmen must use ordinary care to prevent injuring persons on the crossing, the error in an instruction authorizing a recovery if the trainmen negligently failed to have on the engine a sufficient headlight to enable them to see persons using the crossing or to enable such persons to see the train, in that it failed to state what would be a sufficient headlight, was merely one of omission, which called for correction by request for an appropriate instruction. Chicago, R. I. & G. Ry. Co. v. Clay, 119 S. W. 730, 55 Tex. Civ. App. 526. An instruction in an action for nondelivery of a telegram that a company receiving for transmission a message and subsequently discovering that the addressee lives beyond its free delivery limits must notify the sender that additional charges are demanded for delivery, and where it fails to do so, and that negligence as the proximate cause results in injury to the sender, it is liable, is correct as a general proposition, and the company desiring a modification, based on the fact that addressee's residence was known to the sender who paid only the charge to the terminal office, must request it. Lyles v. Western Union Telegraph Co., 65 S. E. 832, 84 S. C. 1, 137 Am. St. Rep. 829.

[30] **Colo.** Heron v. Weston, 100 P. 1130, 44 Colo. 379.

Mich. Ward v. Cook, 122 N. W. 785, 158 Mich. 283.

Mo. Brown v. Globe Printing Co., 112 S. W. 462, 213 Mo. 611, 127 Am. St. Rep. 627; Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314.

Neb. Webb v. Omaha & S. I. Ry. Co., 164 N. W. 564, 101 Neb. 596.

N. D. Shellberg v. Kuhn, 160 N. W. 504, 35 N. D. 448.

Okl. Branham v. State, 182 P. 525, 16 Okl. Cr. 308.

Pa. Burkholder v. Stahl, 58 Pa. (8 P. F. Smith) 371.

Tex. Suderman-Dolson Co. v. Hope (Tex. Civ. App.) 118 S. W. 216.

[31] Yeoman v. State, 115 N. W. 784, 81 Neb. 244, judgment modified on rehearing 115 N. W. 997, 81 Neb. 252.

hold from the jury some of the issues or elements proper for their consideration, error cannot be founded upon the failure of the court to charge upon some particular phase of the evidence, or some particular feature of the case, without a request therefor.[82] This rule applies in criminal cases.[83]

[82] Carleton v. State, 61 N. W. 699, 43 Neb. 378.

[83] **U. S.** Humes v. United States, 18 S. Ct. 602, 170 U. S. 210, 42 L. Ed. 1011; (C. C. A. Ky.) Steers v. United States, 192 F. 1, 112 C. C. A. 423; (C. C. A. La.) Alexis v. United States, 129 F. 60, 63 C. C. A. 502; (C. C. A. Mass.) Johnson v. United States, 170 F. 581, 95 C. C. A. 661; (C. C. A. Mo.) Ripper v. United States, 179 F. 497, 103 C. C. A. 478, denying rehearing 178 F. 24, 101 C. C. A. 152; (C. C. A. Or.) Riddell v. United States, 244 F. 695, 157 C. C. A. 143, certiorari denied 38 S. Ct. 134, 245 U. S. 668, 62 L. Ed. 539; (C. C. A. Wash.) Louie Ding v. United States, 246 F. 80, 158 C. C. A. 306.

Ala. Murphy v. State, 71 So. 967, 14 Ala. App. 78; Jones v. State, 58 So. 250, 176 Ala. 20; Sanderson v. State, 53 So. 109, 168 Ala. 109; Winter v. State, 26 So. 949, 123 Ala. 1; Murphy v. State, 54 Ala. 178; Dave v. State, 22 Ala. 23.

Ariz. Bush v. State, 168 P. 508, 19 Ariz. 195; Lenord v. State, 137 P. 412, 15 Ariz. 137.

Ark. Hays v. State, 196 S. W. 123, 129 Ark. 324; Van Valkinburgh v. State, 142 S. W. 843, 102 Ark. 16; Lackey v. State, 55 S. W. 213, 67 Ark. 416; Holt v. State, 47 Ark. 196, 1 S. W. 61.

Cal. People v. Martin (Cal. App.) 185 P. 1003; People v. Stirgios, 136 P. 957, 23 Cal. App. 48; People v. Anthony, 129 P. 968, 20 Cal. App. 586; People v. White, 90 P. 471, 5 Cal. App. 329; People v. Weber, 86 P. 671, 149 Cal. 325; People v. Oliveria, 59 P. 772, 127 Cal. 376; People v. Appleton, 52 P. 582, 120 Cal. 250; People v. Winthrop, 50 P. 390, 118 Cal. 85; People v. Fice, 97 Cal. 459, 32 P. 531; People v. Olsen, 80 Cal. 122, 22 P. 125; People v. Marks, 72 Cal. 46, 13 P. 149; People v. Gray, 66 Cal. 271, 5 P. 240; People v. Wong Chow, 4 P. 763; People v. Haun, 44 Cal. 96.

Colo. West v. People, 156 P. 137, 60 Colo. 488; Mow v. People, 72 P. 1069, 31 Colo. 351.

Fla. Hobbs v. State, 81 So. 444, 77 Fla. 228; Miller v. State, 80 So. 314, 76 Fla. 518; Hicks v. State, 78 So. 270, 75 Fla. 311; Cross v. State, 74 So. 593, 73 Fla. 530; Herndon v. State, 74 So. 511, 73 Fla. 451; Gillyard v. State, 61 So. 641, 65 Fla. 322; Padgett v. State, 59 So. 946, 64 Fla. 389, Ann. Cas. 1914B, 897; Carr v. State, 34 So. 892, 45 Fla. 11; Clemmons v. State, 30 So. 699, 43 Fla. 200; Rawlins v. State, 24 So. 65, 40 Fla. 155; Lovett v. State, 30 Fla. 142, 11 So. 550, 17 L. R. A. 705; Blount v. State, 30 Fla. 287, 11 So. 547; Reed v. State, 16 Fla. 564.

Ga. Bush v. State, 101 S. E. 695, 24 Ga. App. 544; Smith v. State, 98 S. E. 115, 23 Ga. App. 140; Bush v. State, 97 S. E. 554, 23 Ga. App. 126; Easterling v. State, 97 S. E. 553, 23 Ga. App. 92; Johnson v. State, 97 S. E. 515, 148 Ga. 546; Quinn v. State, 97 S. E. 84, 22 Ga. App. 632; Moon v. State, 97 S. E. 81, 22 Ga. App. 617; Grigg v. State, 96 S. E. 1049, 22 Ga. App. 637; Cooley v. State, 95 S. E. 871, 22 Ga. App. 263; McNulty v. State, 95 S. E. 304, 21 Ga. App. 783; Butler v. State, 94 S. E. 267, 21 Ga. App. 149; Conley v. State, 94 S. E. 261, 21 Ga. App. 134; Purtell v. State, 93 S. E. 227, 20 Ga. App. 723; Partee v. State, 92 S. E. 306, 19 Ga. App. 752; Killian v. State, 92 S. E. 227, 19 Ga. App. 750; Hamilton v. State, 89 S. E. 449, 18 Ga. App. 295; Robinson v. State, 89 S. E. 434, 18 Ga. App. 394; Duhart v. State, 89 S. E. 343, 18 Ga. App. 287; Wells v. State, 86 S. E. 650, 17 Ga. App. 301; Braxley v. State, 86 S. E. 425, 17 Ga. App. 196; Wright v. State, 85 S. E. 823, 16 Ga. App. 572; Sable v. State, 82 S. E. 379, 14 Ga. App. 816; Ward v. State, 81 S. E. 130, 14 Ga. App. 424; Carter v. State, 80 S. E. 995, 141 Ga. 308; Hollis v.

A statutory provision that the court shall state to the jury all

State, 79 S. E. 85, 13 Ga. App. 307; Dickens v. State, 73 S. E. 826, 137 Ga. 523; Renfroe v. State, 72 S. E. 520, 10 Ga. App. 38; Whitley v. State, 68 S. E. 863, 8 Ga. App. 165; Brundage v. State, 67 S. E. 1051, 7 Ga. App. 726; Lepinsky v. State, 66 S. E. 965, 7 Ga. App. 285; Taylor v. State, 62 S. E. 1048, 5 Ga. App. 237; Randall v. State, 52 S. E. 889, 124 Ga. 657; Taylor v. State, 49 S. E. 303, 121 Ga. 348; Owens v. State, 47 S. E. 513, 120 Ga. 205; Green v. State, 45 S. E. 598, 118 Ga. 755; Gibson v. State, 39 S. E. 948, 114 Ga. 34; Robinson v. State, 39 S. E. 862, 114 Ga. 56; Wilson v. State, 69 Ga. 224; Clark v. State, 68 Ga. 291; Farris v. State, 35 Ga. 241.

Idaho. State v. Harness, 76 P. 788, 10 Idaho, 18; People v. Biles, 2 Idaho, 114, 6 P. 120.

Ill. People v. Lucas, 91 N. E. 659, 244 Ill. 603; McDonall v. People, 48 N. E. 86, 168 Ill. 93.

Ind. Brewster v. State, 115 N. E. 54, 186 Ind. 369; Bartlow v. State, 109 N. E. 201, 183 Ind. 398; Cromer v. State, 52 N. E. 239, 21 Ind. App. 502; Voght v. State, 43 N. E. 1049, 145 Ind. 12; Leeper v. State, 12 Ind. App. 637, 40 N. E. 1113; Marshall v. State, 123 Ind. 128, 23 N. E. 1141; Rauck v. State, 11 N. E. 450, 110 Ind. 384; Barnett v. State, 100 Ind. 171; Behymer v. State, 95 Ind. 140; Rollins v. State, 62 Ind. 46; Jones v. State, 49 Ind. 549.

Iowa. State v. Geier, 167 N. W. 186, 184 Iowa, 874; State v. Cameron, 158 N. W. 563, 177 Iowa, 379; State v. Brandenberger, 130 N. W. 1065, 151 Iowa, 197; State v. Manning, 128 N. W. 345, 149 Iowa, 205; State v. Whimpey, 118 N. W. 281, 140 Iowa, 199; State v. Todd, 82 N. W. 322, 110 Iowa, 631; State v. Phipps, 95 Iowa, 487, 64 N. W. 410; State v. Jelinek, 95 Iowa, 420, 64 N. W. 259; State v. Viers, 82 Iowa, 397, 48 N. W. 732; State v. Illsley, 81 Iowa, 49, 46 N. W. 977.

Kan. State v. Tracy, 127 P. 610, 88 Kan. 153; State v. Shaw, 100 P. 78, 79 Kan. 396, 21 L. R. A. (N. S.) 27, 131 Am. St. Rep. 298; State v. Ross, 94 P. 270, 77 Kan. 341; City of Lincoln Center v. Bailey, 67 P. 455, 64 Kan. 885; State v. Cox, 1 Kan. App. 447, 40 P. 816; State v. Rook, 42 Kan. 419, 22 P. 626; State v. Peterson, 38 Kan. 204, 16 P. 263; State v. Pfefferle, 36 Kan. 90, 12 P. 406; State v. Shenkle, 12 P. 309, 36 Kan. 43.

La. State v. Tibbs, 48 La. Ann. 1278, 20 So. 735; State v. Scott, 12 La. Ann. 386.

Me. State v. Straw, 33 Me. 554.

Mass. Commonwealth v. Meserve, 154 Mass. 64, 27 N. E. 997.

Mich. People v. Hinshaw, 97 N. W. 758, 135 Mich. 378; People v. Willett, 105 Mich. 110, 62 N. W. 1115; Driscoll v. People, 47 Mich. 413, 11 N. W. 221; People v. McKinney, 10 Mich. 54.

Minn. State v. O'Hagen, 144 N. W. 410, 124 Minn. 58; State v. Zempel, 115 N. W. 275, 103 Minn. 428.

Miss. Pringle v. State, 67 So. 455, 108 Miss. 802.

Mo. State v. Herring, 188 S. W. 169, 268 Mo. 514; State v. Ramsauer, 124 S. W. 67, 140 Mo. App. 401; State v. Goldsby, 114 S. W. 500, 215 Mo. 48; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330; State v. Emory, 12 Mo. App. 593.

Mont. State v. Inich, 173 P. 230, 55 Mont. 1; State v. Powell, 169 P. 46, 54 Mont. 217.

Neb. Goldsberry v. State, 137 N. W. 1116, 92 Neb. 211; Martin v. State, 93 N. W. 161, 67 Neb. 36; Musfelt v. State, 90 N. W. 237, 64 Neb. 445; Dinsmore v. State, 85 N. W. 445, 61 Neb. 418; Philamalee v. State, 78 N. W. 625, 58 Neb. 320; Chezem v. State, 76 N. W. 1056, 56 Neb. 496; Johnson v. State, 73 N. W. 463, 53 Neb. 103; Ferguson v. State, 72 N. W. 590, 52 Neb. 432, 66 Am. St. Rep. 512; Carleton v. State, 43 Neb. 373, 61 N. W. 699.

Nev. State v. Switzer, 145 P. 925, 38 Nev. 108.

N. J. State v. Taylor, 104 A. 709, 92 N. J. Law, 135; State v. Littman, 92 A. 580, 86 N. J. Law, 453, judgment affirmed 96 A. 66, 88 N. J. Law, 392; State v. D'Adame, 86 A. 414, 84 N. J. Law, 386, Ann. Cas. 1914B, 1109, affirming judgment 82 A. 520, 82 N. J. Law, 315; State v. Bertchey, 73 A.

matters of law necessary for their information in giving their ver-

524, 77 N. J. Law, 640, 18 Ann. Cas. 931; Mead v. State, 53 N. J. Law, 601, 23 A. 264.

N. M. State v. Dickens, 165 P. 850, 23 N. M. 26; Territory v. Gonzales, 68 P. 925, 11 N. M. 301; Trujillo v. Territory, 7 N. M. 43, 32 P. 154; Territory v. O'Donnell, 4 N. M. 196, 12 P. 743.

N. Y. People v. Sanducci, 88 N. E. 385, 195 N. Y. 361; People v. Johnson, 77 N. E. 1164, 185 N. Y. 219; People v. Moett, 58 How. Prac. 467.

N. C. State v. Wade, 84 S. E. 768, 169 N. C. 306; State v. Powell, 83 S. E. 310, 168 N. C. 134; State v. Lance, 81 S. E. 1092, 166 N. C. 411; State v. Robertson, 81 S. E. 689, 166 N. C. 356; State v. Yates, 71 S. E. 317, 155 N. C. 450; State v. Yellowday, 67 S. E. 480, 152 N. C. 793; State v. Martin, 53 S. E. 874, 141 N. C. 832; State v. Worley, 53 S. E. 128, 141 N. C. 764; State v. Kinsauls, 36 S. E. 31, 126 N. C. 1095; State v. Ridge, 34 S. E. 439, 125 N. C. 655; State v. Groves, 25 S. E. 819, 119 N. C. 822; State v. Varner, 115 N. C. 744, 20 S. E. 518; State v. Jackson, 112 N. C. 851, 17 S. E. 149; State v. Nicholson, 85 N. C. 548; State v. Rash, 34 N. C. 382, 55 Am. Dec. 420; State v. O'Neal, 29 N. C. 251; State v. Nicholson, 85 N. C. 548.

N. D. State v. Rosencrans, 82 N. W. 422, 9 N. D. 163.

Ohio. Mason v. State, 27 Ohio Cir. Ct. R. 526; Wray v. State, 27 Ohio Cir. Ct. R. 1; Mitchell v. State, 21 Ohio Cir. Ct. R. 24, 11 O. C. D. 446.

Okl. Fitzsimmons v. State, 166 P. 453, 14 Okl. Cr. 80; Robinson v. Territory, 85 P. 451, 16 Okl. 241, reversed 148 F. 830, 78 C. C. A. 520; Douthitt v. Territory, 54 P. 312, 7 Okl. 55.

Or. State v. Chong Ben, 173 P. 1173, 89 Or. 313, denying rehearing 173 P. 258, 89 Or. 313; State v. McAvoy, 109 P. 763, 57 Or. 1; State v. Meldrum, 70 P. 526, 41 Or. 380.

Pa. Commonwealth v. Bednorciki, 107 A. 666, 264 Pa. 124; Commonwealth v. Beingo, 66 A. 153, 217 Pa. 60; Zell v. Commonwealth, 94 Pa. 258; Commonwealth v. Keegan, 70 Pa. Super. Ct. 436; Commonwealth v. Holgate, 63 Pa. Super. Ct. 246; Commonwealth v. Eaby, 52 Pa. Super. Ct. 619; Commonwealth v. Lenhart, 40 Pa. Super. Ct. 572.

S. C. State v. Brown, 101 S. E. 847, 113 S. C. 513; State v. Evans, 99 S. E. 751, 112 S. C. 43; State v. Sanders, 88 S. E. 10, 103 S. C. 216; State v. Newman, 81 S. E. 667, 97 S. C. 441; State v. Hendrix, 68 S. E. 129, 86 S. C. 64; State v. Cokley, 65 S. E. 174, 83 S. C. 197; State v. Thompson, 56 S. E. 789, 76 S. C. 116; State v. Chiles, 36 S. E. 496, 58 S. C. 47; State v. Kendall, 32 S. E. 300, 54 S. C. 192; State v. Cannon, 30 S. E. 589, 52 S. C. 452; State v. Cannon, 27 S. E. 526, 49 S. C. 550; State v. Moore, 27 S. E. 454, 49 S. C. 438; State v. Sullivan, 43 S. C. 205, 21 S. E. 4; State v. Robinson, 40 S. C. 553, 18 S. E. 891; State v. Anderson, 24 S. C. 109; State v. Coleman, 17 S. C. 473.

Tenn. State v. Davis, 58 S. W. 122, 104 Tenn. 501.

Tex. Gray v. State, 178 S. W. 337, 77 Tex. Cr. R. 221; Robey v. State, 163 S. W. 713, 73 Tex. Cr. R. 9; Stubbs v. State, 160 S. W. 87, 71 Tex. Cr. R. 390; Coggins v. State, 151 S. W. 311, 68 Tex. Cr. R. 266; Tyler v. State, 150 S. W. 782, 67 Tex. Cr. R. 601; Williams v. State, 144 S. W. 622, 65 Tex. Cr. R. 193; Lutrall v. State, 142 S. W. 588, 64 Tex. Cr. R. 411; Treadwell v. State, 141 S. W. 219, 64 Tex. Cr. R. 83; Diggs v. State, 141 S. W. 100, 64 Tex. Cr. R. 122; Gentry v. State, 136 S. W. 50, 61 Tex. Cr. R. 619; Ellis v. State, 130 S. W. 170, 59 Tex. Cr. R. 626; Hamilton v. State, 127 S. W. 212, 58 Tex. Cr. R. 173; Feinstein v. State (Tex. Cr. App.) 73 S. W. 1052; Ramsey v. State (Cr. App.) 65 S. W. 187; Lucia v. State, 35 Tex. Cr. R. 320, 33 S. W. 358; Dunbar v. State, 34 Tex. Cr. R. 596, 31 S. W. 401; Strang v. State, 32 Tex. Cr. R. 219, 22 S. W. 680; Quintana v. State, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; Garner v. State, 28 Tex. App. 561, 13 S. W. 1004; White v. State, 23 Tex. App. 154, 3 S. W. 710; Mooring v. State, 42 Tex. 85; Gillmore v. State, 36 Tex. 334; Greenwood v. State, 35 Tex. 587; O'Connell v. State, 18 Tex.

dict does not render the above rule inapplicable,[34] and a rule that charges given are to be deemed as excepted to does not relieve a litigant from the duty of requesting additional instructions, if in his opinion those given are not sufficient.[35]

§ 469. Specific applications of rule in civil cases

In civil cases the above rule has been applied to the omission of instructions relating to the construction of a written contract,[36] to conditions precedent to the rescission of a contract,[37] to what constitutes separate and community property,[38] to fraud and evidence thereof,[39] to the question of what constitutes due care or negligence,[40] to the violation of an ordinance as constituting negli-

343; Fonville v. State, 17 Tex. App. 368; Waite v. State, 13 Tex. App. 169; Howard v. State, 8 Tex. App. 612.

Vt. State v. Harrison, 66 Vt. 523, 29 A. 807, 44 Am. St. Rep. 864.

Wash. State v. Walker, 177 P. 315, 104 Wash. 472; State v. Ross, 147 P. 1149, 85 Wash. 218; State v. Aton, 121 P. 980, 67 Wash. 485.

W. Va. State v. Alie, 96 S. E. 1011, 82 W. Va. 601; State v. Donohoo, 22 W. Va. 761.

Wis. Birmingham v. State, 129 N. W. 670, 145 Wis. 90; Winn v. State, 82 Wis. 571, 52 N. W. 775.

Wyo. Brantley v. State, 61 P. 139, 9 Wyo. 102.

Effect of assent to instructions. Where, before the court's charge was given, it was reduced to writing and submitted to counsel for the state and for accused, and they were asked if they had any exception to the charge and both replied in the negative, counsel for accused cannot subsequently complain of the court's failure to charge certain other matters of its own motion. State v. Fujita, 129 N. W. 360, 20 N. D. 555, Ann. Cas. 1913A, 159.

Request withdrawn because of unofficial statements by trial judge. Counsel, who fails to ask the court to charge the jury on the subject of self-defense because, in an unofficial conversation with the judge, the latter had stated to him that the plea of self-defense admitted the killing, cannot, after the trial, seek a reversal on the ground that he had been forced by this statement to waive his right of going before the jury on that issue. State v. Salter, 48 La. Ann. 197, 19 So. 265.

[34] Powers v. State, 87 Ind. 144; State v. Walke, 76 P. 408, 69 Kan. 183.

[35] Missouri Pac. R. Co. v. Martin (Tex.) 2 Willson, Civ. Cas. Ct. App. § 655.

[36] Western Brass Mfg. Co. v. Haynes Automobile Co., 112 N. E. 108, 61 Ind. App. 524.

[37] C. Aultman & Co. v. York, 71 Tex. 261, 9 S. W. 127.

[38] Watkins v. Watkins (Tex. Civ. App.) 119 S. W. 145.

[39] **Ky.** Oberdorfer v. Newberger, 67 S. W. 267, 23 Ky. Law Rep. 2323; New York Life Ins. Co. v. Brown's Adm'r, 66 S. W. 613, 139 Ky. 711, 23 Ky. Law Rep. 2070; Rountree v. Glatt, 18 Ky. Law Rep. (abstract) 462.

Mich. McDonald v. Smith, 102 N. W. 668, 139 Mich. 211.

N. Y. Graser v. Stellwagen, 25 N. Y. 315.

N. C. Howard v. Turner, 34 S. E. 229, 125 N. C. 107.

Tex. Half v. Curtis, 68 Tex. 640, 5 S. W. 451.

[40] True v. Chicago & N. W. Ry. Co., 173 N. W. 642, 42 S. D. 35.

Illustrations of instruction held sufficient within rule. In action against a street railroad for injuries to a man 94 years old and slightly deaf in one ear, through being struck by a car, an instruction defining ordinary care as applied to plaintiff as that degree of care which men of his age and capacity usually exercise under similar circumstances was suffi-

gence,[41] to the duty of a person excavating in the highway,[42] to the duty to prevent fire escaping from an engine,[43] to matters of defense,[44] to the question of contributory negligence,[45] to assumption of risk and the law of fellow servants,[46] to liability of a master to third persons because of acts of servant,[47] to advice of counsel in an action for malicious prosecution,[48] to the legal effect of

cient, in the absence of a request to charge that it is the duty of one whose senses are defective to exercise great care and caution in the use of his remaining senses to avoid danger. Louisville Ry. Co. v. Knocke's Adm'r (Ky.) 117 S. W. 271. In an action for injuries sustained while plaintiff, who had a clubfoot, was climbing between cars which had blocked a public crossing, an instruction that if plaintiff went between the cars, and remained there in a dangerous position while the cars were moved, and failed to take such precautions for his safety as an ordinarily cautious person of his age would have done, he could not recover, was at least not affirmative error, and defendant could not complain because it did not authorize the jury to consider plaintiff's deformed foot in determining his due care, unless it presented a direct charge supplying the omission. Texas & N. O. R. Co. v. Bean, 119 S. W. 328, 55 Tex. Civ. App. 341.

[41] Driver v. Atchison, T. & S. F. Ry. Co., 52 P. 79, 59 Kan. 773; Hovey v. Michigan Tel. Co., 83 N. W. 600, 124 Mich. 607.

[42] Brasington v. South Bound R. Co., 40 S. E. 665, 62 S. C. 325, 89 Am. St. Rep. 905.

[43] Bowen v. St. Paul, M. & M. R. Co., 36 Minn. 522, 32 N. W. 751.

[44] **Mo.** Shanholtzer v. Brubaker, 140 S. W. 626, 159 Mo. App. 366.

N. Y. Heiferman v. Greenhut Cloak Co., 145 N. Y. S. 142, 83 Misc. Rep. 435, reversing order (City Ct.) 143 N. Y. S. 411, judgment reversed (Sup.) 148 N. Y. S. 1119.

Tex. Missouri, K. & T. Ry. Co. of Texas v. Reno (Civ. App.) 146 S. W. 207; Chicago, R. I. & P. Ry. Co. v. Hiltibrand, 99 S. W. 707, 44 Tex. Civ. App. 614; Missouri, K. & T. Ry. Co. of Texas v. Crowder (Civ. App.) 55 S. W. 380; Missouri, K. & T. Ry. Co. of Texas v. Witherspoon, 45 S. W. 424, 18 Tex. Civ. App. 615; Sanger v. Warren (Civ. App.) 40 S. W. 840; Rees v. Clark (Civ. App.) 39 S. W. 160; Whiting v. Dugan (Civ. App.) 39 S. W. 148; Missouri, K. & T. Ry. Co. v. Connelly, 39 S. W. 145, 14 Tex. Civ. App. 529.

[45] **Ala.** East Tennessee, V. & G. R. Co. v. Clark, 74 Ala. 443.

Ga. Southern Ry. Co. v. Coursey, 41 S. E. 1013, 115 Ga. 602; Southern Ry. Co. v. Hooper, 36 S. E. 232, 110 Ga. 779; Orr v. Garabold, 85 Ga. 373, 11 S. E. 778.

Ill. Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263.

Ky. Felton v. Curd, 60 S. W. 297, 22 Ky. Law Rep. 1222.

Md. Baltimore & O. R. Co. v. Bahrs, 28 Md. 647.

Minn. Greene v. Minneapolis & St. L. Ry. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785.

Mo. Brown v. Hannibal & St. J. R. Co., 31 Mo. App. 661, affirmed 99 Mo. 310, 12 S. W. 655.

Nev. Zelavin v. Tonopah Belmont Development Co., 149 P. 188, 39 Nev. 1.

Tex. Andrews v. Viraldo (Civ. App.) 176 S. W. 737; Western Union Telegraph Co. v. Buchanan, 129 S. W. 850, 61 Tex. Civ. App. 212; Houston & T. C. R. Co. v. Lentz, 120 S. W. 943, 56 Tex. Civ. App. 498; Barklow v. Avery, 89 S. W. 417, 40 Tex. Civ. App. 355; Gulf, C. & S. F. Ry. Co. v. Pendery (Civ. App.) 27 S. W. 213.

[46] Smith v. Fordyce, 88 S. W. 679, 190 Mo. 1; Turrentine v. Wellington, 48 S. E. 739, 136 N. C. 308; International & G. N. R. Co. v. Beasley, 9 Tex. Civ. App. 569, 29 S. W. 1121.

[47] Gerstein v. C. F. Adams Co., 173 N. W. 209, 169 Wis. 504.

[48] Hurt v. Barnes, 79 S. E. 775, 140 Ga. 743.

an offer to retract a libel,[49] to matters constituting notice and the effect of notice,[50] to questions of adverse possession and matters bearing on running of the statute of limitations,[51] to the object of the action,[52] to what are the material allegations of the complaint,[53] to the relevancy and effect of a deed,[54] to the effect of evidence relating to malice,[55] to the legal effect of evidence as showing due care,[56] to questions relating to the measure and elements of damages,[57] to the necessity of assessing damages separately against

[49] O'Toole v. Post Printing & Publishing Co., 36 A. 288, 179 Pa. 271.

[50] O'Flynn v. City of Butte, 93 P. 643, 36 Mont. 493; Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680; Brotherton v. Weathersby, 73 Tex. 471, 11 S. W. 505.

[51] **Pa.** Wood v. Figard, 28 Pa. 403; Lea v. Hopkins, 7 Pa. 492.

Tex. City of Comanche v. Zettlemoyer (Civ. App.) 40 S. W. 641; Rackley v. Fowlkes (Civ. App.) 36 S. W. 75; Robinson v. McIver (Civ. App.) 23 S. W. 915; Hocker v. Day, 80 Tex. 529, 16 S. W. 322.

Vt. Partch v. Spooner, 57 Vt. 583.

[52] Wimer v. Allbaugh, 78 Iowa, 79, 42 N. W. 587, 16 Am. St. Rep. 422; Klosterman v. Olcott, 25 Neb. 382, 41 N. W. 250.

[53] O'Donnell v. Chicago, R. I. & P. R. Co., 91 N. W. 566, 65 Neb. 612.

[54] Cox v. Ward, 107 N. C. 507, 12 S. E. 379.

[55] Hall v. Jennings, 87 Mo. App. 627.

[56] Leslie v. Granite R. Co., 52 N. E. 542, 172 Mass. 468.

[57] **U. S.** (C. C. A. Ill.) Grand Trunk Western Ry. Co. v. Gilpin, 208 F. 126, 125 C. C. A. 278; (C. C. A. Tex.) Texas & P. Ry. Co. v. Cody, 67 Fed. 71, 14 C. C. A. 310.

Ariz. Arizona Power Co. v. Racine-Sattley Co., 114 P. 558, 13 Ariz. 283.

Cal. Peluso v. City Taxi Co., 182 P. 808, 41 Cal. App. 297; City of Oakland v. Wheeler (App.) 168 P. 23.

Colo. Consolidated Lower Boulder Reservoir & Ditch Co. v. Alaux, 133 P. 1046, 24 Colo. App. 377.

Conn. Palmer v. Smith, 56 A. 516, 76 Conn. 210.

Ga. Smith v. S. H. Fuller Loan Co., 99 S. E. 309, 23 Ga. App. 726; Central of Georgia Ry. Co. v. Newman, 74 S. E. 1077, 138 Ga. 145; Savannah Electric Co. v. Bennett, 61 S. E. 529, 130 Ga. 597; Peterson v. Wadley & Mt. V. R. Co., 43 S. E. 713, 117 Ga. 390.

Ill. Central Ry. Co. v. Ankiewicz, 73 N. E. 382, 218 Ill. 631, affirming 115 Ill. App. 380; Illinois Cent. R. Co. v. Atwell, 64 N. E. 1095, 198 Ill. 200, affirming judgment 100 Ill. App. 513.

Ind. New York Cent. R. Co. v. Reidenbach (App.) 125 N. E. 55; P. B. Arnold Co. v. Buchanan, 111 N. E. 204, 60 Ind. App. 626.

Iowa. Grace v. Minneapolis & St. L. R. Co., 133 N. W. 672, 153 Iowa, 418; Gorton v. Moeller Bros., 130 N. W. 910, 151 Iowa, 729.

Kan. Missouri, K. & T. Ry. Co. v. Steinberger, 55 P. 1101, 60 Kan. 856, affirming judgment 51 P. 623, 6 Kan. App. 585.

Ky. Stearns Coal & Lumber Co. v. Calhoun, 179 S. W. 590, 166 Ky. 607.

Mass. Buzzell v. Emerton, 161 Mass. 176, 36 N. E. 796.

Mich. Merrinane v. Miller, 111 N. W. 1050, 148 Mich. 412.

Minn. Haynes v. City of Duluth, 47 Minn. 458, 50 N. W. 693.

Mo. Greenwell v. Chicago, M. & St. P. Ry. Co. (Sup.) 224 S. W. 404; Cook v. City of St. Joseph, 220 S. W. 693, 203 Mo. App. 430; Kerr v. Bush (App.) 215 S. W. 393; Delano v. Roberts (App.) 182 S. W. 771; Nelson v. United Rys. Co. of St. Louis, 158 S. W. 446, 176 Mo. App. 423; Potter v. St. Louis & S. F. R. Co., 117 S. W. 593, 136 Mo. App. 125; Dreyfus v.

several defendants,[58] to the question of proximate cause,[59] to the omission of the court to impress upon the jury the necessity of basing their verdict upon the evidence alone,[60] to failure of the court to especially direct the attention of the jury to a matter of common knowledge,[61] to the failure to submit certain questions to the jury,[62] to omissions in a charge on the burden of proof,[63] and as to the form of the verdict.[64]

St. Louis & S. Ry. Co., 102 S. W. 53, 124 Mo. App. 585.

N. J. Gruen v. George A. Ohl & Co., 80 A. 547, 81 N. J. Law, 626.

N. C. Willey v. Norfolk Southern R. Co., 96 N. C. 408, 1 S. E. 446.

Pa. Hart v. Drumm, 55 Pa. Super. Ct. 457.

Tex. Andrews v. York (Civ. App.) 192 S. W. 338; Kansas City, M. & O. Ry. Co. of Texas v. Worsham (Civ. App.) 149 S. W. 755; Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Civ. App.) 142 S. W. 992; Houston & T. C. R. Co. v. Davenport, 117 S. W. 790, 102 Tex. 369, affirming judgment (Civ. App.) 110 S. W. 150; Houston, E. & W. T. Ry. Co. v. Roach, 114 S. W. 418, 52 Tex. Civ. App. 95; Houston & T. C. R. Co. v. Craig, 92 S. W. 1033, 42 Tex. Civ. App. 486; Hargrave v. Western Union Tel. Co. (Civ. App.) 60 S. W. 687.

Wis. Sharon v. Winnebago Furniture Mfg. Co., 124 N. W. 299, 141 Wis. 185; Thomas v. Williams, 121 N. W. 148, 139 Wis. 467.

Instructions held sufficient within rule. In an action for injury to standing timber by negligently starting a fire, it was not error to charge that the jury should be fair and just in fixing damages and award plaintiff such sum as would compensate him for the injuries sustained by defendant's negligence; neither party having requested more specific instructions. Miller v. Neale, 119 N. W. 94, 137 Wis. 426, 129 Am. St. Rep. 1077.

Use of word "pain" as including mental suffering. Where plaintiff demanded compensation for physical and mental pain, and the court charged that plaintiff demanded compensation for physical and mental pain, an instruction directing the jury in assessing the damages to consider the personal injury suffered, the pain already suffered, or which he might suffer in the future, etc., was not objectionable as restricting the damages to physical pain only, in the absence of any requested instruction on the subject, for the word "pain" was broad enough to include both physical and mental suffering. Hall v. Chicago, B. & Q. Ry. Co., 122 N. W. 894, 145 Iowa, 291.

[58] Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero (Tex. Civ. App.) 212 S. W. 981.

[59] **S. C.** Berry v. City of Greenville, 65 S. E. 1030, 84 S. C. 122, 19 Ann. Cas. 978.

Tex. Guerra v. San Antonio Sewer Pipe Co. (Civ. App.) 163 S. W. 669; Ft. Worth & D. C. Ry. Co. v. Keeran (Civ. App.) 149 S. W. 355; Gulf, C. & S. F. Ry. Co. v. Josey (Civ. App.) 95 S. W. 688; International & G. N. R. Co. v. Smith (Sup.) 1 S. W. 565.

Wis. Fisher v. Waupaca Electric Light & Ry. Co., 124 N. W. 1005, 141 Wis. 515; Stumm v. Western Union Telegraph Co., 122 N. W. 1032, 140 Wis. 528.

[60] Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.

[61] Greenway v. Taylor County, 122 N. W. 943, 144 Iowa, 332.

[62] **Mich.** Lynch v. Johnson, 109 Mich. 640, 67 N. W. 908.

Pa. Stuckslager v. Neel, 123 Pa. 53, 16 A. 94.

Tex. Southern Traction Co. v. Ellis (Civ. App.) 198 S. W. 983; Peck v. Atchison, T. & S. F. Ry. Co. (Civ. App.) 91 S. W. 323; Missouri, K. & T. Ry. Co. of Texas v. Penny, 87 S.

[63] Suiter v. Chicago, R. I. & P. Ry. Co., 121 N. W. 113, 84 Neb. 256.

[64] Economy Light & Power Co. v. Hiller, 113 Ill. App. 103, judgment affirmed 71 N. E. 1096, 211 Ill. 568.

The above rule applies where given instructions are applicable only to a particular state of facts which there is evidence to prove, although there is also evidence to prove a different state of facts.[65]

§ 470. Application of rule in criminal cases

In criminal cases the above rule has been applied to the omission of the court to instruct, or to give as full instructions as were desired, on the subject of the elements of the offense charged,[66] on the intent of the defendant,[67] on the subject of motive,[68] on the degrees of the offense alleged,[69] on particular phases of manslaughter,[70] and on the necessity of finding that the crime was committed in the jurisdiction.[71]

W. 718, 39 Tex. Civ. App. 358; San Antonio & A. P. Ry. Co. v. Hahl (Civ. App.) 83 S. W. 27; Cuneo v. De Cuneo, 59 S. W. 284, 24 Tex. Civ. App. 436; Slayden v. Stone, 47 S. W. 747, 19 Tex. Civ. App. 618; Mexia v. Lewis, 12 Tex. Civ. App. 102, 34 S. W. 158.

[65] Missouri, K. & T. Ry. Co. v. Miller, 39 S. W. 583, 15 Tex. Civ. App. 428.

[66] **Ala.** Smith v. State, 24 So. 55, 118 Ala. 117.

Cal. People v. Castile, 86 P. 746, 3 Cal. App. 487; People v. Balkwell, 76 P. 1017, 143 Cal. 259.

Ga. Livingston v. State, 90 S. E. 287, 18 Ga. App. 679; Gaskins v. State, 76 S. E. 777, 12 Ga. App. 97.

Kan. State v. Potter, 15 Kan. 302.

La. State v. Scossoni, 21 So. 32, 48 La. Ann. 1464.

Mo. State v. Keithley, 127 S. W. 406, 142 Mo. App. 417.

Mont. State v. Fuller, 85 P. 369, 34 Mont. 12, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648.

Neb. Priel v. Adams, 91 N. W. 536, 3 Neb. (Unof.) 305.

N. Y. People v. Dunbar Contracting Co., 109 N. E. 554, 215 N. Y. 416, affirming judgment 151 N. Y. S. 164, 165 App. Div. 59.

Pa. Commonwealth v. Scott, 38 Pa. Super. Ct. 303.

S. C. State v. Lee, 60 S. E. 524, 79 S. C. 223; State v. Byrd, 51 S. E. 542, 72 S. C. 104.

Tex. Dozier v. State, 137 S. W. 679, 62 Tex. Cr. R. 258.

Instructions held sufficient within rule. Where, in a prosecution for fighting in a public place, the court charged that the law defines a public place as any place at which people are assembled for the purpose of business, amusement, recreation, or other lawful purposes; that a private residence cannot be a public place, unless it is made public by being open to the public; that a place may be public at one time and private at another; that if the jury find that the house at which accused was charged with fighting was a public place, and that accused fought there with other persons, they should find him guilty, it was held that the instruction sufficiently presented the proposition that if people were assembled at a house by special invitation, and the public generally not invited, the place was not a public one, in the absence of a request for a more specific charge. Austin v. State, 124 S. W. 639, 57 Tex. Cr. R. 611.

[67] People v. Shaw, 172 P. 401, 36 Cal. App. 441; Blackshear v. State, 92 S. E. 547, 20 Ga. App. 87; Smith v. State, 87 S. E. 829, 17 Ga. App. 554; Crum v. State, 47 N. E. 833, 148 Ind. 401; State v. Chambers, 161 N. W. 470, 179 Iowa, 436.

[68] State v. Melvin, 166 Mo. 565, 66 S. W. 534.

[69] Commonwealth v. Pacito, 78 A. 828, 229 Pa. 328.

[70] **Ga.** Booker v. State, 85 S. E. 255, 16 Ga. App. 280; Short v. State, 80 S. E. 8, 140 Ga. 780; Rogers v.

[71] State v. Eggleston, 77 P. 738, 45 Or. 346.

So the above rule has been applied to omissions of the court with respect to defenses set up by the accused,[72] or to the issue of self-defense or of defense of another,[73] as the failure to charge, in

State, 57 S. E. 227, 128 Ga. 67, 10 L. R. A. (N. S.) 999, 119 Am. St. Rep. 364.

Ind. Fisher v. State, 77 Ind. 42.

Mo. State v. Linn, 122 S. W. 679, 223 Mo. 98.

Okl. Atchison v. State, 105 P. 387, 3 Okl. Cr. 295.

S. C. State v. Chastain, 67 S. E. 6, 85 S. C. 64.

Tex. Witty v. State, 171 S. W. 229, 75 Tex. Cr. R. 440; Girtman v. State, 164 S. W. 1008, 73 Tex. Cr. R. 158; Crist v. State, 21 Tex. App. 361, 17 S. W. 260; Surrell v. State, 29 Tex. App. 321, 15 S. W. 816.

Wis. Sullivan v. State, 75 N. W. 956, 100 Wis. 283.

[72] **Cal.** People v. Turner, 154 P. 34, 28 Cal. App. 766.

Fla. Douglass v. State, 43 So. 424, 53 Fla. 27.

Ga. Webb v. State, 99 S. E. 630, 149 Ga. 211; Wilensky v. State, 83 S. E. 276, 15 Ga. App. 360; Josey v. State, 74 S. E. 282, 137 Ga. 769; Ramfos v. State, 47 S. E. 562, 120 Ga. 175.

Iowa. State v. Judd, 109 N. W. 892, 132 Iowa, 296, 11 Ann. Cas. 91; State v. Rennick, 103 N. W. 159, 127 Iowa, 294, 4 Ann. Cas. 568.

Mo. State v. Groves, 92 S. W. 631, 194 Mo. 452.

Pa. Commonwealth v. Russogulo 106 A. 180, 263 Pa. 93; Commonwealth v. Webb, 97 A. 189, 252 Pa. 187.

Tex. Shelton v. State, 100 S. W. 955, 50 Tex. Cr. R. 627.

Wis. Guenther v. State, 118 N. W. 640, 137 Wis. 183.

Defense that homicide the result of accident. Where, on trial for murder, the defense is that the homicide was the result of accident or misfortune, and the court has correctly charged the law in relation thereto, it is not error to omit to define what would constitute accident or misfortune, in the absence of request therefor. Washington v. State, 73 S. E. 512, 137 Ga. 218.

Defense that wife acted under the coercion of the husband. Where, on the trial of a wife for maintaining a liquor nuisance, the evidence showed that sales by her were made without the knowledge of the husband, the failure, in the absence of a request, to charge that she presumptively acted under the coercion of the husband was not erroneous. State v. Kruse, 144 N. W. 586, 163 Iowa, 341.

[73] **U. S.** (C. C. A. N. M.) Territory v. Trapp, 120 P. 702, 16 N. M. 700, judgment reversed Trapp v. Territory of New Mexico, 225 F. 968, 141 C. C. A. 28.

Ark. Lee v. State, 172 S. W. 1025, 116 Ark. 588.

Cal. People v. Fowler, 174 P. 892, 178 Cal. 657; People v. Dobbins, 72 P. 339, 138 Cal. 694.

Ga. Harris v. State, 90 S. E. 491, 18 Ga. App. 752; Thornton v. State, 90 S. E. 489, 18 Ga. App. 744; Collins v. State, 72 S. E. 526, 10 Ga. App. 34; Morman v. State, 65 S. E. 146, 133 Ga. 76; Williams v. State, 48 S. E. 368, 120 Ga. 870.

Ill. Morello v. People, 80 N. E. 903, 226 Ill. 388.

Ind. Gross v. State, 117 N. E. 562, 186 Ind. 581, 1 A. L. R. 1151.

Iowa. State v. Young, 74 N. W. 693, 104 Iowa, 730.

Kan. State v. Page, 102 P. 780, 80 Kan. 389.

Mo. State v. King, 102 S. W. 515, 203 Mo. 560.

N. Y. People v. Rosino, 152 N. Y. S. 623, 168 App. Div. 920.

Ohio. Szalkai v. State, 117 N. E. 12, 96 Ohio St. 36.

Okl. Davis v. State, 177 P. 621, 15 Okl. Cr. 386.

S. C. State v. Anderson, 26 S. C. 599, 2 S. E. 699.

Tex. Welch v. State, 147 S. W. 572, 66 Tex. Cr. R. 525; Hoyle v. State, 137 S. W. 355, 62 Tex. Cr. R. 297; Harrelson v. State, 132 S. W. 783,

a murder case, on the character of the deceased for violence,[74] or on threats by the deceased,[75] or to omissions in instructions on the defense of alibi.[76]

While it is the duty of the court without request to present the particular defense upon which the accused relies, it is not necessary, in the absence of a request, to specifically refer to the particular testimony upon which that defense is based,[77] and where the court charges in a clear and comprehensive manner on insanity generally as a defense to crime, its failure to instruct on the specific form of mania relied upon as a defense,[78] or to go into details as to the various phases of insanity,[79] cannot be urged as error without a request for additional instructions.

So the above rule has been applied to the failure to instruct, or to omissions in instructions, on the necessity of an agreement be-

60 Tex. Cr. R. 534; Allen v. State, 70 S. W. 85, 44 Tex. Cr. R. 205.

Wash. State v. Hawkins, 154 P. 827, 89 Wash. 449.

Right of defendant on his own premises. Where in a prosecution for homicide a charge on self-defense, that accused, pleading self-defense, must be without fault in bringing on the difficulty, and he must have honestly believed that he was in danger of losing his life or of receiving serious bodily harm, and a person of ordinary firmness would have been warranted in coming to that conclusion, and there must have been no reasonable way for accused to escape, having been given, if accused desired to avail himself of any special rights arising from the fact that he was on his own premises at the time of the homicide, he must present a request embodying a proposition to that effect. State v. Crosby, 70 S. E. 440, 88 S. C. 98.

Defense of relative. Where accused claimed that he killed deceased because of hostile acts on deceased's part against defendant and his father, and that he had reason to believe that a dangerous attack was about to be made on his father as well as himself, an instruction that previous threats or acts of hostility of deceased towards defendant, however violent, were not of themselves sufficient to justify defendant in slaying deceased, but that he must have acted under an honest belief that it was necessary at the time to take deceased's life in order to save his own or himself from great bodily injury, etc., was not erroneous as eliminating defendant's rights with reference to protecting his father; the burden being on accused, if he desired a broader instruction covering such subject, to request it. People v. Loomer, 110 P. 460, 13 Cal. App. 654.

[74] Hill v. State, 89 S. E. 351, 18 Ga. App. 259, conforming to answer to certified questions Deal v. Same, 88 S. E. 573, 145 Ga. 33; Tillman v. State, 70 S. E. 876, 136 Ga. 59; McDougal v. State, 208 S. W. 173, 84 Tex. Cr. R. 424.

[75] Kimbrell v. State, 75 S. E. 252, 138 Ga. 413; State v. Nelson, 75 P. 505, 68 Kan. 566, 1 Ann. Cas. 468; State v. Fletcher (Mo.) 190 S. W. 317.

[76] Langston v. State, 97 S. E. 444, 23 Ga. App. 82; Thomas v. State, 88 S. E. 917, 18 Ga. App. 101; Brown v. State, 160 S. W. 374, 72 Tex. Cr. R. 33; Oxford v. State, 32 Tex. Cr. R. 272, 22 S. W. 971.

[77] Groves v. State, 70 S. E. 93, 8 Ga. App. 690.

[78] People v. Keyes, 175 P. 6, 178 Cal. 794; Commonwealth v. Pacito, 78 A. 828, 229 Pa. 328.

[79] Taylor v. State, 31 S. E. 764, 105 Ga. 746; State v. Charles, 50 So. 699, 124 La. 744, 18 Ann. Cas. 934.

tween the indictment and the evidence,[80] on matters affecting the credibility of witnesses,[81] on the confession of accused,[82] on dying declarations,[83] on expert testimony,[84] on circumstantial evidence,[85] on the question of the good character of the defendant,[86] on the doctrine of reasonable doubt,[87] on the question of punishment,[88] with respect to arguments of counsel,[89] with respect to definition of terms,[90] and to the failure to direct the attention of the jury to particular evidence for the accused.[91]

An instruction referring only to murder in the first degree may be given, when other instructions properly advise the jury as to the lesser degrees of the crime charged in the indictment, and also as to the defense interposed by the plea of not guilty.[92] If counsel for the defendant desires an additional charge on circumstantial evidence, to meet a phase of the argument of the prosecuting attorney, he should request it.[93]

In the absence of a request for fuller instructions, a charge, in a prosecution for murder, that if deceased came to his death by accident, unattended with criminal design or culpable neglect of the

[80] Timmons v. State, 82 S. E. 378, 14 Ga. App. 802.

[81] Roszczyniala v. State, 104 N. W. 113, 125 Wis. 414.

[82] Mercer v. State, 17 Ga. 146.

[83] Cash v. State, 89 S. E. 603, 18 Ga. App. 486; State v. Mueller, 141 N. W. 1113, 122 Minn. 91.

[84] State v. Hayden, 107 N. W. 929, 131 Iowa, 1; State v. Watson, 81 Iowa, 380, 46 N. W. 868.

[85] State v. Nolan, 169 P. 295, 31 Idaho, 71; State v. Hayward, 133 N. W. 667, 153 Iowa, 265; State v. Sloah, 128 N. W. 842, 149 Iowa, 469; State v. Glass, 151 N. W. 229, 29 N. D. 620.

[86] Johnson v. State, 94 S. E. 630, 21 Ga. App. 497; Mosley v. State, 75 S. E. 144, 11 Ga. App. 303.

[87] **Cal.** People v. Brittan, 50 P. 664, 118 Cal. 409; People v. Donguli, 92 Cal. 607, 28 Pac. 782.

Ga. Bragg v. State, 84 S. E. 82, 15 Ga. App. 623; Pressley v. State, 63 S. E. 784, 132 Ga. 64; Riley v. State, 60 S. E. 274, 3 Ga. App. 534.

Ind. Conrad v. State, 132 Ind. 254, 31 N. E. 805; Sullivan v. State, 52 Ind. 309.

Miss. Herman v. State, 22 So. 873, 75 Miss. 340.

Okl. Inklebarger v. State, 127 P. 707, 8 Okl. Cr. 316.

Pa. Commonwealth v. Varano, 102 A. 131, 258 Pa. 442.

Tex. Simpson v. State, 196 S. W. 885, 81 Tex. Cr. R. 389; Hamilton v. State, 141 S. W. 966, 64 Tex. Cr. R. 175; McDaniel v. State, 139 S. W. 1154, 63 Tex. Cr. R. 359.

[88] West v. State, 164 P. 327, 13 Okl. Cr. 312, L. R. A. 1917E, 1129.

[89] State v. Davenport, 72 S. E. 7, 156 N. C. 596; State v. Knudson, 132 N. W. 149, 21 N. D. 562.

[90] **Fla.** Johnson v. State, 46 So. 174, 55 Fla. 41; Lewis v. State, 45 So. 998, 55 Fla. 54.

Mo. State v. Keithley, 127 S. W. 406, 142 Mo. App. 417.

Tex. Brown v. State, 162 S. W. 339, 71 Tex. Cr. R. 353; Pope v. State, 158 S. W. 527, 71 Tex. Cr. R. 261; Ellington v. State, 140 S. W. 1100, 63 Tex. Cr. R. 424.

Utah. State v. Yee Foo Lun, 147 P. 488, 45 Utah, 531.

[91] Mixon v. State, 82 S. E. 935, 15 Ga. App. 252; Harden v. State, 78 S. E. 681, 13 Ga. App. 34.

[92] Savary v. State, 87 N. W. 34, 62 Neb. 166.

[93] Canales v. State, 215 S. W. 964, 86 Tex. Cr. R. 142.

defendant, he would be entitled to an acquittal, is sufficient,[94] and on trial for shooting with intent to kill it will be proper to charge in general terms that, if all the evidence and circumstances of the case warrant the finding, the jury may find the prisoner guilty, of the offense charged in the indictment, or if all the facts and circumstances of the case warrant such finding, they may find the defendant guilty of a part of the offense charged, whether such part be a felony or a misdemeanor.[95]

In one jurisdiction, in the absence of a timely request therefor, the court is not required to charge on a theory of the case presented solely by the unsworn statement of the defendant,[96] provided the court calls the attention of the jury to the statement and charges the law in regard thereto as contained in the statute,[97] unless the only defense of the defendant is based on a theory raised solely by his statement.[98]

§ 471. Qualifications of rule

In some jurisdictions it is the duty of the court, as has elsewhere been shown, even without request, to give appropriate instructions applicable to the material issues in the case,[99] and the fail-

[94] Green v. State, 90 S. E. 284, 18 Ga. App. 677.

[95] State v. Donohoo, 22 W. Va. 761.

[96] Goldberg v. State (App.) 103 S. E. 90; Brinson v. State, 97 S. E. 102, 22 Ga. App. 649; Burney v. State, 97 S. E. 85, 22 Ga. App. 622; Reed v. State, 95 S. E. 692, 148 Ga. 18; Weldon v. State, 94 S. E. 326, 21 Ga. App. 330; Lott v. State, 90 S. E. 727, 18 Ga. App. 747; Swilling v. State, 90 S. E. 78, 18 Ga. App. 618; Murray v. State, 87 S. E. 828, 17 Ga. App. 562; Crews v. State, 87 S. E. 604, 17 Ga. App. 465; Curry v. State, 86 S. E. 742, 17 Ga. App. 312; Morgan v. State, 86 S. E. 281, 17 Ga. App. 124; Darby v. State, 84 S. E. 724, 16 Ga. App. 171; Bryant v. State, 83 S. E. 795, 15 Ga. App. 535; Shelton v. State, 83 S. E. 152, 15 Ga. App. 341; McLendon v. State, 82 S. E. 317, 14 Ga. App. 737; Jackson v. State, 81 S. E. 905, 14 Ga. App. 608; Pitts v. State, 80 S. E. 510, 14 Ga. App. 283; Taylor v. State, 79 S. E. 924, 13 Ga. App. 715; Jackson v. State, 78 S. E. 867, 13 Ga. App. 147; Thigpen v. State, 76 S. E. 596, 11 Ga. App. 846; Tyler v. State, 76 S. E. 102, 11 Ga. App. 762; Strickland v. State, 75 S. E. 446, 11 Ga. App. 427; Phillips v. State, 75 S. E. 14, 11 Ga. App. 262; Jordan v. State, 71 S. E. 875, 9 Ga. App. 578; Brown v. State, 69 S. E. 45, 8 Ga. App. 382; Cook v. State, 67 S. E. 812, 134 Ga. 347; Gray v. State, 65 S. E. 191, 6 Ga. App. 428; West v. State, 49 S. E. 266, 121 Ga. 364; Collins v. State, 48 S. E. 903, 121 Ga. 173; Middlebrooks v. State, 45 S. E. 607, 118 Ga. 772; Hardin v. State, 33 S. E. 700, 107 Ga. 718; Carroll v. State, 25 S. E. 680, 99 Ga. 36.

Effect of charge by court of its own motion on certain matters presented by statement. Where, in a criminal case, prisoner's statement raises two distinct theories of defense, each based solely on such statement, it is not error, in the absence of a proper request, for the trial judge to fail to charge as to one of these theories, though he may have charged the law applicable to the other. Smith v. State, 43 S. E. 703, 117 Ga. 259.

[97] Taylor v. State, 63 S. E. 296, 131 Ga. 765.

[98] Thornton v. State, 90 S. E. 489, 18 Ga. App. 744.

[99] Weldon v. State, 94 S. E. 326, 21

ure of the court to instruct on a material issue is not cured by the absence of a request for an instruction on such issue.[1] When the trial judge undertakes to charge the law on any subject, he must charge all of the law pertaining thereto which is material and applicable to the case,[2] and in such case the omission of an essential ingredient or element,[3] or the omission of a charge to embrace material conclusions deducible from the evidence,[4] will constitute a misdescription of which complaint can be made without requesting further instructions. Thus, where an instruction given with respect to the right to recover on a certain state of facts omits an essential element, the failure to request an instruction covering such element will not preclude a party complaining of the omission, since in such case the instruction is fundamentally erroneous.[5]

In Tennessee it is held that, while it is true generally that a failure of the trial court to charge fully, when there is no essential point omitted or wrongfully charged, is not error, in the absence of a request for further instructions, still on the trial of a capital offense a charge, although correct as far as it goes, will be erroneous if it omits to instruct the jury fully and explicitly on the legal effect of all the circumstances developed on the trial which would tend to determine the question, or the character or degree, of the prisoner's guilt.[6]

In some jurisdictions it is error, or at least not good practice, for the court to omit entirely an instruction on the measure of damages, although no request has been made therefor.[7] In one

Ga. App. 330; Wall v. Wall, 82 S. E. 791, 15 Ga. App. 156; Toole v. Davis, 78 S. E. 865, 13 Ga. App. 122.

[1] **Ga.** Parker v. State, 100 S. E. 452, 24 Ga. App. 267; Central of Georgia Ry. Co. v. Reid, 99 S. E. 235, 23 Ga. App. 694; Reed v. State, 83 S. E. 674, 15 Ga. App. 435; Porter v. State, 65 S. E. 814, 6 Ga. App. 770; Savannah Electric Co. v. Jackson, 64 S. E. 680, 132 Ga. 559; Haigler v. Adams, 63 S. E. 715, 5 Ga. App. 637.

Ky. Huddleston v. Commonwealth, 188 S. W. 332, 171 Ky. 187.

[2] Williams v. State (Ga. App.) 102 S. E. 875; Rumph v. State, 100 S. E. 768, 24 Ga. App. 338; Batten v. State, 80 Ind. 394; State v. Harris, 134 S. W. 535, 232 Mo. 317.

[3] State v. Wolf, 29 S. E. 841, 122 N. C. 1079.

[4] Mitchell v. Welborn, 63 S. E. 113, 149 N. C. 347; Stude v. Saunders, 2 Posey, Unrep. Cas. (Tex.) 122; Schwaninger v. E. J. McNeeley & Co., 87 P. 514, 44 Wash. 447.

[5] Missouri, K. & T. Ry. Co. of Texas v. Groseclose, 110 S. W. 477, 50 Tex. Civ. App. 525.

Omissions through inadvertence. Failure to instruct that negligence, to be actionable, must be the proximate cause of the injury complained of, is such a plain inadvertence as to require counsel to call the court's attention to it. Bolton v. Western Union Telegraph Co., 65 S. E. 937, 84 S. C. 67.

[6] Nelson v. State, 2 Swan. (Tenn.) 237.

[7] Mustang Reservoir, Canal & Land Co. v. Hissman, 112 P. 800, 49 Colo. 308; Central of Georgia Ry. Co. v.

jurisdiction when, in an action for personal injuries, the issue of lost or impaired earning capacity of the plaintiff is presented by the pleadings and the evidence, the court should instruct thereon without a request.[8] Where the jury may not understand the rule of law on a material point, the court should, as a general rule, instruct them on that point without any request for a charge,[9] and a failure to make a request for an instruction will not prevent a party from asserting the omission of the court to give it as error, when the record shows that any request would have been useless.[10]

4. *Failure to Request Instructions as Precluding Party from Complaining of Positive Error or Misdirection in Those Given*

§ 472. General rule

The general rule is that, where the trial court commits positive error in instructing on one of the substantial issues of the case, the failure of a party to request an instruction on the subject-matter of the erroneous charge will not preclude him from alleging such error;[11] this rule applying in a prosecution for a misdemeanor.[12]

Madden, 69 S. E. 165, 135 Ga. 205, 31 L. R. A. (N. S.) 813, 21 Ann. Cas. 1077; Atlanta, B. & A. R. Co. v. Barnwell, 75 S. E. 645, 138 Ga. 569; McLane v. Pittsburg Rys. Co., 79 A. 237, 230 Pa. 29.

[8] Holt v. Georgia Ry. & Power Co., 101 S. E. 758, 24 Ga. App. 607; McDonald v. Southern Ry. Co., 101 S. E. 714, 24 Ga. App. 608.

[9] Wolfe v. Ives, 76 A. 526, 83 Conn. 174, 19 Ann. Cas. 752.

[10] Griffin v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 42 S. W. 319; International & G. N. Ry. Co. v. Underwood, 64 Tex. 463.

[11] **Ala.** Bowles v. Lowery, 62 So. 107, 181 Ala. 603.

Ark. Graysonia-Nashville Lumber Co. v. Hopkins, 168 S. W. 129, 113 Ark. 598.

Cal. People v. Profumo, 138 P. 109, 23 Cal. App. 376.

Iowa. Hall v. Cedar Rapids & M. C. Ry. Co., 87 N. W. 739, 115 Iowa, 18; Ford v. Chicago, R. I. & P. Ry. Co., 75 N. W. 650, 106 Iowa, 85.

Kan. State v. Curtis, 145 P. 858, 93 Kan. 743.

Ky. Huntington Contract Co. v. Bush, 200 S. W. 618, 179 Ky. 433.

Mo. Brooks v. Brookes (App.) 186 S. W. 1105; Shinn v. United Rys. Co. of St. Louis, 125 S. W. 782, 146 Mo. App. 718.

N. Y. Whittaker v. Delaware & H. Canal Co., 49 Hun, 400, 3 N. Y. S. 576; Carnes v. Platt, 29 N. Y. Super. Ct. 270.

Pa. Wilkinson v. Northeast Borough, 64 A. 734, 215 Pa. 486; Garrett v. Gonter, 42 Pa. 143; Seigle v. Louderbaugh, 5 Pa. 490.

S. D. Tosini v. Cascade Milling Co., 117 N. W. 1037, 22 S. D. 377.

Tex. Edwards v. Clemmons (Civ. App.) 181 S. W. 840; Sauer v. Veltmann (Civ. App.) 149 S. W. 706; International & G. N. Ry. Co. v. Kuehn, 11 Tex. Civ. App. 21, 31 S. W. 322; Missouri, K. & T. Ry. Co. v. Kirschoffer (Civ. App.) 24 S. W. 577; Bergstroem v. State, 58 Tex. 92.

[12] Boattenhamer v. State, 206 S. W. 344, 84 Tex. Cr. R. 210; Novy v. State, 138 S. W. 139, 62 Tex. Cr. R. 492.

§ 473. What constitutes positive error

That a charge as given has a tendency to mislead is generally held not to constitute affirmative error within the above rule, and if the aggrieved party wishes to complain of such misleading tendencies he should ask an explanatory charge.[13] It is not an affirmative error within the above rule to omit from the charge of the court a material part of the pleadings of a party,[14] or to fail to submit the theory under which a party may recover while submitting the theory under which his adversary can recover.[15]

§ 474. Error in instructions induced by party

Where the court, in its instructions, follows the rule of law adopted by a party on the trial of the case, and such party fails to require an instruction announcing a different rule, he cannot on appeal avail himself of an alleged error in so charging.[16]

B. Time of Making Requests

Manner and time of preferring requests for written instructions, see ante, § 448.

§ 475. Rule in absence of specific regulation

Where no statute governs the subject, the time within which instructions should be requested is within the sound discretion of the trial court; such discretion to be exercised fairly and liber-

[13] **Ala.** Aquilino v. Birmingham Ry., Light & Power Co., 77 So. 328, 201 Ala. 34; Blount County Bank v. Harris, 77 So. 43, 200 Ala. 669; Republic Iron & Steel Co. v. Howard, 72 So. 263, 196 Ala. 663; Portsmouth Cotton Oil Refining Corp. v. Madrid Cotton Oil Co., 71 So. 111, 195 Ala. 256; Alabama Consol. Coal & Iron Co. v. Heald, 55 So. 181, 171 Ala. 263; Merrill v. Sheffield Co., 53 So. 219, 169 Ala. 242; E. Rose & Co. v. Woods, 39 So. 581; Moore v. Nashville, C. & St. L. Ry., 34 So. 617, 137 Ala. 495; Gilliland v. R. G. Dunn & Co., 34 So. 25, 136 Ala. 327; Anniston City Land Co. v. Edmondson, 30 So. 61, 127 Ala. 445; Pullman Palace-Car Co. v. Adams, 24 So. 921, 120 Ala. 581, 45 L. R. A. 767, 74 Am. St. Rep. 53; Forest v. Leonard, 22 So. 481, 116 Ala. 82; Drennen v. Smith, 22 So. 442, 115 Ala. 396.

Ark. Flowers v. Flowers, 85 S. W. 242, 74 Ark. 212.

Ind. Plummer v. Indianapolis Union Ry. Co., 104 N. E. 601, 50 Ind. App. 615.

Mass. Commonwealth v. Middleby, 73 N. E. 208, 187 Mass. 342.

Minn. Lahr v. Kraemer, 97 N. W. 418, 91 Minn. 26.

Nev. Brownell v. Fuller, 83 N. W. 669, 60 Neb. 558.

N. Y. Woods v. Long Island R. Co., 54 N. E. 1095, 159 N. Y. 546, affirming judgment and order 42 N. Y. S. 140, 11 App. Div. 16.

[14] Estes v. Estes (Tex. Civ. App.) 122 S. W. 304; International & G. N. R. Co. v. Garcia, 117 S. W. 206, 54 Tex. Civ. App. 59; Galveston, H. & H. R. Co. v. Alberti, 103 S. W. 699, 47 Tex. Civ. App. 32.

[15] Erp v. Raywood Canal & Milling Co. (Tex. Civ. App.) 130 S. W. 897.

[16] Maloney v. Chicago & N. W. Ry. Co., 95 Iowa, 255, 63 N. W. 690.

ally with a view to a full hearing and the trial of cases on their merits, and with a view to affording counsel reasonable opportunity to prepare requests.[17] In the absence of any specific rule of court or statute controlling the matter, however, there must come a time when the court is not called upon to listen to, and pass upon, further requests to charge.[18] Thus it is held that orderly procedure does not permit that, when a jury on its own motion returns to the courtroom for further instructions, the case should be again opened for the submission by counsel on either side of further requests.[19]

§ 476. Regulation by statute or rule of court

Ordinarily a limitation of the time for presenting requests for instructions is prescribed by statute or rule of court, and when this is the case it is not error for the court, subject to qualifications to be hereafter stated, to refuse an instruction not presented in the time named.[20]

[17] Dixon v. State, 13 Fla. 636; Craddock v. Barnes, 54 S. E. 1003, 142 N. C. 89; Brewer v. State, 165 P. 634, 13 Okl. Cr. 514.

[18] Astruc v. Star Co. (C. C. N. Y.) 182 F. 705; Pritchett v. Southern Ry. Co., 72 S. E. 828, 158 N. C. 88.

[19] Flexilis Werke, Spezial Tiegel Stahlgiesserei, Gesellschaft Mit Beschrankter Haftung v. Hess (C. C. A. Pa.) 205 F. 850, 124 C. C. A. 52.

See, also, ante, § 458.

[20] **Cal.** Waldie v. Doll, 29 Cal. 555.

Ga. Freeman v. Petty, 95 S. E. 737, 22 Ga. App. 199; Commercial City Bank v. Sullivan, 90 S. E. 173, 18 Ga. App. 608; Central of Georgia Ry. Co. v. Borland, 78 S. E. 352, 12 Ga. App. 729.

Ill. Rauch v. Bankers' Nat. Bank of Chicago, 143 Ill. App. 625; Chicago & A. Ry. Co. v. Louderback, 125 Ill. App. 323; Pennsylvania Co. v. Greso, 102 Ill. App. 252; Chicago City Ry. v. Sullivan, 76 Ill. App. 505.

Ind. Klitzke v. Smith, 109 N. E. 412, 59 Ind. App. 461; Lake Erie & W. R. Co. v. Brafford, 43 N. E. 882, 15 Ind. App. 655; German Fire Ins. Co. v. Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41; Craig v. Frazier, 127 Ind. 286, 26 N. E. 842; Puett v. Beard, 86 Ind. 104.

Mass. Randall v. Peerless Motor Car Co., 99 N. E. 221, 212 Mass. 352; Manning v. Anthony, 94 N. E. 466, 208 Mass. 399, 32 L. R. A. (N. S.) 1179; Garrity v. Higgins, 58 N. E. 1010, 177 Mass. 414.

Mo. Sweet v. Bunn, 193 S. W. 897, 195 Mo. App. 500.

N. C. Nail v. Brown & Williamson, 64 S. E. 434, 150 N. C. 533; Shober v. Wheeler, 113 N. C. 370, 18 S. E. 328; Luttrell v. Martin, 112 N. C. 593, 17 S. E. 573; Marsh v. Richardson, 106 N. C. 539, 11 S. E. 522.

Ohio. Cincinnati, H. & D. Ry. v. Taylor, 27 Ohio Cir. Ct. R. 757.

Pa. Sgier v. Philadelphia & R. Ry. Co., 103 A. 730, 260 Pa. 343.

S. C. Cutter v. Mallard Lumber Co., 83 S. E. 595, 99 S. C. 231.

Vt. W. B. Johnson & Co. v. Central Vermont Ry. Co., 79 A. 1095, 84 Vt. 486; Vaughan v. Porter, 16 Vt. 266.

Effect of constitutional provision requiring judges to declare the law. Although a constitutional provision requires judges in charging juries "to declare the law," they are not bound to charge in the absence of a request submitted in accordance with a rule of court requiring requests to be submitted before argument, and providing that such addi-

§ 477. Prematurity of requests

Requests for instructions are improper, and are properly refused, when they are prematurely made, or made at an inopportune time, as where a request is presented before the introduction of any evidence,[21] or during the midst of the examination of a witness,[22] or in the midst of the argument of counsel to the jury.[23]

§ 478. Tardiness of requests

In one jurisdiction, requests should not be made until after the main or general charge.[24] In the majority of jurisdictions, however, requests for instructions should be presented before the general charge of the court.[25] To entitle a party to have consid-

tional requests as may be suggested by the argument may be submitted at the conclusion thereof. Morrison v. Mutual Benev. Ass'n of Chesterfield County, 59 S. E. 27, 78 S. C. 398.

Effect of giving wrong reason for refusing request. The fact that the judge, in refusing to give instructions which are requested later than the time prescribed by law, bases his refusal on a mistaken impression that he has already given the same instructions in substance, does not make such refusal error. Posey v. Patton, 109 N. C. 455, 14 S. E. 64.

[21] Comstock v. Livingston, 97 N. E. 106, 210 Mass. 581.

[22] People v. Germino, 175 P. 489, 38 Cal. App. 100; Wood v. Skelly, 81 N. E. 872, 196 Mass. 114, 124 Am. St. Rep. 516.

[23] Richmond & M. R. Co. v. Humphreys, 90 Va. 425, 18 S. E. 901.

[24] Myers. v. Taylor, 64 S. W. 719. 107 Tenn. 364; Chicago Guaranty Fund Life Soc. v. Ford, 58 S. W. 239, 104 Tenn. 533; Felton v. Clarkson, 53 S. W. 733, 103 Tenn. 457; Cooper v. Overton, 52 S. W. 183, 102 Tenn. 211, 45 L. R. A. 591, 73 Am. St. Rep. 864; Cumberland Telephone & Telegraph Co. v. Shaw, 52 S. W. 163, 102 Tenn. 313; Chesapeake, O. & S. W. R. Co. v. Hendricks, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488; Chesapeake, O. & S. W. R. Co. v. Foster, 88 Tenn. 671, 13 S. W. 694, 14 S. W. 428.

[25] **U. S.** City of Chicago v. Le Moyne, 119 F. 662, 56 C. C. A. 278; (C. C. Mass.) United States v. Gilbert, Fed. Cas. No. 15,204; (C. C. A. N. Y.) Holmes v. Montauk Steamboat Co., 93 F. 731, 35 C. C. A. 556.

Ind. Town of Noblesville v. Vestal, 118 Ind. 80, 20 N. E. 479.

Mass. Mones v. Bay State St. Ry. Co., 125 N. E. 151, 234 Mass. 82; McMahon v. O'Connor, 137 Mass. 216.

Or. Johnson v. Portland Ry., Light & Power Co., 155 P. 375, 79 Or. 403.

Tex. Galan v. State, 177 S. W. 124, 76 Tex. Cr. R. 619; Kell v. Ross (Civ. App.) 175 S. W. 752; Reed v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 174 S. W. 956; Watts v. State, 171 S. W. 202, 75 Tex. Cr. R. 330; James v. State, 167 S. W. 727, 74 Tex. Cr. R. 139.

Utah. Flint v. Nelson, 10 Utah, 261, 37 P. 479.

Vt. Russ v. Good, 97 A. 987, 90 Vt. 236; State v. Gomez, 96 A. 190, 89 Vt. 490; Clark v. Tudhope, 95 A. 489, 89 Vt. 246.

Discretion of court. The giving of further instructions to the jury after the charge has been concluded is discretionary, and exceptions to a refusal to do so will not lie. Tibbetts v. Williams, 32 Me. 598, Append.

Request for instruction as to purpose and effect of evidence. Where evidence has been treated in the arguments of counsel on both sides as bearing only on the credit of a witness, and the court has charged accordingly, no exception lies to a refusal of a request, made for the first time after the charge has been given,

ered requests for instructions presented after the conclusion of the main charge of the court, it should appear that such requests were made necessary by something the court has already charged or omitted to charge.[26]

In a number of jurisdictions, under statute or rule of court, the requirement is that requests to charge should be made at the close of the evidence,[27] or before the commencement or close of the ar-

to instruct the jury to consider the evidence as evidence in chief. Wilmot v. Howard, 39 Vt. 447, 94 Am. Dec. 338.

[26] Leydecker v. Brintnall, 158 Mass. 292, 33 N. E. 399; Dunne v. Jersey City Galvanizing Co., 64 A. 1076, 73 N. J. Law, 586.

Putting counsel to election. A presiding justice has no authority to put counsel to an election between presenting his requests during his argument to the jury and having them ruled on as he proceeds, or waiving them. Maxwell v. Massachusetts Title Ins. Co., 92 N. E. 42, 206 Mass. 197.

[27] **U. S.** Atchison, T. & S. F. Ry. Co. v. Hamble, 177 F. 644, 101 C. C. A. 270.

Ind. Duckwall v. Williams, 63 N. E. 232, 29 Ind. App. 650.

N. J. Carmany v. West Jersey & S. S. R. Co., 74 A. 656, 78 N. J. Law, 552; Dunne v. Jersey City Galvanizing Co., 64 A. 1076, 73 N. J. Law, 586.

N. C. Barringer v. Deal, 80 S. E. 161, 164 N. C. 246; State v. Hairston, 28 S. E. 492, 121 N. C. 579; Ward v. Albemarle & R. R. Co., 112 N. C. 168, 16 S. E. 921; Posey v. Patton, 109 N. C. 455, 14 S. E. 64; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

Wash. State v. Brache, 115 P. 853, 63 Wash. 396.

Right to prefer requests before arguments of counsel. The words "at or before the close of the evidence," in Revisal, § 536 (Code, § 414), requiring that a request to put the instructions in writing shall be made "at or before the close of the evidence," if inserted in section 538 (Code, § 415), providing that counsel shall reduce their prayers for special instructions to writing, would mean that requested instructions could be made at some time not later than the beginning of the argument of counsel to the jury, and the refusal of requested charges because made too late, when made before the commencement of argument, is erroneous. Craddock v. Barnes, 54 S. E. 1003, 142 N. C. 89. Where, after the evidence was closed and the jury dismissed for the noon recess, counsel, at the request of the judge, argued a certain point in the case as preliminary to the argument after the recess, it was held that it was not too late to request a written charge after court had reconvened and before the argument to the jury had commenced. Universal Metal Co. v. Durham & C. R. Co., 59 S. E. 50, 145 N. C. 293.

Discretion of court with respect to granting time to prepare requests before arguments of counsel. It is in the sound discretion of the trial court to determine whether time shall be given either party, at the conclusion of the evidence and before the commencement of the argument, to reduce his request for special instructions to writing and deliver them to the court. Phillips v. Thorne, 103 Ind. 275, 2 N. E. 747. Where, in a personal injury action, the only doubtful question is as to the amount of recovery, and there are no difficult questions of law involved, and defendant, represented by two counsels, presents at the close of the testimony four instructions in writing and requests time to prepare further instructions, and the amount of the verdict is not excessive, the judgment will not be reversed because the court refused to grant further time. Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463.

guments of counsel,[28] and such a rule is a reasonable one.[29] In some jurisdictions such requests are not unseasonable, if made after the delivery of the main charge,[30] and it is improper to refuse

[28] **Ala.** Osborn v. State, 73 So. 985, 198 Ala. 21.

Ariz. Territory v. Harper, 1 Ariz. 399, 25 P. 528.

Ark. Lee v. State, 223 S. W. 373; St. Louis Southwestern Ry. Co. v. Mitchell, 171 S. W. 895, 115 Ark. 339, Ann. Cas. 1916E, 317.

Cal. People v. Lang, 76 P. 232, 142 Cal. 482.

Ill. Prindiville v. People, 42 Ill. 217.

Ind. Bartlow v. State, 109 N. E. 201, 183 Ind. 398; Adams v. Main, 29 N. E. 792, 3 Ind. App. 232, 50 Am. St. Rep. 266; Benson v. State, 119 Ind. 488, 21 N. E. 1109; Surber v. State, 99 Ind. 71; Hege v. Newson, 96 Ind. 426.

Iowa. Shelberg v. Jones, 151 N. W. 1066, 170 Iowa, 19.

La. State v. Gordon, 39 So. 625, 115 La. 571.

Mass. Quimby v. Jay, 82 N. E. 1084, 196 Mass. 584; Root v. Boston Elevated Ry. Co., 67 N. E. 365, 183 Mass. 418; In re Keohane, 60 N. E. 406, 179 Mass. 69.

Minn. Gracz v. Anderson, 116 N. W. 1116, 104 Minn. 476.

Miss. Montgomery v. State, 37 So. 835, 85 Miss. 330.

Mo. Hall v. City of St. Joseph, 146 S. W. 458, 163 Mo. App. 214; Payne v. Payne, 57 Mo. App. 130.

N. Y. Schuhle v. Cunningham, 14 Daly, 404.

N. C. State v. Claudius, 80 S. E. 261, 164 N. C. 521; Holder v. Giant Lumber Co., 76 S. E. 485, 161 N. C. 177; Biggs v. Gurganus, 67 S. E. 500, 152 N. C. 173.

Ohio. Toledo, F. & N. Ry. Co. v. Gilbert, 24 Ohio Cir. Ct. R. 181.

Pa. Everett v. Sturges, 46 Pa. Super. Ct. 612.

S. C. Salley v. Cox, 77 S. E. 933, 94 S. C. 216, 46 L. R. A. (N. S.) 53, Ann. Cas. 1915A, 1111; State v. Glenn, 70 S. E. 453, 88 S. C. 162.

S. D. White v. Amrhien, 85 N. W. 191, 14 S. D. 270.

Tex. O'Toole v. State, 183 S. W. 1160, 79 Tex. Cr. R. 153; Forward v. State, 166 S. W. 725, 73 Tex. Cr. R. 561.

Vt. Cady v. Owen, 34 Vt. 598; State v. Catlin, 8 Vt. 530, 23 Am. Dec. 230.

Requests not too late. A request for an instruction should not be rejected as too late, when made during the opening and only argument in the case. McCaleb v. Smith, 22 Iowa, 242.

Instructions on accomplice testimony. The rule of court that instructions requested must be presented before argument does not apply to the instruction that "the testimony of an accomplice is to be viewed with distrust," which the statute declares is to be given on all proper occasions. People v. Silva, 54 P. 146, 121 Cal. 668.

Questions of fact. A rule of court, requiring the instructions requested to be submitted before argument, does not apply to instructions on questions of fact. State v. Magers, 57 P. 197, 35 Or. 520.

Effect in criminal cases of rule of court in civil cases. A rule of court requiring requested instructions in civil cases to be presented before the conclusion of the argument does not justify a refusal to consider requested instructions presented in a criminal case after argument and after other instructions had been read. People v. Cook, 83 P. 43, 148 Cal. 334.

[29] Manhattan Life Ins. Co. v. Francisco, 17 Wall. 672, 21 L. Ed. 698; Sterling Organ Co. v. House, 25 W. Va. 64.

[30] Gallagher v. McMullin, 7 App. Div. 321, 40 N. Y. S. 222; Pfeffele v. Second Ave. R. Co., 34 Hun, 497; Chapman v. McCormick, 86 N. Y. 479.

Rule in particular jurisdictions. In the Southern district of New York it is the custom not to refuse requests after the charge has been delivered, but requests at that time cannot re-

requests merely because they are so made,[31] and in some jurisdictions, or under some rules of court, the requirement simply is that requests should be tendered before the jury retire.[32]

§ 479. Operation and mandatory character of statutes or rules of court prescribing time for presenting requests

A rule of court cannot exist in the breast of the judge, but must be announced as a rule and of record,[33] and where such a rule prescribing the time of presenting requests is in writing, and spread upon the records of the court, and given reasonable publicity, it will be obligatory upon the court, and no discretion in the matter allowed, unless the exercise of discretion is permitted by the rule itself.[34] Ordinarily, however, statutes or rules of court prescribing the time of making requests for instructions are not framed in such language as to prevent the court, if in its opinion it is proper to do so in the furtherance of justice, from granting or passing on requests after such time.[35]

ceive the careful attention they would receive if presented at the close of the evidence, and the trial judge should not be held to the same degree of accountability for erroneously refusing a request then presented as he must be one presented at a more appropriate time. (C. C. A. N. Y.) Linn v. United States, 251 F. 476, 163 C. C. A. 470.

[31] Carey v. Chicago, M. & S. P. Ry. Co., 61 Wis. 71, 20 N. W. 648.

[32] **Ga.** Macon v. State, 100 S. E. 785, 24 Ga. App. 337; Brown v. State, 100 S. E. 452, 24 Ga. App. 268; Towler v. State, 100 S. E. 42, 24 Ga. App. 167; Waller v. State, 97 S. E. 876, 23 Ga. App. 156; McLeod v. State, 95 S. E. 934, 22 Ga. App. 241; Southern Ry. Co. v. Williams, 91 S. E. 1001, 19 Ga. App. 544; Farkas v. S. Cohn & Son, 91 S. E. 892, 19 Ga. App. 472; Seaboard Air Line Ry. v. Barrow, 89 S. E. 383, 18 Ga. App. 261; Seaboard Air Line Ry. v. Lyon, 89 S. E. 384, 18 Ga. App. 266; Brooks v. State, 96 Ga. 353, 23 S. E. 413.

Kan. State v. Bloom, 136 P. 951, 91 Kan. 156. Compare, Firman v. Blood, 2 Kan. 496.

N. J. Engeman v. State, 54 N. J. Law, 247, 23 A. 676.

N. D. State v. Barry, 92 N. W. 809, 11 N. D. 428.

See State v. Laycock, 141 Mo. 274, 42 S. W. 723.

Request too late after retirement of jury. It is not error to refuse a request to charge made after the jury had retired to deliberate on the case. Key v. State, 62 So. 335, 8 Ala. App. 2. Where the trial judge makes an inaccurate statement of some particular part of the testimony in the course of his charge, the counsel for the party aggrieved should call the judge's attention to the unintentional slip before the jury retires, and have it corrected. Commonwealth v. Wasson, 42 Pa. Super. Ct. 38.

See, also, ante, § 457.

[33] Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572.

[34] Illinois Cent. R. Co. v. Haskins, 115 Ill. 300, 2 N. E. 654.

[35] **Cal.** People v. Demasters, 105 Cal. 669, 39 P. 35; People v. Sears, 18 Cal. 635.

Conn. Farrington v. Cheponis & Panarausky, 78 A. 652, 84 Conn. 1.

Ill. Frank Parmelee Co. v. Griffin, 136 Ill. App. 307, judgment affirmed Griffin v. Frank Parmelee Co., 83 N. E. 1041, 232 Ill. 503; Lyman v. Kline, 128 Ill. App. 497.

Ky. Wills v. Tanner, 18 S. W. 166.

Mass. Commonwealth v. Hassan, 126 N. E. 287, 235 Mass. 26; Robert-

Such a regulation is not applicable to a request for an instruction, the occasion for which arises after the expiration of the time prescribed,[36] and where the court omits from its charge matters which are of such a nature that a party may justly assume that they will be treated in the charge, he may present requests thereafter to supply such omissions, notwithstanding a rule requiring such presentation before the arguments of counsel or before the main charge.[37]

Where an instruction without qualification is calculated to mislead the jury, it is error to refuse, on the ground that it is not timely, a requested instruction which corrects such misleading tend-

son v. Boston & N. St. Ry. Co., 76 N. E. 513, 190 Mass. 108, 3 L. R. A. (N. S.) 588, 112 Am. St. Rep. 314.

Mich. People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Minn. Sanborn v. School Dist. No. 10, Rice County, 12 Minn. 17 (Gil. 1).

Mo. Buck v. People's Street Railway & Electric Light & Power Co., 108 Mo. 179, 18 S. W. 1090.

Neb. Billings v. McCoy, 5 Neb. 187.

S. C. State v. Williams, 56 S. E. 783, 76 S. C. 135.

Vt. Fadden v. McKinney, 89 A. 351, 87 Vt. 316.

Matters authorizing departure from rule. Though a rule of court requires propositions to be submitted before argument, the court should, in its sound legal discretion, receive propositions submitted after argument, where counsel states he thought the rule required the propositions to be submitted before judgment. Mann v. Learnard, 63 N. E. 178, 195 Ill. 502.

Matters not requiring departure from rule. Under a rule of court of Cook county that "all instructions must be presented to the court at the conclusion of the evidence," an instruction, presented nearly at the close of the address of the plaintiff's attorney to the jury, is properly refused, where the argument of plaintiff's counsel does not render necessary the giving of the instruction. Pittsburg, C., C. & St. L. Ry. Co. v. Hewitt, 102 Ill. App. 428, judgment affirmed 66 N. E. 829, 202 Ill. 28.

Leave of court to present requests after time prescribed for presentation. A rule of court requiring instructions requested to be presented before argument, does not mean that leave must be obtained to present requests later, but that requests presented later cannot be entertained without leave of court. Robertson v. Boston & N. St. Ry. Co., 76 N. E. 513, 190 Mass. 108, 3 L. R. A. (N. S.) 588, 112 Am. St. Rep. 314. Where the trial judge received and refused certain requests to charge, presented after argument, his act in so doing was in effect the giving of special leave to present such instructions at the time they were presented. Robertson v. Boston & N. St. Ry. Co., 76 N. E. 513, 190 Mass. 108, 3 L. R. A. (N. S.) 588, 112 Am. St. Rep. 314.

[36] Standard Fire Ins. Co. v. Wren, 11 Ill. App. 242.

[37] Freeby v. Town of Sibley, 167 N. W. 770, 183 Iowa, 827; Brick v. Bosworth, 162 Mass. 334, 39 N. E. 36; Crippen v. Hope, 38 Mich. 344; McKennan v. Omaha & C. B. St. R. Co., 146 N. W. 1014, 95 Neb. 643; Campbell v. State, 141 S. W. 232, 63 Tex. Cr. R. 595, Ann. Cas. 1913D, 858.

Omission to state rules of evidence. Counsel have a right to assume that, in its charge, the court, without request, will state such of the rules of evidence as are pertinent, and hence it is error to refuse a further instruction asked at the close of the charge, embodying a correct rule of evidence peculiarly applicable to the issues, on the ground that it should have been presented before the charge was given. Malone v. Third Ave. R. Co., 42 N. Y. S. 694, 12 App. Div. 508, 4 N. Y. Ann. Cas. 43.

encies,[38] and a timely tender of a request, which is refused because of defects in form, will be sufficient to make it an abuse of discretion on the part of the court to subsequently refuse to give, because not tendered in time, another instruction good in form and involving the same legal principle, the application of which to the issues the party making the request is entitled to under the facts of the case, and the giving of which cannot injure the opposite party.[39]

A request not made in time will make it the duty of the court in some jurisdictions to submit to the jury the law applicable to the case as made by the evidence of the requesting party upon the points to which attention is called in such request.[40] A rule requiring requests to be made before arguments of counsel is without force in a case which is submitted to the jury without argument.[41]

C. Formal Matters Connected with Preparation of Requests

§ 480. Requisites of requests in general

The court is not bound to consider requests to charge which are not presented as required by the rules of court,[42] and the court may properly refuse instructions which are bad in form.[43] The rules that govern the court in framing instructions on its own motion, and which have been discussed in preceding chapters, apply to the preparation by counsel of instructions to be requested on behalf of a party.[44] Requests which are unintelligible, indefinite,

[38] Hoge v. Turner, 32 S. E. 291, 96 Va. 624.

[39] Hill v. Wright, 23 Ark. 530.

[40] Allen v. Perry, 56 Wis. 178, 14 N. W. 3.

[41] Tinney v. Endicott, 5 Cal. 102.

[42] Richardson v. State, 90 S. E. 487, 18 Ga. App. 755; State v. Allen, 96 S. E. 401, 110 S. C. 278. See Hamburg-American Steam Packet Co. v. United States (C. C. A. N. Y.) 250 F. 747, 163 C. C. A. 79, certiorari denied Hamburg-Amerikanischer Steam Packet Co., 38 S. Ct. 333, 246 U. S. 662, 62 L. Ed. 927.

[43] Western Union Telegraph Co. v. Rowell, 45 So. 73, 153 Ala. 295.

Inadvertent use of wrong word. Where a request to charge used the word "defendant" where the name of the assaulted party was intended, the charge was fatally defective, and, even if otherwise good, was properly refused. Moore v. State, 45 So. 656, 154 Ala. 48. A requested instruction, in a homicide case, which refers to the person killed as defendant, and to accused as plaintiff was properly refused as meaningless. Underwood v. State, 60 So. 842, 179 Ala. 9.

[44] **U. S.** Keiper v. Equitable Life Assur. Soc. of United States, 159 F. 206.

Ala. Jebeles & Colias Confectionery Co. v. Booze, 62 So. 12, 181 Ala. 456; Alabama Great Southern Ry. Co. v. Guest, 39 So. 654, 144 Ala. 373; McWhorter v. Bluthenthal & Bickart, 33 So. 552, 136 Ala. 568, 96 Am. St. Rep. 43.

Conn. Beattie v. McMullen,

misleading, or confusing are properly refused,[45] as where a request is so defaced with erasures and interlineations as to be illegible,[46] and it is not improper to refuse a request setting forth a proposition which is an absurdity, although it may be obvious that this is the result of a palpable and unintentional error on the part of counsel in framing the request.[47] A request to charge several enumerated sections of a statute, referring to them by number only, is not sufficiently definite to require favorable action by the court.[48] Requests, however, need not be so worded as to anticipate and guard against every possible opportunity for misapprehension on the part of the jury.[49]

A mere suggestion to the trial court is not sufficient to require it to submit an issue,[50] and a request merely reciting certain facts,

Weand & McDermott, 74 A. 767, 82 Conn. 484.

Ga. McElwaney v. McDiarmid, 62 S. E. 20, 131 Ga. 97.

Ill. Swengel v. Illinois Third Vein Coal Co., 154 Ill. App. 409.

Mo. Scanlan v. Gulick, 97 S. W. 884, 199 Mo. 449.

Ohio. American Steel Packing Co. v. Conkle, 99 N. E. 89, 86 Ohio St. 117.

Citation of cases. A memorandum of authorities in support of a request for an instruction, written on the margin thereof, does not give ground for refusing the instruction, if otherwise proper. City of South Omaha v. Fennell, 94 N. W. 632, 4 Neb. (Unof.) 427.

[45] **Ala.** McDonald v. State, 51 So. 629, 165 Ala. 85.

Md. Neighbors v. Leatherman, 82 A. 152, 116 Md. 484; Robey v. State, 50 A. 411, 94 Md. 61, 89 Am. St. Rep. 405; Blair v. Blair, 39 Md. 556; Weber v. Zimmerman, 22 Md. 156; Dorsey v. Harris, 22 Md. 85; Kent v. Holliday, 17 Md. 387; Baltimore & O. R. Co. v. Resley, 14 Md. 424; Wheeler v. State, 7 Gill, 343.

Mo. Hulett v. Missouri, K. & T. Ry. Co., 145 Mo. 35, 46 S. W. 951.

Mont. Ramsey v. Burns, 69 P. 711, 27 Mont. 154.

N. Y. Van Vechten v. Griffiths, 40 N. Y. (1 Keyes) 104.

N. C. Wooten v. Holleman, 88 S. E. 480, 171 N. C. 461.

Tex. Creager v. Yarborough (Civ. App.) 87 S. W. 376.

Va. Kitty v. Fitzhugh, 4 Rand. 600.

W. Va. Barens v. City of Grafton, 56 S. E. 608, 61 W. Va. 408; Patton v. Elk River Nav. Co., 13 W. Va. 259.

[46] Eaton v. State, 63 So. 41, 8 Ala. App. 136; Roberts v. State, 54 So. 993, 171 Ala. 12.

[47] Macon Consol. St. R. Co. v. Barnes, 38 S. E. 756, 113 Ga. 212.

[48] Conley v. State, 94 S. E. 261, 21 Ga. App. 134.

[49] Parson v. Lyman, 73 N. W. 634, 71 Minn. 34.

[50] **U. S.** (C. C. A. Okl.) Stout v. United States, 227 F. 799, 142 C. C. A. 323, certiorari denied 36 S. Ct. 549, 241 U. S. 664, 60 L. Ed. 1227.

Ga. Jackson v. State, 91 S. E. 923, 19 Ga. App. 621.

Iowa. State v. Klute, 140 N. W. 864, 160 Iowa, 170.

Me. Virgie v. Stetson, 73 Me. 452.

Mo. State v. Starr, 148 S. W. 862, 244 Mo. 161.

Or. State v. Magers, 58 P. 892, 36 Or. 38.

S. C. State v. Wine, 36 S. E. 439, 58 S. C. 94.

Tex. Orient Ins. Co. v. Wingfield, 108 S. W. 788, 49 Tex. Civ. App. 202; Warthan v. State, 55 S. W. 55, 41 Tex. Cr. R. 385; Missouri, K. & T. Ry. Co. of Texas v. Cardena, 54 S. W. 312, 22 Tex. Civ. App. 300.

Wyo. Smith v. State, 101 P. 847, 17 Wyo. 481.

Requests insufficient within rule. In an action on an account,

without making any application of them, is properly refused,[51] as is a requested instruction to disregard certain counts in the complaint, which does not specify the supposed defects therein.[52]

A request should be so constructed that the trial court can answer it by a single affirmation or negation,[53] and so that the court can give it in the very language of the request,[54] and a request is improperly framed which so mixes the facts with the law as to necessitate either refusing to give the instruction or to discriminate between the facts and the law.[55]

a mere contention of plaintiff's counsel during the trial that there was an account stated by reason of defendant's failure to object within reasonable time after it was rendered cannot be regarded as a request for an instruction on such issue. Davis v. Stephenson, 62 S. E. 900, 149 N. C. 113. Where the trial judge offered to recall the jury and give instructions which defendant claimed were presented to him, if counsel thought it was necessary, but counsel did not state that they desired them to be given, but merely said they excepted to the refusal to give the instructions, there was no such request as would put the court in error. Scherrer v. City of Seattle, 101 P. 144, 52 Wash. 4. A general request that the court declare the whole law governing the case was insufficient to call the court's attention to its failure to charge on alibi. State v. Bond, 90 S. W. 830, 191 Mo. 555. A request to instruct that defendant is presumed to be innocent, and all evidence against him must be weighed with this presumption in the minds of the jurors from the beginning of the trial to the moment that the jury concludes, if it does so conclude, that defendant is guilty, is not a request to instruct that the jurors' minds must be kept open and free from any conclusion till after the jury has heard all the evidence. Commonwealth v. Clancy, 72 N. E. 842, 187 Mass. 191. An informal request to charge on the subject of the duty of a person about to cross a railroad track to stop, look, and listen, without stating any legal proposition, was properly ignored. Wright v. Western & A. R. Co., 77 S. E. 161, 139 Ga. 343.

Effect of objections and exceptions to instructions given. A bare exception to a charge given is not equivalent to a request to charge. Ripper v. United States (C. C. A. Mo.) 179 F. 497, 103 C. C. A. 478, denying rehearing 178 F. 24, 101 C. C. A. 152. And a general objection of failure to instruct on the whole law of the case is insufficient to require an instruction limiting the jury's consideration of another crime committed at the same time the offense charged was committed to its relation to such offense. State v. Rasco, 144 S. W. 449, 239 Mo. 535. But an objection to an instruction on a criminal trial that the jury should not fix the punishment, and the saving of an exception thereto, has been held equivalent to a request to charge that the jury fix the punishment. Reynolds v. United States, 103 S. W. 762, 7 Ind. T. 51.

[51] Barclay v. Coman, 110 N. W. 49, 146 Mich. 650.

[52] Heidenreich v. Bremner, 103 N. E. 275, 260 Ill. 439, affirming judgment 176 Ill. App. 230; Chicago, R. I. & P. Ry. Co. v. Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

[53] Fisher v. Delaware, L. & W. R. Co., 76 A. 718, 227 Pa. 635; Schweitzer v. Williams, 43 Pa. Super. Ct. 202; Commonwealth v. Page, 6 Pa. Super. Ct. 220.

[54] Fuller v. State, 97 Ala. 27, 12 So. 392; Heilbron v. State, 2 Tex. App. 537; Montgomery v. State, 107 N. W. 14, 128 Wis. 183.

[55] Patton v. Elk River Nav. Co., 13 W. Va. 259.

A charge marred by typographical [56] or grammatical errors [57] is properly refused.

It is proper to prefer alternative requests, which are not inconsistent, based on varying facts, one or more of which may be found to the exclusion of the others; [58] but, where a party requesting a charge desires it given only in the event that more favorable requested charges are refused, a conditional request for its submission should be made.[59]

Each proposition of law contended for should be covered by a single requested instruction,[60] and it is proper to refuse a request which contains more than one proposition.[61]

§ 481. Form and requisites of request for direction of verdict in criminal case

A motion, in form, to discharge the defendant in a criminal case or to dismiss the indictment may be regarded as in substance a request to direct a verdict.[62] A motion by the defendant for a verdict should state the precise grounds upon which he bases his request.[63] Thus a motion to direct an acquittal on account of the failure of proof on the part of the state must, unless such failure is a total one, specify wherein it is claimed such proof fails,[64] and a motion for an acquittal, which fails to call the attention of the court to an alleged misnomer on which it is based, is properly refused.[65]

[56] Reliance Life Ins. Co. of Pittsburgh, Pa., v. Garth, 68 So. 871, 192 Ala. 91; Smith v. E. T. Davenport & Co., 68 So. 545, 12 Ala. App. 456.

[57] Schieffelin v. Schieffelin, 28 So. 687, 127 Ala. 14; Shields' Estate v. Michener, 113 Ill. App. 18.

Use of word "deceased" for "plaintiff." Where an action is brought by an administrator to recover damages for the alleged negligent killing of plaintiff's intestate, charges which instruct the jury that under certain hypothesized conditions deceased could not recover are wanting in clearness, and so incorrect in the use of the word "deceased" for the word "plaintiff" that the trial court will not be put in error for refusing such charge. Tutwiler Coal, Coke & Iron Co. v. Enslen, 30 So. 600, 129 Ala. 336.

[58] Kosher Dairy Co. v. New York, S. & W. R. Co., 91 A. 1037, 86 N. J. Law, 161.

[59] Gestean v. Bishop (Tex. Civ. App.) 181 S. W. 696, denying certification to Supreme Court 180 S. W. 302.

[60] Rocky Mountain Fuel Co. v. Bakarich, 180 P. 754, 66 Colo. 275.

[61] Klaw v. Life Pub. Co. (C. C. A. N. Y.) 145 F. 184, 76 C. C. A. 154; Rudy v. Myton, 19 Pa. Super. Ct. 312.

[62] People v. Ledwon, 46 N. E. 1046, 153 N. Y. 10; People v. Bennett, 49 N. Y. 137.

[63] State v. Nulty, 57 Vt. 543.

[64] State v. Feister, 50 P. 561, 32 Or. 254; State v. Tamler, 19 Or. 528, 25 P. 71, 9 L. R. A. 853.

[65] State v. Dyer, 67 Vt. 690, 32 A. 814.

§ 482. Separating, numbering, and signing requests

Where there are several requests, they should be separated and numbered.[66]

In some jurisdictions requests for instructions must be signed by the party making the requests or his attorney,[67] and it is proper to refuse requests not so signed.[68]

The trial court may, however, disregard objections to instructions based on the failure to sign and number them,[69] statutes requiring such signing and numbering not being considered as mandatory,[70] and the mere fact of such omission is no ground for re-

[66] Basenberg v. Lawrence, 49 So. 771, 160 Ala. 422; Anniston Electric & Gas Co. v. Rosen, 48 So. 798, 159 Ala. 195, 133 Am. St. Rep. 32; Urbansky v. Kutinsky, 84 A. 317, 86 Conn. 22; Hackett v. Straw, 144 N. W. 655, 33 S. D. 17; Western Union Tel. Co. v. Johnson, 41 S. W. 367, 16 Tex. Civ. App. 546.

[67] **Ind.** Glover v. State, 109 Ind. 391, 10 N. E. 282; Hunt v. Elliott, 80 Ind. 245, 41 Am. Rep. 794; Jeffersonville, M. & I. R. Co. v. Vancant, 40 Ind. 233.

Okl. Chicago Live Stock Commission Co. v. Connally, 78 P. 318, 15 Okl. 45; Chicago Live Stock Commission Co. v. Fix, 78 P. 316, 15 Okl. 37.

Tex. St. Louis Southwestern Ry. Co. of Texas v. Cleland, 110 S. W. 122, 50 Tex. Civ. App. 499; Moore v. Brown, 64 S. W. 946, 27 Tex. Civ. App. 208; Redus v. Burnett, 59 Tex. 576.

Sufficiency of signing. Where a defendant presented instructions to the trial court, the request reciting the caption of the case, and that defendant therein requested the court to give the jury each of the following instructions, numbered 1 to 32, inclusive, which was signed by defendant's attorneys as attorneys for defendant, and the requested instructions followed, but were not signed at the end thereof by defendant or his counsel, the instructions were sufficiently signed within the statute requiring all instructions to be numbered consecutively, and signed by the party or his counsel. City of Garrett v. Winterich (Ind. App.) 84 N. E. 1006.

[68] **Ind.** Weigand v. State, 99 N. E. 999, 178 Ind. 623; Hablich v. University Park Bldg. Co., 97 N. E. 539, 177 Ind. 193; Volker v. State, 97 N. E. 422, 177 Ind. 159; Retseck v. Harbart, 96 N. E. 386, 176 Ind. 441; Bader v. State, 94 N. E. 1009, 176 Ind. 268; Pittsburgh, C., C. & St. L. Ry. Co. v. O'Conner, 85 N. E. 969, 171 Ind. 686; Eacock v. State, 82 N. E. 1039, 169 Ind. 488; Starr v. State, 67 N. E. 527, 160 Ind. 661; Musser v. State, 61 N. E. 1, 157 Ind. 423; Collett v. State, 59 N. E. 168, 156 Ind. 64; Hamilton v. State, 52 N. E. 419, 22 Ind. App. 479; Houk v. Branson, 45 N. E. 78, 17 Ind. App. 119; Lake Erie & W. R. Co. v. Brafford, 43 N. E. 882, 15 Ind. App. 655; Citizens' St. R. Co. v. Hobbs, 15 Ind. App. 610, 43 N. E. 479, 44 N. E. 377; Louisville, N. A. & C. Ry. Co. v. Goben, 42 N. E. 1116, 15 Ind. App. 123; Buchart v. Ell, 9 Ind. App. 353, 36 N. E. 762; Toledo, etc., R. Co. v. Cosand, 33 N. E. 251, 6 Ind. App. 222; Howard v. County Com'rs v. Legg, 110 Ind. 479, 11 N. E. 612; Hutchinson v. Lemcke, 107 Ind. 121, 8 N. E. 71; State v. Sutton, 99 Ind. 300; Stott v. Smith, 70 Ind. 298; Sutherland v. Hankins, 56 Ind. 343.

Kan. Farrar v. McNair, 69 P. 167, 65 Kan. 147; Morisette v. Howard, 63 P. 756, 62 Kan. 463.

Tex. First Nat. Bank of Snyder v. Patterson (Civ. App.) 185 S. W. 1018; Texas & P. Ry. Co. v. Mitchell, 26 S. W. 154; Smith v. Fordyce (Sup.) 18 S. W. 663.

[69] Gibbs v. Wall, 10 Colo. 153, 14 Pac. 216; Galveston, H. & S. A. Ry. Co. v. Neel (Tex. Civ. App.) 26 S. W. 788.

[70] Mason v. Sieglitz, 22 Colo. 320, 44 P. 588; Terry v. Davenport, 83 N. E. 636, 170 Ind. 74.

versal.[71] In one jurisdiction the practice of the signing by attorneys of their requests is not commended,[72] although the fact of such signing is not reversible error.[73]

§ 483. Submission of requests to opposing counsel

In some jurisdictions it is proper for the court to permit requests by a party to be examined by his adversary before their submission to the jury,[74] it being said that ordinary courtesy would seem to suggest the propriety of such submission,[75] and that such a practice is to be commended, as enabling the court to secure the views of both sides with respect to the issues involved, and thereby assist him in correctly expounding the law thereon,[76] and in some jurisdictions there are positive requirements, under rules of court or otherwise, that such requests shall be submitted to the opposing counsel.[77] In one jurisdiction, under such a statutory provision, it is deemed the duty of the court, and not of counsel, to submit special charges to opposing counsel.[78]

§ 484. Filing requests

In some jurisdictions there is a requirement that a special charge requested by a party should be filed before it is read to the jury.[79]

D. Necessity of Written Requests

§ 485. Statement of rule

The general rule is that requests for instructions should be in writing,[80] the rule being usually embodied in statutory form,[81] and

[71] Orman v. Mannix, 17 Colo. 564, 30 P. 1037, 17 L. R. A. 602, 31 Am. St. Rep. 340.

[72] State v. McDonald 70 P. 724, 27 Mont. 230.

[73] Thornton-Thomas Mercantile Co. v. Bretherton, 80 P. 10, 32 Mont. 80.

[74] Alabama G. S. R. Co. v. Arnold, 80 Ala. 600, 2 So. 337.

[75] Cooper v. Altoona Concrete Construction & Supply Co., 53 Pa. Super. Ct. 141.

[76] Houston & T. C. R. Co. v. Turner, 78 S. W. 712, 34 Tex. Civ. App. 397.

[77] Roehl v. Baasen, 8 Minn. 26 (Gil. 9); Lampe v. United Rys. Co. of St. Louis, 160 S. W. 899, 177 Mo. App. 652; Haines v. Stauffer, 13 Pa. (1 Harris) 541, 53 Am. Dec. 493; Murphy v. Chicago, M. & St. P. Ry. Co., 120 P. 525, 66 Wash. 663; Jones v. Riverside Bridge Co., 73 S. E. 942, 70 W. Va. 374.

In Indiana it seems that a party, by taking certain steps may secure the right to an examination of the requests of his adversary before argument. Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100.

[78] Shipley v. Missouri, K. & T. Ry. Co. of Texas, 217 S. W. 137, 110 Tex. 194, reversing judgment (Civ. App.) 199 S. W. 661.

[79] Texas & P. Ry. Co. v. Thorp (Tex. Civ. App.) 198 S. W. 335.

[80] **Ala.** Oldacre v. State, 72 So. 303, 196 Ala. 690; Martin v. State, 56 So. 3, 1 Ala. App. 215; Stallworth v. State, 46 So. 518, 155 Ala. 14.

Ga. Dumas v. J. W. Stafford & Son, 95 S. E. 1009, 22 Ga. App. 365;

[81] See note 81 on following page.

whether so or not it being regarded as the better practice to re-

Sutton v. State, 88 S. E. 122, 587, 17 Ga. App. 713; Garrison v. State, 86 S. E. 743, 17 Ga. App. 314; Lenox Drug Co. v. New England Jewelry Co., 85 S. E. 681, 16 Ga. App. 476; Tolbert v. State, 85 S. E. 267, 16 Ga. App. 311; Jones v. State, 83 S. E. 1099, 15 Ga. App. 641; Bragg v. State, 83 S. E. 274, 15 Ga. App. 368; Shropshire v. State, 83 S. E. 152, 15 Ga. App. 345; Saunders v. State, 83 S. E. 148, 15 Ga. App. 344; Hart v. State, 82 S. E. 164, 14 Ga. App. 714; Hightower v. State, 80 S. E. 684, 14 Ga. App. 246; Dent v. State, 80 S. E. 548, 14 Ga. App. 270; Walton v. State, 77 S. E. 891, 12 Ga. App. 551; Washington v. State, 75 S. E. 253, 138 Ga. 370; Greene v. State, 74 S. E. 1101, 11 Ga. App. 257; Hartfelder & Cochran v. Clark, 73 S. E. 608, 10 Ga. App. 422; Alford v. State, 73 S. E. 375, 137 Ga. 458; Fuller v. State, 72 S. E. 515, 10 Ga. App. 34; Suggs v. State, 72 S. E. 287, 9 Ga. App. 830; Maddox v. State, 71 S. E. 498, 9 Ga. App. 448; Hunter v. State, 70 S. E. 643, 136 Ga. 103; Renfroe v. State, 70 S. E. 70, 8 Ga. App. 676; Billings v. State, 70 S. E. 36, 8 Ga. App. 672; Allen v. State, 67 S. E. 1038, 134 Ga. 380; McLendon v. State, 67 S. E. 846, 7 Ga. App. 687; Turner v. State, 63 S. E. 294, 131 Ga. 761; Roberson v. State, 62 S. E. 539, 4 Ga. App. 833; Coleman v. State, 62 S. E. 487, 4 Ga. App. 786; Strickland v. State, 61 S. E. 841, 4 Ga. App. 445; Millen & S. W. R. Co. v. Allen, 61 S. E. 541, 130 Ga. 656; Jones v. State, 60 S. E. 840, 130 Ga. 274; Freeney v. State, 59 S. E. 788, 129 Ga. 759; Lewis v. State, 59 S. E. 782, 129 Ga. 731; Wiley v. State, 59 S. E. 438, 3 Ga. App. 120; Western & A. R. Co. v. Tate, 59 S. E. 266, 129 Ga. 526; Sasser v. State, 59 S. E. 255, 129 Ga. 541; Tabor v. Macon Ry. & Light Co., 59 S. E. 225, 129 Ga. 417; Wholesale Mercantile Co. v. Jackson, 59 S. E. 106, 2 Ga. App. 776; Joiner v. State, 58 S. E. 859, 129 Ga. 295; Robberson v. State, 58 S. E. 544, 2 Ga. App. 417; Carter v. State, 58 S. E. 532, 2 Ga. App. 254; Handley v. State, 57 S. E. 236, 128 Ga. 24; Cress v. State, 55 S. E. 491, 126 Ga. 564; Southern Ry. Co. v. Brown, 54 S. E. 911, 126 Ga. 1; Moody v. State, 48 S. E. 262, 1 Ga. App. 772.

Kan. St. Louis & S. F. R. Co. v. Noland, 90 P. 273, 75 Kan. 691.

Ky. Ross v. Kohler, 174 S. W. 36, 163 Ky. 583, L. R. A. 1915D, 621.

Mass. Bingham v. Monroe, 99 N. E. 165, 212 Mass. 455.

N. C. Biggs v. Gurganus, 67 S. E. 500, 152 N. C. 173.

Okl. Williams v. State, 151 P. 900, 12 Okl. Cr. 39; Livingston v. Chicago, R. I. & P. Ry. Co., 139 P. 260, 41 Okl. 505; Chicago, R. I. & P. Ry. Co. v. Radford, 129 P. 834, 36 Okl. 657; Robinson v. Territory, 85 P. 451, 16 Okl. 241, reversed Robinson v. Territory of Oklahoma 148 F. 830, 78 C. C. A. 520.

S. C. Salley v. Cox, 77 S. E. 933, 94 S. C. 216, 46 L. R. A. (N. S.) 53, Ann. Cas. 1915A, 1111.

Tex. Ingram v. State, 182 S. W. 290, 78 Tex. Cr. R. 559; Mooney v. State, 176 S. W. 52, 76 Tex. Cr. R. 539; Schoennerstedt v. State, 117 S. W. 829, 55 Tex. Cr. R. 638; De Lam v. State, 95 S. W. 532, 50 Tex. Cr. R. 4; Osborne v. State (Tex. Cr. App.) 56 S. W. 53; Jones v. Thurmond's Heirs, 5 Tex. 318.

Wis. McCummins v. State, 112 N. W. 25, 132 Wis. 236.

[81] **Ala.** Davis v. Brandon, 75 So. 908, 200 Ala. 160.

Colo. Taylor v. Barnett, 90 P. 74, 39 Colo. 469.

Ga. Monroe County v. Driskell, 60 S. E. 293, 3 Ga. App. 583.

Ill. Harding v. Sandy, 43 Ill. App. 442.

Ind. Ft. Wayne & W. V. Traction Co. v. Olinger, 90 N. E. 652, 46 Ind. App. 733; Louisville & S. I. Traction Co. v. Korbe, 90 N. E. 483.

Ky. Charles Taylor Sons Co. v. Hunt, 173 S. W. 333, 163 Ky. 120; Louisville & N. R. Co. v. Woodford, 153 S. W. 722, 152 Ky. 398, rehearing denied 154 S. W. 1083, 153 Ky. 185; Bell's Adm'r v. Louisville Ry. Co., 146 S. W. 383, 148 Ky. 189.

Mo. Marion v. St. Louis & S. F.

duce such requests to writing,[82] and requests for instructions not in compliance with such rule may be refused.[83] The above rule applies to criminal as well as civil cases.[84]

Under a statute providing that each instruction asked by counsel shall be given without change or modification, or refused in full, it has been held that an objection to the failure of the court to give an instruction not reduced to writing, nor even to words, but

R. Co., 101 S. W. 688, 124 Mo. App. 445.

Mont. Helena & L. Smelting & Reduction Co. v. Lynch, 65 P. 919, 25 Mont. 497.

N. D. Carr v. Minneapolis, St. P. & S. S. M. Ry. Co., 112 N. W. 972, 16 N. D. 217.

[82] Leonhardt v. Green, 96 A. 1096, 251 Pa. 579; Virginia Cedar Works v. Dalea, 64 S. E. 41, 109 Va. 333; Smith v. State, 101 P. 847, 17 Wyo. 481.

[83] **U. S.** (C. C. A. Ga.) Southern Ry. Co. v. Shaw, 86 F. 865, 31 C. C. A. 70; (C. C. Pa.) Keystone Bank v. Safety Banking & Trust Co., 179 F. 727.

Ala. Ricketts v. Birmingham St. Ry. Co., 85 Ala. 600, 5 So. 353; South & N. A. R. Co. v. Seale, 59 Ala. 608.

Conn. Bogudsky v. Backes, 76 A. 540, 83 Conn. 208.

D. C. Washington Herald Co. v. Berry, 41 App. D. C. 322.

Ga. Henley v. Toole, 92 S. E. 760, 20 Ga. App. 146; Browder-Manget Co. v. West End Bank, 85 S. E. 881, 143 Ga. 736; Macon, D. & S. R. Co. v. Holsey, 70 S. E. 354, 9 Ga. App. 100; Mallary Bros. & Co. v. Moon, 61 S. E. 401, 130 Ga. 591; Brown v. McBride, 58 S. E. 702, 129 Ga. 92.

Ill. Chicago & A. R. Co. v. Kelly, 75 Ill. App. 490; Hartford Deposit Co. v. Pederson, 67 Ill. App. 142, affirmed 48 N. E. 30, 168 Ill. 224; Swift & Co. v. Fue, 66 Ill. App. 651, affirmed 47 N. E. 761, 167 Ill. 443.

Ind. Molt v. Hoover, 81 N. E. 221.

Kan. Cooper v. Harvey, 94 P. 213, 77 Kan. 854; Smith v. Yost, 59 P. 379, 10 Kan. App. 580; Tays v. Carr, 37 Kan. 141, 14 P. 456.

Minn. Mobile Trust & Trading Co. v. Potter, 81 N. W. 392, 78 Minn. 487.

N. C. Linker v. Linker, 83 S. E. 736, 167 N. C. 651; Marshall v. Stine, 112 N. C. 697, 17 S. E. 495.

Wis. Du Cate v. Town of Brighton, 114 N. W. 103, 133 Wis. 628; Hardt v. Chicago, M. & St. P. Ry. Co., 110 N. W. 427, 130 Wis. 512.

[84] **Ala.** Winford v. State, 75 So. 819, 16 Ala. App. 143; Foote v. State, 75 So. 728, 16 Ala. App. 136; Fuller v. State, 97 Ala. 27, 12 So. 392; King v. State, 77 Ala. 94.

Fla. Irvin v. State, 19 Fla. 872.

Ga. Crawford v. State, 54 S. E. 695, 125 Ga. 793; Williams v. State, 54 S. E. 186, 125 Ga. 235; Levan v. State, 54 S. E. 173, 125 Ga. 278; Lewis v. State, 53 S. E. 816, 125 Ga. 48; Campbell v. State, 52 S. E. 914, 124 Ga. 432; Patterson v. State, 52 S. E. 534, 124 Ga. 408; Jenkins v. State, 51 S. E. 598, 123 Ga. 523; Id., 51 S. E. 386, 123 Ga. 523; Seale v. State, 49 S. E. 740, 121 Ga. 741, dismissed 26 S. Ct. 763, 201 U. S. 642, 50 L. Ed. 902; Brown v. State, 28 Ga. 199.

La. State v. Bogain, 12 La. Ann. 264.

N. C. State v. Wilkes, 87 S. E. 48, 170 N. C. 735; State v. Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613.

S. C. State v. Owens, 60 S. E. 305, 79 S. C. 125; State v. Davis, 27 S. E. 905, 50 S. C. 405, 62 Am. St. Rep. 837.

Tex. Garrison v. State, 114 S. W. 128, 54 Tex. Cr. R. 600; Hull v. State (Cr. App.) 80 S. W. 380; Hankins v. State (Cr. App.) 75 S. W. 787; Garner v. State (Cr. App.) 70 S. W. 213; Shaw v. State (Cr. App.) 33 S. W. 1083; Waechter v. State, 34 Tex. Cr. R. 297, 30 S. W. 444; Sparks v. State, 23 Tex. App. 447, 5 S. W. 135; Hobbs v. State, 7 Tex. App. 117.

of which the general idea is suggested orally, will not be considered.[85]

§ 486. Waiver of requirements of rule

Ordinarily, however, the trial court may waive the requirements of the above rule,[86] and it has been held that it may be error to refuse an oral request presented in response to the question of the judge as to whether he has overlooked anything, the view being taken that, if a written request is desired in such case, time should be given to counsel to put it in writing.[87]

E. Presentation of Requests to Court

§ 487. Necessary formalities connected with presenting requests to court

To make available on appeal the failure of the trial court to give a requested instruction, it must be called to its personal attention. It is not sufficient to merely place the signed request on the desk of the judge,[88] and a statement to the judge out of the courtroom will not be sufficient to put the court in error in not giving an instruction.[89] It has been held, however, that a rule of court providing that counsel shall read and submit to the court requests to charge is for the benefit of the court, and that, where the judge does not require counsel to read the requests submitted, his failure to do so will not preclude him from asking for a new trial because of the error of the judge in inadvertently failing to pass on the charges.[90]

§ 488. Argument of requests

While it is not necessary in some jurisdictions that counsel, in requesting an instruction, should state his reasons therefor,[91] the rule is otherwise in other jurisdictions.[92] On the other hand, a party has a right to be heard in a reasonable manner in support of his requests to charge, if he makes known to the court his wish to be thus heard,[93] and a party should be given the right to pre-

[85] Hacker v. Heiney, 87 N. W. 249, 111 Wis. 313.

[86] Willis v. Western Union Tel. Co., 48 S. E. 538, 69 S. C. 531, 104 Am. St. Rep. 828, 2 Ann. Cas. 52.

[87] Harnau v. Haight, 155 N. W. 563, 189 Mich. 600.

[88] Bailey v. Hartman (Tex. Civ. App.) 85 S. W. 829.

[89] McDermott v. Mahoney, 106 N. W. 925, affirmed on rehearing 115 N. W. 32, 139 Iowa, 292.

[90] Herskovitz v. Baird, 37 S. E. 922, 59 S. C. 307.

[91] Chicago, I. & L. Ry. Co. v. Martin, 63 N. E. 247, 28 Ind. App. 468.

[92] Wilson v. State, 189 S. W. 1071, 80 Tex. Cr. R. 266.

[93] Wildey v. Crane, 36 N. W. 734, 69 Mich. 17.

In Louisiana, however, it has been

sent arguments as to the propriety of granting requests presented by his adversary.[94]

Accordingly it is not improper for the court, when an instruction is asked by a party, to ask the counsel for the adverse party as to his view of the propriety of such instruction.[95] It is within the discretion of the court whether the jury shall be present when the requests are being discussed and considered,[96] and accordingly the court may require the jury to retire during the argument of requests for instructions;[97] constitutional and statutory provisions that the parties or their counsel may address the court and jury on the law and the facts of the case, and that in criminal cases a defendant shall have a speedy public trial by an impartial jury, being held not to exclude the exercise of such power.[98]

F. Passing on Requests and Disposition Thereof

§ 489. General considerations

It is the legal right of a party presenting written requests for instructions to have the court consider and rule upon them.[99] Accordingly it is bad practice for the court to read to the jury requested instructions and not determine until thereafter whether they should be given or not,[1] and a party is entitled to a distinct and responsive answer to his requests, if they are properly drawn and present questions fairly arising, which can be answered by a simple affirmance or refusal.[2]

However, language of the court in answer to a request may con-

held that the fact that counsel for accused was not permitted to read and discuss requests to charge, but was required to hand them up, in writing, to the judge, is no ground of reversal, for it does not infringe any right. State v. Hill, 28 La. Ann. 311.

[94] Kenny v. Inhabitants of Ipswich, 178 Mass. 368, 59 N. E. 1007.

[95] Sullivan v. McManus (Sup.) 45 N. Y. S. 1079, 19 App. Div. 167.

[96] Cooper v. Altoona Concrete Construction & Supply Co., 53 Pa. Super. Ct. 141.

[97] Casey v. State, 37 Ark. 67.

[98] State v. Coella, 3 Wash. St. 99, 28 P. 28.

[99] Keitt v. Spencer, 19 Fla. 748; Moseley v. Johnson, 56 S. E. 922, 144 N. C. 257, 274; Jones v. Seaboard Air Line Ry. Co., 45 S. E. 188, 67 S. C. 181.

[1] Revilla Fish Products Co. v. American-Hawaiian S. S. Co., 137 P. 387, 77 Wash. 49.

[2] **N. C.** George v. Smith, 51 N. C. 273.

Pa. Sommer v. Gilmore, 160 Pa. 129, 28 A. 654; Hoffman v. Clough, 124 Pa. 505, 17 A. 19, 23 Wkly. Notes Cas. 399; Kraft v. Smith, 117 Pa. 183, 11 A. 370; Swank v. Phillips, 113 Pa. 482, 6 A. 450; Hood v. Hood, 2 Grant Cas. 229; Hamilton v. Menor, 2 Serg. & R. 70; Smith v. Thompson, 2 Serg. & R. 49; Powers v. McFerran, 2 Serg. & R. 44; Perry v. Pittsburg Rys. Co., 55 Pa. Super. Ct. 289; Repp v. Reynolds, 53 Pa. Super. Ct. 567.

Action of court held not in compliance with rule. It is not a proper disposition of a long series of requested instructions to charge: "So far as the points are in accordance

stitute an affirmance or refusal of it, although not formally so,[3] and the court need not specifically affirm or refuse the points covered by the general charge.[4] The court is not required to read and specifically answer in the presence of the jury points presented for instructions, as it is held that such practice gives practically no assistance to the jury.[5]

The failure of the court to answer a request is equivalent to a refusal of it,[6] and instructions tendered by a party are regarded

with what we have said to you was the controlling question in the case, they are affirmed, and, so far as they are not in accordance with the opinion we expressed in the general charge, they are refused." People's Sav. Bank v. Denig, 131 Pa. 241, 18 A. 1083, 25 Wkly. Notes Cas. 293; Duncan v. Sherman, 121 Pa. 520, 15 A. 565. Where a party on the trial of a case presents certain hypothetical facts to the court which there is evidence to sustain, and requests the instruction of the court upon the effect of those facts if believed by the jury, it is error for the court to charge simply that the question is one of fact for the jury, and that its weight is entirely for them. Kraft v. Smith, 117 Pa. 183, 11 A. 370. Where, instead of giving instructions requested by defendant, the court told the jury that they might use them "so far as the same are practicable in arriving at a verdict," it was held that this action was erroneous, as leaving to the jury to decide whether they embodied correct proposition of law. Duthie v. Town of Washburn, 87 Wis. 231, 58 N. W. 380.

[3] Cremore v. Huber (Sup.) 45 N. Y. S. 947, 18 App. Div. 231; Cosgrove v. Cummings, 42 A. 881, 190 Pa. 525; Hutchison v. Town of Summerville, 45 S. E. 8, 66 S. C. 442.

Language of court held to constitute affirmance of request. Where plaintiff, at the close of the main charge, requested an instruction, and the court replied, "Yes; I will not touch that any more than I have," the language of the court should be construed as in effect giving the instruction, and not as a refusal so to do. Buckley v. Westchester Lighting Co., 76 N. E. 1090, 183 N. Y. 506, affirming judgment 87 N. Y. S. 763, 93 App. Div. 436.

Matters not constituting absolute refusal of request. A statement by the trial judge that he would not read to the jury defendant's requests, but would pass on them in his general charge, and cover all requests which were correct, was not an absolute refusal to charge a request. Martin v. Columbia Electric St. Ry., Light & Power Co., 66 S. E. 993, 84 S. C. 568.

Matters amounting to refusal of request. An instruction marked given which was not actually read to the jury, and which was not given to them upon the submission of the cause, is to be considered as refused. Craw v. Chicago City Ry. Co., 159 Ill. App. 100.

[4] Baltimore & O. R. Co. v. Friel (C. C. A. Pa.) 77 F. 126, 23 C. C. A. 77.

[5] Zacheyfia v. John Lang Paper Co. (C. C. Pa.) 170 F. 617.

[6] Emerson v. Hogg (C. C. N. Y.) Fed. Cas. No. 4,440, 2 Blatchf. 1, 1 Fish. Pat. Rep. 77; Bartle v. Saunders, 2 Grant Cas. (Pa.) 199; Arbuckle v. Thompson, 37 Pa. (1 Wright) 170.

Effect of postponing consideration of requests. The act of a presiding judge in deferring the consideration of requests for rulings presented during the closing argument of counsel, without their having been shown to the opposing counsel, until after the charge to the jury, is not a refusal to give the instructions requested, and is no ground for exception, where no exception is taken to the charge as given, and where it does not appear that the rulings were not given in substance as requested.

as having been refused where they are given as modified by the court; the modified instructions being considered as given by the court on its own motion.[7]

It is cause for reversal to read an instruction to the jury as one requested by one of the parties in language substantially different from that requested, although the instruction as so modified may correctly state the law.[8]

A party requesting a number of instructions on the same issue or principle of law, one of which is given, cannot complain of the refusal of the others,[9] or that the one most favorable to him or the most important is not given.[10]

Requested charges, containing correct propositions of law and applicable to the pleadings and the evidence, should be given, if the subject-matter of such charges is not covered by any other instruction.[11] The court may reconsider a determination to give a request, on subsequently becoming satisfied that it is erroneous.[12]

Bonino v. Caledonio, 144 Mass. 299, 11 N. E. 98.

[7] Baxter v. Baxter, 92 N. E. 881, 1039, 46 Ind. App. 514; Wea Tp., Tippecanoe County, v. Cloyd, 91 N. E. 959, 46 Ind. App. 49; Exchange Bank v. Cooper, 40 Mo. 169; Meyer v. Pacific R. R., Id. 151. Compare Flower v. Beveridge, 161 Ill. 53, 43 N. E. 722, affirming 58 Ill. App. 431; Chandler v. Prince, 109 N. E. 374, 221 Mass. 495.

[8] Rood v. Dutcher, 120 N. W. 772, 23 S. D. 70, 20 Ann. Cas. 480.

[9] **Ill.** A. H. Nilson Machine Co. v. Kurtz Action Co., 186 Ill. App. 424.

Tex. St. Louis Southwestern Ry. Co. of Texas v. Aston (Civ. App.) 179 S. W. 1128; Fidelity Phenix Fire Ins. Co. v. Sadau (Civ. App.) 178 S. W. 559; Kansas City, M. & O. Ry. Co. of Texas v. Beckham (Civ. App.) 152 S. W. 228; Chicago, R. I. & G. Ry. Co. v. Green (Civ. App.) 135 S. W. 1031; Alamo Dressed Beef Co. v. Yeargan, 123 S. W. 721, 58 Tex. Civ. App. 92; International & G. N. R. Co. v. Ford (Civ. App.) 118 S. W. 1137; Lyon v. Bedgood, 117 S. W. 897, 54 Tex. Civ. App. 19; Missouri, K. & T. Ry. Co. of Texas v. Morgan, 108 S. W. 724, 49 Tex. Civ. App. 212; St. Louis Southwestern Ry. Co. of Texas v. Haney (Civ. App.) 94 S. W. 386.

[10] **Ill.** Clifford v. Pioneer Fireproofing Co., 83 N. E. 448, 232 Ill. 150; East St. Louis & S. Ry. Co. v. Zink, 82 N. E. 283, 229 Ill. 180; City of Evanston v. Richards, 79 N. E. 673, 224 Ill. 444; National Enameling & Stamping Co. v. McCorkle, 76 N. E. 843, 219 Ill. 557; Indiana, I. & I. R. Co. v. Otstot, 72 N. E. 387, 212 Ill. 429, affirming judgment 113 Ill. App. 37; City of Salem v. Webster, 95 Ill. App. 120, judgment affirmed 61 N. E. 323, 192 Ill. 369.

Tex. Van Zandt-Moore Iron Works v. Axtell, 126 S. W. 930, 58 Tex. Civ. App. 353; Waggoner v. Sneed, 118 S. W. 547, 53 Tex. Civ. App. 278.

[11] **N. Y.** Santiago v. John E. Walsh Stevedore Co., 137 N. Y. S. 611, 152 App. Div. 697.

Okl. Dunlap & Taylor v. Flowers, 96 P. 643, 21 Okl. 600.

Tex. St. Louis Southwestern Ry. Co. of Texas v. Neef (Civ. App.) 138 S. W. 1168; Bishop v. Riddle, 113 S. W. 151, 51 Tex. Civ. App. 317; Love v. Perry (Civ. App.) 111 S. W. 203.

[12] Louisville, N. A. & C. Ry. Co. v. Hubbard, 116 Ind. 193, 18 N. E. 611.

§ 490. Time of passing on requests

A party has no absolute right to have the instructions requested by him reserved until after those proposed by his adversary have been passed upon.[13] It will be error to grant a request of one party during the argument of counsel for the other side, if thereby counsel is deprived of the opportunity to refer to the same,[14] and in one jurisdiction, under statutory provisions, a party has the absolute right to have such correct written instructions as may be requested given to the jury before the argument.[15] In another jurisdiction the court may, before giving its general charge, read to the jury and pass on requested instructions.[16]

§ 491. Manner of giving requested instructions

The rule is in some jurisdictions that the court should, on giving requested instructions, read them to the jury before they retire,[17] and that if it is clearly shown that instructions asked on behalf of a party were handed to the jury without reading, thus placing them under a cloud, a verdict against such party will be set aside.[18] It is not a sufficient compliance with the above rule that instructions asked by counsel are read by him under direction of the court,[19] although a new trial will not be granted merely because counsel is allowed to read his requests to charge to the jury, where the writing is somewhat illegible and it is apparent that no harm has resulted.[20]

[13] Shaw v. Township of Saline, 71 N. W. 642, 113 Mich. 342.

[14] King v. State, 83 So. 164, 121 Miss. 230.

[15] Village of Monroeville v. Root, 54 Ohio St. 523, 44 N. E. 237; Lutterbeck v. Toledo Consol. St. Ry. Co., 5 O. C. D. 141.

Waiver of failure to give request before argument. Where certain requests to charge are submitted to the court prior to the argument, with the request that the same be made part of the charge of the court, but no request is made that they be given to the jury before the argument of counsel, the fact that the court did pass upon them, and give most of them in his final charge to the jury, and not before argument of counsel is not error. City of Toledo v. Higgins, 12 Ohio Cir. Ct. R. 646, 7 O. C. D. 29.

[16] Walton v. Hinnau, 146 Pa. 396, 23 A. 342.

[17] Alabama G. S. R. Co. v. Arnold, 80 Ala. 600, 2 So. 337; Leaptrot v. Robertson, 44 Ga. 46.

Reading not required unless requested. Requested instructions are sufficiently given, where they are indorsed "Given" and handed to the jury, with a statement that they are given at the request of defendant, if defendant does not request that they be read to the jury. Boyd v. State, 45 So. 634, 154 Ala. 9.

[18] Veneman v. McCurtain, 33 Neb. 643, 50 N. W. 955; McDuffie v. Bentley, 27 Neb. 380, 43 N. W. 123.

[19] O'Dell v. Goff, 117 N. W. 59, 153 Mich. 643; State v. Missio, 58 S. W. 216, 105 Tenn. 218.

[20] Gow v. Charlotte, C. & A. R. Co., 68 Ga. 54.

Failure to repeat requests read by counsel. A new trial will not be granted because the presiding judge did not repeat formally to the jury requests to charge read by counsel,

The court should not only read requests given to the jury, but should distinctly inform them that such requests are correct propositions of law, to be considered along with the other instructions given in the case.[21] However, while a party is entitled to an affirmance of a request which clearly and adequately expresses a relevant legal principle, no set formula is required to indicate that such request has been granted.[22] The remark of the court, on being requested to give an instruction, that he has already so charged, is equivalent to a charge as requested,[23] and it is not necessary for the trial judge to affirm requests to charge separately, but he may read them through and affirm them altogether.[24] Where the court grants an oral request by the defendant in a criminal case, he can-

and approved by the court as read; no request having been made at the time. East Tennessee, V. & G. R. Co. v. Fain, 80 Tenn. (12 Lea) 35.

[21] **Ga.** Blandon v. State, 65 S. E. 842, 6 Ga. App. 782; Georgia Railroad & Banking Co. v. Flowers, 33 S. E. 874, 108 Ga. 795; Colquitt v. Thomas, 8 Ga. 258.

N. J. Olsofrom v. North Jersey St. Ry. Co. (Sup.) 79 A. 1039, 81 N. J. Law, 321; Roe v. State, 45 N. J. Law (16 Vroom) 49.

Tex. Burnett v. State, 79 S. W. 550, 46 Tex. Cr. R. 116.

Action by court held not obnoxious to rule. Where the court was requested to give the jury a certain written instruction, and the court read slowly the requested instruction to the jury, and said, "I give you that in charge, as the law of the case," it is a proper manner of charging. Feagan v. Cureton, 19 Ga. 404. Where the court, before giving a requested charge, said, "Counsel have handed me some requests as stating propositions of law by which you should be guided in determining your verdict," a contention that the court failed to say that the charge was correct, whereupon the jury failed to understand that the requests read were given, is not well taken. Noble v. Bessemer S. S. Co., 86 N. W. 520, 127 Mich. 103, 54 L. R. A. 456, 89 Am. St. Rep. 461.

Harmless error. Where several requests to charge were handed to the judge, and by him read to the jury, without expressly giving the same in charge, the omission to distinctly inform the jury that such requests were correct propositions of law, to be considered along with the other instructions given in the case, was not reversible error where all the requests save one were covered by the general charge, and, after reading the general charge, the judge used with reference thereto language plainly indicating his intention to give it in charge with a qualification which was itself proper. Georgia Railroad & Banking Co. v. Flowers, 33 S. E. 874, 108 Ga. 795.

[22] **Ark.** Hale & Scott v. St. Louis & S. F. R. Co., 193 S. W. 790, 128 Ark. 203.

N. Y. People v. Mongano, 1 N. Y. Cr. R. 411.

Pa. Borough of West Bellevue v. Huddleson, 16 A. 764, 23 Wkly. Notes Cas. 240; Brenneman v. P. H. Glatfelter Co., 61 Pa. Super. Ct. 64; Succop v. Baltimore & O. R. Co., 58 Pa. Super. Ct. 246.

S. C. Autrey v. Bell, 103 S. E. 749, 114 S. C. 370; State v. Stewart, 26 S. C. 125, 1 S. E. 468.

[23] Schechwitz v. New York City Ry. Co. (Sup.) 103 N. Y. S. 781; State v. Shapiro, 69 A. 340, 29 R. I. 133; Caldwell v. Duncan, 69 S. E. 660, 87 S. C. 331.

[24] Commonwealth v. Cleary, 135 Pa. 64, 19 A. 1017, 26 Wkly. Notes Cas. 137, 8 L. R. A. 301.

not complain of the particular language used by the court in complying with the request.[25]

It is not improper for the court, in giving a requested instruction, to state that it is probably abstract,[26] or that it is given because no objection has been made to it,[27] or to suggest that the plaintiff may so amend his complaint, if he wishes, as to obviate the effect of a charge given at the request of the defendant;[28] but it is improper, after giving an instruction in the very terms of the request for it, to weaken its force by sarcastic comment, so as to leave the jury in doubt whether the instruction has been given or refused.[29]

So it is error for the court to hand to the jury the requests submitted by counsel, with an admonition to follow them so far as they conform to other parts of the charge, the duty of discriminating as to such conformity being thus imposed on the jury,[30] and it is equally improper, on giving a requested instruction, to tell the jury that they will "please be governed thereby," as this is calculated to influence the jury.[31] The court is not required to furnish the jury with reasons for instructions given.[32]

Informing the jury that certain instructions are given at the request of a particular party,[33] or the failure to make such a state-

[25] Autrey v. State, 100 S. E. 782, 24 Ga. App. 414.

[26] Morrow v. Parkman, 14 Ala. 769.

[27] State v. Musick, 101 Mo. 260, 14 S. W. 212.

[28] Crimm's Adm'rs v. Crawford, 29 Ala. 623.

[29] Horton v. Williams, 21 Minn. 187.

Remark that court did not see applicability of request. Where, on an indictment for murder in the first degree, accused requested the court to charge as to different grades of manslaughter, to which the court replied that it thought that it would be better to so charge rather than to deny the request, although it did not see the applicability of it, it was held that, if the evidence entitled the accused to have the question as to manslaughter submitted to the jury, the court's charge was erroneous, as the jury probably would not have considered the case in connection with the crime of manslaughter after such remark by the court. People v. Rego, 36 Hun, 129.

[30] Lang v. State, 84 Tenn. (16 Lea) 433, 1 S. W. 318.

[31] Bradford v. State, 25 Tex. App. 723, 9 S. W. 46.

[32] King Solomon Tunnel Co. v. Mining Co., 127 P. 129, 22 Colo. App. 528; Charlotte Harbor & N. Ry. Co. v. Truette (Fla.) 87 So. 427; Hansen v. Hough, 158 N. W. 501, 177 Iowa, 93.

[33] **U. S.** (C. C. A. Neb.) Colorado Yule Marble Co. v. Collins, 230 F. 78, 144 C. C. A. 376.

Cal. Wilmarth v. Pacific Mut. Life Ins. Co. of California, 143 P. 780, 168 Cal. 536, Ann. Cas. 1915B, 1120; People v. Wilder, 66 P. 228, 134 Cal. 182.

Ga. Dotson v. State, 71 S. E. 164, 136 Ga. 243.

Ill. Illinois Cent. R. Co. v. Larson, 152 Ill. 326, 38 N. E. 784.

Iowa. Scott v. Chicago, M. & St. P. Ry. Co., 68 Iowa, 360, 24 N. W. 584.

Neb. Clawson v. State, 148 N. W. 524, 96 Neb. 499.

Tex. Lott v. State, 146 S. W. 544, 66 Tex. Cr. R. 152; St. Louis South-

ment,[34] will not ordinarily constitute reversible error, although the practice of making such a statement is not commended,[35] and if by such an announcement anything may be added to or detracted from the force of the requested instruction, it should not be made.[36] The better practice is to give all proper requests as emanating from the court itself.[37]

It is not improper to instruct that special charges given at the request of a party are entitled to equal weight with the main charge.[38] The order in which instructions are given is usually not material.[39] Granted requests, however, should, if possible, be incorporated in the charge in connection with the subject of which they form a part; if this cannot be done, the orderly place for them is after the court has completed the body of the charge and not at its beginning.[40] In a criminal case, the court need not give instructions requested by the defendant in a single group, but may mingle them with the other instructions given, as a logical and orderly arrangement of the instructions as a whole may require.[41]

An erroneous refusal of a requested instruction may be cured by subsequently recalling the jury and giving the instruction.[42]

§ 492. Comments and explanations by court on refusing requests

On refusing requests for instructions, the court is not required to read them to the jury, together with his ruling.[43] If the trial judge reads only such points as he affirms, and files those which

western Ry. Co. of Texas v. Cleland, 110 S. W. 122, 50 Tex. Civ. App. 499.

Wash. State v. Poyner, 107 P. 181, 57 Wash. 489.

Wis. Meyer v. Milwaukee Electric Ry. & Light Co., 93 N. W. 6, 116 Wis. 336.

[34] Gutzman v. Clancy, 90 N. W. 1081, 114 Wis. 589, 58 L. R. A. 744.

[35] Meyer v. Milwaukee Electric, etc. R. Co., 93 N. W. 6, 116 Wis. 336.

[36] Dodd v. Moore, 91 Ind. 522.

[37] People v. Bundy, 145 P. 537, 168 Cal. 777; State v. Marren, 107 P. 993, 17 Idaho, 766; Aneals v. People, 134 Ill. 401, 25 N. E. 1022; Stevenson v. Chicago & N. W. Ry. Co., 94 Iowa, 719, 61 N. W. 964; Jones v. State, 127 N. W. 158, 87 Neb. 390.

[38] Goodley v. Northern Texas Traction Co. (Tex. Civ. App.) 144 S. W. 359.

[39] People v. Holt, 136 P. 501, 22 Cal. App. 697; Colombo v. People, 55 N. E. 519, 182 Ill. 411.

[40] Gannon v. Sisk, 112 A. 697, 95 Conn. 639.

[41] Young v. People, 61 N. E. 1104, 193 Ill. 236; Crowell v. People, 60 N. E. 872, 190 Ill. 508; Harrington v. People, 90 Ill. App. 456.

[42] Shepperd v. State, 94 Ala. 102, 10 So. 663; Booker v. State, 76 Ala. 22; People v. Turley, 30 Cal. 469; Rockmore v. State, 93 Ga. 123, 19 S. E. 32.

[43] **Fla.** Sherman v. State, 17 Fla. 888.

Pa. Clay v. Western Maryland R. Co., 70 A. 807, 221 Pa. 439; Woeckner v. Erie Electric Motor Co., 41 A. 28, 187 Pa. 206, 43 Wkly. Notes Cas. 50; Muthersbaugh v. McCabe, 22 Pa. Super. Ct. 587; Commonwealth v. Clark, 3 Pa. Super. Ct. 141.

S. C. Long v. Southern Ry. Co., 27 S. E. 531, 50 S. C. 49.

Tenn. Foutch v. State, 45 S. W. 678, 100 Tenn. 334.

he refuses, with his rulings and exceptions which may be taken, nothing more can be required of him,[44] and it is considered improper to read requests which have been refused in some jurisdictions.[45]

Remarks made by the court, on refusing an instruction, calculated to mislead the jury, are ground for reversal;[46] but, where the legal proposition in controversy is fully elucidated by the court in its general charge, remarks made by it on refusing a requested instruction will not work a reversal, in the absence of a clear showing of prejudicial error.[47] Thus an impropriety in instructing the jury on the court's own motion as to its reasons for refusing certain instructions will not be ground for reversal, if no prejudice could have resulted therefrom,[48] and the giving of an erroneous reason for the refusal of an instruction which ought not to be given is no cause for reversal.[49] A doubt expressed by the court on refusing an instruction with respect to a certain phase of it does not amount to an approval of it in other respects, which is prejudicial if the jury are fairly and fully instructed.[50]

If the court refuses to give a requested charge because it has already been given in another form, the court should so state, if the jury would otherwise be misled.[51] Such a statement is not necessary where the jury have no knowledge of refused instructions.[52]

The rule against the expression of an opinion by the court on issues of fact is not violated by a statement that it declines to give a requested instruction because there is no evidence in the

[44] Cooper v. Altoona C. C. & S. Co., 53 Pa. Super. Ct. 141.

[45] Ransone v. Christian, 56 Ga. 351.

[46] Biehler v. Coonce, 9 Mo. 347.

Illustrations of misleading remarks. Where counsel submit requests to charge which are correct both as to the facts and law, a ruling of the court that such request "has been sufficiently covered in the general charge, and is declined" is erroneous, as the statement that the point was declined has a tendency to mislead. McNess v. Sims, 80 A. 866, 231 Pa. 386.

Matters not constituting error within rule. Where the court made certain changes in an instruction, and wrote upon the margin the sentence, "Refused as ignoring the specific proof of specific orders to do the work in question, and for other reasons," and then ran his pen through all these words, leaving them plainly visible, and gave it to the jury, it was held not error, as giving special prominence to particular evidence. Cobb Chocolate Co. v. Knudson, 107 Ill. App. 668, judgment affirmed 69 N. E. 816, 207 Ill. 452.

[47] Lake Shore & M. S. R. Co. v. Erie County Sup'rs, 2 N. Y. St. Rep. 317.

[48] Pennsylvania Co. v. Frana, 112 Ill. 398.

[49] Budd v. Brooke, 3 Gill (Md.) 198, 43 Am. Dec. 321.

[50] Coombs v. Radford, 110 Mich. 192, 68 N. W. 128.

[51] People v. Williams, 17 Cal. 142; People v. Ramirez, 13 Cal. 172; People v. Hurley, 8 Cal. 390; State v. Ferguson, 9 Nev. 106.

[52] People v. Barthleman, 52 P. 112, 120 Cal. 7; People v. Douglass, 34 P. 490, 100 Cal. 1.

case to justify it.[53] Where a statement by the court of its reasons for refusing a requested instruction shows a misconception of the proposition embodied therein, counsel for the requesting party should explain it and point out the misconception.[54]

§ 493. Noting disposition of requests

There are statutory requirements in some jurisdictions that the court shall indicate by memorandum the numbers of requested instructions given and of those refused, and that such memorandum shall be signed by the judge.[55] In other jurisdictions the statute requires the trial judge to indorse on a requested instruction what disposition he has made of it, and to sign his name to such notation.[56]

[53] Pillsbury v. Sweet, 80 Me. 392, 14 A. 742.

[54] Garbaczewski v. Third Ave. R. Co., 5 App. Div. 186, 39 N. Y. S. 33.

[55] Inland Steel Co. v. Smith, 75 N. E. 852, 39 Ind. App. 636, judgment affirmed 80 N. E. 538, 168 Ind. 245.

[56] Wells v. Territory, 78 P. 124, 14 Okl. 436; Peart v. Chicago, M. & St. P. Ry. Co., 8 S. D. 431, 66 N. W. 814; Missouri, K. & T. Ry. Co. of Texas v. Hurdle (Tex. Civ. App.) 142 S. W. 992.

Sufficiency of compliance with statute. A refusal of instructions asked by writing at the bottom of the last of the pages on which they were written, "the foregoing are all refused—some because they are embraced within those given by the court; others because they are believed to not accurately state the law"—is sufficient. Territory v. Baker, 4 N. M. (Johns.) 117, 13 P. 30. If the words "Given" or "Refused" be indorsed upon the judge's charge, or annexed thereto, that will sufficiently show the disposition of the charge, and subject it to revision for error. Thompson v. Chumney, 8 Tex. 389. Where several requests for instructions were on the same piece of paper, and unseparated, it was a proper mode of refusing them for the judge to write the word "Refused" on the paper, and sign his name thereto. Pearce v. State, 22 So. 502, 115 Ala. 115. That an instruction is indorsed by the court "Given as modified" does not show that part of it was refused, so as to require the court, as provided by the statute in such case, to make an indorsement showing the part given and the part refused, as the modification may have consisted in something added by the court by way of correction or otherwise. People v. Owens, 56 P. 251, 123 Cal. 482. The indorsement by the court upon an instruction submitted that it "did not consider and pass upon said proposition, because it did not include and was not based on the leading facts upon which the case was tried," amounts to a refusal, and is a sufficient compliance with the practice act. Moore v. Sweeney, 28 Ill. App. 547. Where a party asks the court to give each of seven instructions written on six leaves of paper fastened together at the top, and the court writes on the margin of the first of said leaves: "Instructions one to seven all refused. Defendant excepts"—and signs the same, there is a substantial compliance with the statute, requiring the court to write on the margin of each instruction not given the word "Refused." Harvey v. Tama County, 53 Iowa, 228, 5 N. W. 130. An instruction, or a series of instructions, headed, "Instructions Given by the Court on Its Own Motion," and so placed in the record as to be clearly separate and distinguishable from the instructions presented by the parties, sufficiently complies with a statute providing that instructions must be marked "Given" or "Refused" on the

While such statutes are held to be mandatory in some jurisdictions,[57] in other jurisdictions they are held to be directory merely,[58] and ordinarily the mere failure of the trial judge to indorse "Given" or "Refused" on each instruction asked will not be cause for reversal, where the party complaining does not direct attention to the omission,[59] or where it can be ascertained which instructions were given and which refused,[60] or where such failure is not prejudicial to the losing party,[61] and it has been held that not marking instructions either "Given" or "Refused," when they are not given, has the same effect as marking them "Refused."[62]

Such a statutory provision does not apply to instructions given by the court on its own motion.[63] In some jurisdictions, where an instruction is refused because its substance has been given, that fact should be noted on the instruction.[64]

margin. Gillen v. Riley, 27 Neb. 158, 42 N. W. 1054.

Sufficiency of signature of judge. The statute does not require the judge to sign his name in full on charges marked by him "Given" or "Refused," or to add his title to his name in such cases. Kennedy v. Smith, 99 Ala. 83, 11 So. 665.

[57] Levy v. Burkstrom, 174 Ill. App. 276; Holcomb v. Norman, 87 N. E. 1057, 43 Ind. App. 506.

[58] Farrell v. Citizens' Light & Ry. Co., 114 N. W. 1063, 137 Iowa, 309; Van Buskirk v. Quincy, O. & K. C. R. Co., 111 S. W. 832, 131 Mo. App. 357.

[59] Barnewall v. Murrell, 108 Ala. 366, 18 So. 831.

[60] People v. Duzan, 112 N. E. 315, 272 Ill. 478; McDonald v. Fairbanks, Morse & Co., 161 Ill. 124, 43 N. E. 783; Tobin v. People, 101 Ill. 121; Cook v. Hunt, 24 Ill. 535; Chicago Union Traction Co. v. Olsen, 113 Ill. App. 303, judgment affirmed 71 N. E. 985, 211 Ill. 255; Harrigan v. Turner, 65 Ill. App. 469; Frame v. Murphy, 56 Ill. App. 555; St. Louis, A. & T. H. R. Co. v. Hawkins, 39 Ill. App. 406; Clapp v. Martin, 33 Ill. App. 438. See Washington v. State, 106 Ala. 58, 17 So. 546.

Effect of error in marking instruction. Where, in a closely-contested case, an instruction which correctly states the law upon an important branch of the case is read to the jury, marked "Refused," and given to the jury with other instructions marked "Given," and no other instruction covering the same point is given, a reversal of the judgment is justified. Terre Haute & I. R. Co. v. Hybarger, 67 Ill. App. 480.

[61] **Ill.** Daxanbeklar v. People, 93 Ill. App. 553; World's Columbian Exposition v. Bell, 76 Ill. App. 591.

Iowa. Turley v. Griffin, 76 N. W. 660, 106 Iowa, 161.

Neb. Clasen v. Pruhs, 95 N. W. 640, 69 Neb. 278, 5 Ann. Cas. 112; Home Fire Ins. Co. v. Decker, 75 N. W. 841, 55 Neb. 346; Eickhoff v. Eikenbary, 72 N. W. 308, 52 Neb. 332.

[62] Leman v. United States Fidelity & Guaranty Co. of Maryland, 137 Ill. App. 258; Chicago, W. & V. Coal Co. v. People, 114 Ill. App. 75, judgment affirmed 73 N. E. 770, 214 Ill. 421.

[63] Territory v. Cordova, 68 P. 919, 11 N. M. 367.

[64] State v. Ferguson, 9 Nev. 106.

In California, since the jury can take into their room only instructions given and have no knowledge of instructions which have been refused, the court need not state to the jury that it refuses to give certain instructions asked because they have been given in other instructions. People v. Barthleman, 52 P. 112, 120 Cal. 7.

§ 494. Inconsistent requests

A party cannot complain of the refusal of a requested instruction which is inconsistent with one given at his own instance.[65] At least he cannot so complain without first asking for the withdrawal of the prior inconsistent instruction.[66] Inconsistencies between instructions given at the request of the respective parties, arising from the fact that the instructions given at the instance of one

[65] **Ala.** Western Union Telegraph Co. v. Griffith, 50 So. 91, 161 Ala. 241.

Colo. Healey v. Rupp, 63 P. 319, 28 Colo. 102.

Ill. Chicago City Ry. Co. v. Taylor, 48 N. E. 831, 170 Ill. 49, affirming judgment 68 Ill. App. 613; United States Rolling Stock Co. v. Wilder, 116 Ill. 100, 5 N. E. 92; Fitzsimmons-Kreider Milling Co. v. Millers' Mut. Fire Ins. Ass'n of Illinois, 161 Ill. App. 542.

Ky. Louisville & N. R. Co. v. Hunter, 10 Ky. Law Rep. (abstract) 871.

Md. Ætna Indemnity Co. of Hartford, Conn., v. George A. Fuller Co., 73 A. 738, 111 Md. 321, reargument denied 74 A. 369, 111 Md. 321; B. F. Sturtevant Co. v. Cumberland Dugan & Co., 68 A. 351, 106 Md. 587, 14 Ann. Cas. 675; Cumberland Coal & Iron Co. v. Tilghman, 13 Md. 74.

Mass. Percival v. Chase, 65 N. E. 800, 182 Mass. 371.

Mo. St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company, 61 S. W. 300, 160 Mo. 396; Tetherow v. St. Joseph & D. M. R. Co., 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617.

Neb. Missouri Pac. R. Co. v. Fox, 83 N. W. 744, 60 Neb. 531.

N. Y. Ramsey v. National Contracting Co., 63 N. Y. S. 286, 49 App. Div. 11.

Pa. Griesemer v. Suburban Electric Co., 73 A. 340, 224 Pa. 328.

Tex. Missouri, K. & T. Ry. Co. of Texas v. Reno (Civ. App.) 146 S. W. 207; Texas & P. Ry. Co. v. Hassell, 58 S. W. 54, 23 Tex. Civ. App. 681; Scott v. Texas & P. Ry. Co., 57 S. W. 801, 93 Tex. 625, reversing judgment (Civ. App.) 56 S. W. 97.

Vt. Briggs v. Town of Georgia, 12 Vt. 60.

Va. City of Richmond v. Pemberton, 61 S. E. 787, 108 Va. 220.

W. Va. Baltimore & O. R. Co. v. Lafferty, 2 W. Va. 104; Lazzell v. Napel, 1 W. Va. 43.

Requests held not inconsistent within rule. The insertion in an instruction requested by plaintiff of a requirement that the jury must find that the west side of a street intersection was the regular stopping place for street cars traveling in the direction plaintiff was going at the time she was injured in attempting to alight did not preclude her from having the case submitted to the jury in another instruction, to the effect that, if the car was halted in obedience to her signal to permit her to alight, and was started carelessly while she was doing so, she was entitled to recover, regardless of the question whether the car had stopped at its usual stopping place. Groshong v. United Rys. Co. of St. Louis, 121 S. W. 1084, 142 Mo. App. 718. A requested charge by defendant, in slander, that, unless he spoke the words charged in the petition or enough of them to constitute the charge of misconduct, the verdict should be for him, given as the counterpart of a charge given for plaintiff, is not inconsistent with the position taken by defendant by demurring to the evidence on the ground of insufficiency to support the petition. Kunz v. Hartwig, 131 S. W. 721, 151 Mo. App. 94. In action for injury to a person struck by a train at a grade crossing, plaintiff, by submitting the issue of the humanitarian doctrine, did not preclude himself from submitting his theories of recovery based on negligence. De Rousse v. West, 200 S. W. 783, 198 Mo. App. 293.

[66] Gregory v. Chicago, R. I. & P. R. Co., 124 N. W. 797, 147 Iowa, 715, Ann. Cas. 1912B, 723.

of the parties are too favorable to him, cannot be complained of by him.[67]

G. Power and Duty of Court with Respect to the Modification of, or the Substitution of Other Instructions for, Correct Requests

§ 495. Rule that court may, on granting a correct request, vary its phraseology

The general rule is, both in civil[68] and in criminal cases,[69] that instructions need not be given in the exact language in which

[67] McNamara v. Macdonough, 102 Cal. 575, 36 P. 941.

[68] **U. S.** Continental Imp. Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403; Law v. Cross, 1 Black, 533, 17 L. Ed. 185; Clymer v. Dawkins, 44 U. S. (3 How.) 674, 11 L. Ed. 778; (C. C. A. Cal.) Mountain Copper Co. v. Van Buren, 133 F. 1, 66 C. C. A. 151; (C. C. Me.) Pitts v. Whitman, Fed. Cas. No. 11,196, 2 Story, 609; (C. C. A. Vt.) Boston & M. R. Co. v. McDuffey, 79 F. 934, 25 C. C. A. 247; (C. C. A. Va.) Mathieson Alkali Works v. Mathieson, 150 F. 241, 80 C. C. A. 129; (C. C. A. W. Va.) Southern Bell Telephone & Telegraph Co. v. Watts, 66 F. 460, 13 C. C. A. 579.

Ala. Long v. Rodgers, 19 Ala. 321.

Cal. People v. Cox, 155 P. 1010, 29 Cal. App. 419; Jamson v. Quivey, 5 Cal. 490; Conrad v. Lindley, 2 Cal. 173.

Conn. Radwick v. Goldstein, 98 A. 583, 90 Conn. 701; Koskoff v. Goldman, 85 A. 588, 86 Conn. 415; Dunham v. Cox, 70 A. 1033, 81 Conn. 268; Tiesler v. Town of Norwich, 47 A. 161, 73 Conn. 199; Appeal of Livingston, 63 Conn. 68, 26 A. 470.

Dak. Parliaman v. Young, 2 Dak. 175, 4 N. W. 139, 711.

Ga. Holbert v. Allred, 102 S. E. 192, 24 Ga. App. 727; Atkinson v. F. S. Dismuke & Bro., 75 S. E. 835, 11 Ga. App. 521; Southern Ry. Co. v. Reynolds, 55 S. E. 1039, 126 Ga. 657; Southern Cotton Oil Co. v. Skipper, 54 S. E. 110, 125 Ga. 368; Western & A. R. Co. v. Clements, 60 Ga. 319; Hammack v. State, 52 Ga. 397; Long v. State, 12 Ga. 293.

Ill. Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850; Chicago & N. W. Ry. Co. v. Goebel, 119 Ill. 515, 10 N. E. 369; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Needham v. People, 98 Ill. 275; Hays v. Borders, 1 Gilman, 46; Born v. Schrieber, 199 Ill. App. 101.

Iowa. State v. Gibbons, 10 Iowa, 117.

Kan. Rouse v. Downs, 47 P. 982, 5 Kan. App. 549; Reed v. Golden, 28 Kan. 632, 42 Am. Rep. 180; Deitz v. Regnier, 27 Kan. 94; City of Topeka v. Tuttle, 5 Kan. 311.

Ky. Slusher v. Hopkins, 89 S. W. 244, 28 Ky. Law Rep. 347.

Me. Godfrey v. Haynes, 74 Me. 96; Foye v. Southard, 64 Me. 389; Treat v. Lord, 42 Me. 552, 66 Am. Dec. 298; Anderson v. City of Bath, 42 Me. 346.

Md. Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Hall v. Hall, 6 Gill & J. 386.

Mass. Heuser v. Tileston & Hollingsworth Co., 119 N. E. 683, 230 Mass. 299; Holbrook v. Seagrave, 116 N. E. 889, 228 Mass. 26; Tripp v. Taft, 106 N. E. 578, 219 Mass. 81; O'Leary v. Boston Elevated Ry. Co., 95 N. E. 85, 209 Mass. 62; Stubbs v. Boston & N. St. Ry. Co., 79 N. E. 795, 193 Mass. 513; Percival v. Chase, 65 N. E. 800, 182 Mass. 371; Davenport v. Johnson, 65 N. E. 392, 182 Mass. 269; P. P. Emery Mfg. Co. v. Rood, 65 N. E. 58, 182 Mass. 166; Boston Dairy Co. v. Mulliken, 175 Mass. 447, 56 N. E. 711; Western v. Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; O'Neil

[69] See note 69 on page 884.

they are requested, although the requests are entirely proper, but

v. Hanscom, 175 Mass. 313, 56 N. E. 587; Black v. Buckingham, 174 Mass. 102, 54 N. E. 494; Sullivan v. Sheehan, 53 N. E. 902, 173 Mass. 361; Spaulding v. Jennings, 173 Mass. 65, 53 N. E. 204; Boylan v. Everett, 172 Mass. 453, 52 N. E. 541; Frost v. Courtis, 172 Mass. 401, 52 N. E. 515; Dorey v. Metropolitan Life Ins. Co., 172 Mass. 234, 51 N. E. 974; Ellis v. Simonds, 47 N. E. 116, 168 Mass. 316; Noble v. Fagnant, 162 Mass. 275, 38 N. E. 507; Commonwealth v. Farrell, 160 Mass. 525, 36 N. E. 475; Breen v. Field, 159 Mass. 582, 35 N. E. 95; Turner v. Patterson, 160 Mass. 20, 34 N. E. 1083; Norwood v. City of Somerville, 159 Mass. 105, 33 N. E. 1108; Commonwealth v. Moore, 157 Mass. 324, 31 N. E. 1070; O'Driscoll v. Faxon, 156 Mass. 527, 31 N. E. 685; Merrigan v. Boston & A. R. Co., 154 Mass. 189, 28 N. E. 149; Hudson v. Inhabitants of Marlborough, 154 Mass. 218, 28 N. E. 147; Weld v. Brooks, 152 Mass. 297, 25 N. E. 719; Parker v. City of Springfield, 147 Mass. 391, 18 N. E. 70; Inhabitants of Deerfield v. Connecticut River R. R., 144 Mass. 325, 11 N. E. 105.

Mich. Alton v. Meenwenberg, 66 N. W. 571, 108 Mich. 629; Lewis v. Rice, 27 N. W. 867, 61 Mich. 97.

Minn. Anderson v. Foley Bros., 124 N. W. 987, 110 Minn. 151; Smith v. St. Paul & D. R. Co., 51 Minn. 86, 52 N. W. 1068; Dodge v. Rogers, 9 Minn. 223 (Gil. 209).

Miss. George v. State, 39 Miss. 570.

Mo. Grimes v. Cole, 113 S. W. 685, 133 Mo. App. 522; Taylor v. Missouri Pac. Ry. Co., 16 S. W. 206; Stocke v. Mueller, 1 Mo. App. 163.

Neb. Meyer v. Shamp, 71 N. W. 57, 51 Neb. 424; Lau v. Grimes Dry Goods Co., 38 Neb. 215, 56 N. W. 954; Jameson v. Butler, 1 Neb. 115.

N. H. Kasjeta v. Nashua Mfg. Co., 58 A. 874, 73 N. H. 22; Elwell v. Roper, 58 A. 507, 72 N. H. 585; Bond v. Bean, 57 A. 340, 72 N. H. 444, 101 Am. St. Rep. 686; Wheeler v. Grand Trunk Ry. Co., 50 A. 103, 70 N. H. 607, 54 L. R. A. 955; Walker v. Walker, 64 N. H. 55, 5 A. 460; Clark v. Wood, 34 N. H. 447.

N. J. Miller v. Delaware River Transp. Co., 90 A. 288, 85 N. J. Law, 700, Ann. Cas. 1916C, 165; Pavan v. Worthen & Aldrich Co., 78 A. 658, 80 N. J. Law, 567.

N. Y. Sherman v. Wakeman, 11 Barb. 254; Williams v. Birch, 19 N. Y. Super. Ct. 299.

N. C. Hall v. Geissell & Richardson, 103 S. E. 392, 179 N. C. 657; Beck v. Sylva Tanning Co., 101 S. E. 498, 179 N. C. 123; Hooker v. Norfolk & S. R. Co., 72 S. E. 210, 156 N. C. 155; Harris v. Atlantic Coast Line R. Co., 43 S. E. 589, 132 N. C. 160; Bethea v. Raleigh & A. A. L. R. Co., 106 N. C. 279, 10 S. E. 1045; Carlton v. Wilmington & W. R. Co., 104 N. C. 365, 10 S. E. 516; Newby v. Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503; Patterson v. McIver, 90 N. C. 493; Overcash v. Kitchie, 89 N. C. 384; Burton v. March, 51 N. C. 409; Marshall v. Flinn, 49 N. C. 199; Town of Newbern Com'rs v. Dawson, 32 N. C. 436.

Ohio. Ashtabula Rapid Transit Co. v. Dagenbach, 11 O. C. D. 307.

Okl. Veseley v. Engelkemier, 61 P. 924, 10 Okl. 290.

Or. Booth-Kelly Lumber Co. v. Williams, 188 P. 213, 95 Or. 476; State v. Butler, 186 P. 55, 96 Or. 219; Stool v. Southern Pac. Co., 172 P. 101, 88 Or. 350.

Pa. Jones v. Greenfield, 25 Pa. Super. Ct. 315; Geiger v. Welsh, 1 Rawle, 349.

R. I. McGowan v. Court of Probate of City of Newport, 62 A. 571, 27 R. I. 394, 114 Am. St. Rep. 52.

S. C. State v. Simmons, 100 S. E. 149, 112 S. C. 451; State v. Jones, 88 S. E. 444, 104 S. C. 141; Hair v. Winnsboro Bank, 88 S. E. 26, 103 S. C. 343; Broom v. Atlantic Coast Line R. Co., 80 S. E. 616, 96 S. C. 368; Pooler v. Smith, 52 S. E. 967, 73 S. C. 102; Edwards v. Wessinger, 43 S. E. 518, 65 S. C. 161, 95 Am. St. Rep. 789.

Tex. Western Union Telegraph Co. v. Goodson (Civ. App.) 202 S. W. 766; Gulf, C. & S. F. Ry. Co. v. Davis, 80 S. W. 253, 35 Tex. Civ. App. 285.

Utah. Speight v. Rocky Mountain Bell Telephone Co., 107 P. 742, 36 Utah, 483; Hickey v. Rio Grande

Western Ry. Co., 82 P. 29, 29 Utah, 392.

Vt. Rice v. Bennington County Sav. Bank, 108 A. 708, 93 Vt. 493; Desmarchier v. Frost, 99 A. 782, 91 Vt. 138; Campbell v. Day, 16 Vt. 558.

Wash. Hall v. Northwest Lumber Co., 112 P. 369, 61 Wash. 351; Averbuch v. Great Northern Ry. Co., 104 P. 1103, 55 Wash. 633; Smith v. Michigan Lumber Co., 86 P. 652, 43 Wash. 402; Gottstein v. Seattle Lumber & Commercial Co., 7 Wash. 424, 35 P. 133; Seattle v. Buzby, 2 Wash. T. 25, 3 P. 180.

Wis. Jones v. Monson, 119 N. W. 179, 137 Wis. 478, 129 Am. St. Rep. 1082.

Consent to modification. It was not error to qualify defendant's requested instruction in giving it, where the defendant accepted it as qualified. Tucker v. State, 150 S. W. 190, 67 Tex. Cr. R. 510.

Illustrations of proper modifications. An instruction that the proof of certain disputed facts must be "affirmative and direct" is a sufficient compliance with the prayer that it should be "affirmative and distinct." Cornelius v. Brawley, 109 N. C. 542, 14 S. E. 78. It is proper to modify an instruction which states that, "while the law presumes all men to be sane, yet this presumption is overcome by evidence tending to prove insanity," so as to make it read, "yet this presumption may be overcome," etc. Jamison v. People, 145 Ill. 357, 34 N. E. 486. An instruction "that the plaintiff must prove his case by a preponderance or greater weight of evidence. Therefore, if the evidence in this case preponderates in favor of the defendant, or if the evidence fails to preponderate in favor of the plaintiff, or if you are unable to say on which side is the greater weight of the evidence, you should find the issues for the defendant"—is not materially changed by inserting "on plaintiff's case" after the word, "case." Frank v. Crane, 154 Ill. App. 643. In a prosecution for procuring an abortion, it was not error for the court to modify instructions given at defendant's request by including in the hypothesis on which he would not be guilty the fact that he did not aid or assist in the act. Cook v. People, 52 N. E. 273, 177 Ill. 146. A charge that the jury is not to decide the case by sympathy with the plaintiff or ill feeling against railroads, but according to the law charged and the evidence heard, is a sufficient answer to a request to charge that it would be not only illegal, but disgraceful, for the jury to be swayed by any outside influence. Hay v. Carolina Midland Ry. Co., 41 S. C. 542, 19 S. E. 976. Where requested instructions contain a proposition of law depending on questions of fact, regarding which there is a material dispute, the court may qualify his affirmance of the points requested by telling the jury that it must determine the disputed facts. Snyder v. Loy, 4 Pa. Super. Ct. 201, 40 Wkly. Notes Cas. 333. In an action for breach of a contract to feed sheep where plaintiff alleged defendant's delay in constructing corrals, the substitution of the word "reasonable" for the words "reasonably short" in a requested charge with reference to the time for such construction was not error. Rea v. Alfalfa Products Co., 161 P. 708, 53 Mont. 90. It was not error to modify a charge that if the jury believed that plaintiff purchased a ticket to a certain station, but remained on the train and did not get off there, and did not communicate his intention to get off at a place further on, to the conductor, and if the conductor did not know that plaintiff intended to leave the train when he did, they should find for defendant, by substituting "defendant's servants" for the word "conductor" where first used, and "such servant" for "conductor" where it later appeared; there being no substantial difference between the words; "servants" including "conductor." Cornell v. Chicago, R. I. & P. Ry. Co., 128 S. W. 1021, 143 Mo. App. 598. There is no ground of exception to instructions by the court, stating in general propositions the law of domicile as applicable to the facts of the case, though embraced in a different form from the instructions asked for; it not appearing that the judge made any improper reference to the evidence applicable to them, or that the jury failed to ap-

preciate them and apply them to the case. Wilson v. Terry, 11 Allen (Mass.) 206. Defendant having requested an instruction that if the jury believed certain facts relative to the arrest as testified to by the magistrate defendant could not be held responsible, it was not error to give the instruction, with the omission of the words "as testified to by the justice." Lovick v. Atlantic Coast Line R. Co., 40 S. E. 191, 129 N. C. 427. A request to charge, in effect, that defendant could not complain of a fraud, if at the time he executed the note he entertained a settled conviction that he had been defrauded, is satisfied by a charge that if defendant knew when he signed the note that he had been defrauded plaintiff could recover. Smith v. McDonald, 102 N. W. 738, 139 Mich. 225. Where plaintiff claimed that a conveyance of defendant's goods was in fraud of creditors, and requested a charge that, in determining whether the purchaser knew of the debtor's intention to defraud, facts coming to the notice of the purchaser, which would put a prudent man on inquiry which, if followed, would lead to the knowledge of the fraud, were evidence from which the jury might infer knowledge of such fraud, and the court modified instruction by striking out the words, "from which the jury may infer that the purchaser had knowledge of such fraud," and inserting, "which the jury may consider in determining whether the purchaser had knowledge of such fraud," the modification was not error, since the difference in meaning was so unsubstantial that the jury could not have been misled thereby. John Deere Plow Co. v. Sullivan, 59 S. W. 1005, 158 Mo. 440. Where a request to charge is simply that the jury determine whether or not a married woman knew that her husband was carrying on business as her agent, it is a compliance with the request for the court to go further, and charge that such carrying on of the business must be with her knowledge, consent, and approval. Reed v. Newcomb, 64 Vt. 49, 23 A. 589. The court's modification of a requested instruction, that an employé of full age and ordinary intelligence assumes the risk of dangers which are "open and plain to his sight," by adding the words "and understanding," does not change its meaning. Chicago, R. I. & P. Ry. Co. v. Kinnare, 60 N. E. 57, 190 Ill. 9, affirming judgment 91 Ill. App. 508. Upon an issue as to the negligence of a defendant railroad company in failing to properly inspect a car, a defect in which caused plaintiff's injury, it was not error for the court to modify a requested instruction, so as to confine the consideration of the jury to the inspection of the particular car in question. Illinois Cent. R. Co. v. Coughlin (C. C. A. Tenn.) 145 F. 37, 75 C. C. A. 262. An instruction that testimony as to other defects in the sidewalk near the place where plaintiff was injured was admitted for the purpose of showing notice to the city is a substantial compliance with a request to charge that the consideration of such testimony should be limited to the subject of notice. Moore v. City of Kalamazoo, 109 Mich. 176, 66 N. W. 1089. In an action against a municipal corporation for maintaining a dam, so as to cause plaintiff's land to be overflowed, defendant claimed that the right to flow the land had been dedicated to the public, and plaintiff requested an instruction that the fact that hunting, fishing, or boating were done over or near plaintiff's overflowed lands was alone not enough to show dedication, and the court gave the instruction, adding, "This means, of course, just what it says—that the fact of hunting or fishing upon plaintiff's land, in and of itself, is not enough to show that there had been any dedication." Boye v. City of Albert Lea, 100 N. W. 642, 93 Minn. 121. Submitting to the jury the question whether a society arranging a bicycle race was guilty of negligence in permitting a sulky into which one of the riders ran to be standing on the track was a sufficient compliance with a request to charge that the society was not under the duty to keep the whole track clear, but only so much as was necessary for the race. Benedict v. Union Agricultural Soc., 52 A. 110, 74 Vt. 91. A response to a request to charge that, if deceased's negligence contributed in the slightest degree to the

accident, plaintiff could not recover, wherein the court stated that, if deceased's negligence contributed at all, it would defeat the action, was not erroneous in emphasizing the word "contributed." Predmore v. Consumers' Light & Power Co., 91 N. Y. S. 118, 99 App. Div. 551. In replevin, where defendant claimed property had been abandoned, action of court in defining term "abandon," used in requested instruction given for defendant, was not an alteration of such instruction. St. Louis Dairy Co. v. Northwestern Bottle Co. (Mo. App.) 204 S. W. 281. In an action for milk sold and delivered, defendant requested the court to rule that if any credit was given to defendant's sons, to whom the milk was delivered, a promise by defendant to pay for it would be void unless in writing There was evidence that defendant had signed and delivered to plaintiff a writing, "Charge milk to me, and I will pay for it." The court instructed the jury that if they found the credit was given to the sons, and that defendant merely contracted to be responsible for the bill, that was not the contract sued on, and plaintiff could not recover; adding that the alleged writing was not a contract of guaranty. Boston Dairy Co. v. Mulliken, 56 N. E. 711, 175 Mass. 447. The modification of a charge requested by plaintiff in an action for trespass, one defense to which was adverse possession, by the insertion of the word "mere" before the word "cultivation" in the statement that the cultivation of the land would not be an adverse exclusive holding, made no change in the meaning. Southern Realty & Inv. Co. v. Keenan, 83 S. E. 39, 99 S. C. 200. Where the mother of certain witnesses was a defendant in an action of ejectment, it was not error for the court to call attention to such fact, as qualifying a charge, given by defendants' request, that such witnesses were not interested parties. Fitzpatrick v. Graham (C. C. A. N. Y.) 122 F. 401, 58 C. C. A. 619.

In Texas, there are early decisions holding that the practice of making alterations in requested instructions which are correct is improper. Trezevant v. Rains (Tex. Civ. App.) 25 S. W. 1092.

69 U. S. (C. C. A. N. Y.) Fraina v. United States, 255 F. 28, 166 C. C. A. 356; (C. C. A. N. D.) O'Hare v. United States, 253 F. 538, 165 C. C. A. 208, certiorari denied 39 S. Ct. 257, 249 U. S. 598, 63 L. Ed. 795.

Ark. Sheppard v. State, 179 S. W. 168, 120 Ark. 160.

Cal. People v. Lemperle, 94 Cal. 45, 29 P. 709; People v. Cadd, 60 Cal. 640; People v. Dodge, 30 Cal. 448.

Conn. State v. Castelli, 101 A. 476, 92 Conn. 58; State v. Lanyon, 76 A. 1095, 83 Conn. 449; State v. Rathbun, 51 A. 540, 74 Conn. 524.

Del. Colombo v. State, 78 A. 595, 2 Boyce, 28, affirming judgment State v. Colombo (O. & T.) 75 A. 616, 1 Boyce, 96.

Ga. Danzley v. State (App.) 102 S. E. 915; Mixon v. State, 68 S. E. 315, 7 Ga. App. 805; Whitley v. State, 66 Ga. 656; Long v. State, 12 Ga. 293.

Kan. State v. Bush, 79 P. 657, 70 Kan. 739; State v. Volmer, 6 Kan. 371; Rice v. State, 3 Kan. 141.

La. State v. Miller, 41 La. Ann. 677, 6 So. 546; State v. Wright, 41 La. Ann. 605, 6 So. 137; State v. Durr, 39 La. Ann. 751, 2 So. 546.

Me. State v. Reed, 62 Me. 129; State v. Barnes, 29 Me. 561.

Mass. Commonwealth v. Kronick, 82 N. E. 39, 196 Mass. 286; Commonwealth v. Tucker, 76 N. E. 127, 189 Mass. 457, 7 L. R. A. (N. S.) 1056; Commonwealth v. Johnson, 74 N. E. 939, 188 Mass. 382; Commonwealth v. Clancy, 72 N. E. 842, 187 Mass. 191: Commonwealth v. Chance, 54 N. E. 551, 174 Mass. 245, 75 Am. St. Rep. 306; Commonwealth v. Uhrig, 167 Mass. 420, 45 N. E. 1047; Commonwealth v. Mullen, 150 Mass. 394, 23 N. E. 51; Commonwealth v. Brown, 121 Mass. 69; Commonwealth v. Cobb, 120 Mass. 356; Commonwealth v. Costley, 118 Mass. 1.

Mich. People v. Sauerbier, 139 N. W. 260, 173 Mich. 521; People v. Quimby, 96 N. W. 1061, 134 Mich. 625; People v. Weaver, 66 N. W. 567, 108 Mich. 649; People v. Parsons, 105 Mich. 177, 63 N. W. 69; Ulrich v. People, 39 Mich. 245.

Miss. Matthews v. State, 66 So.

the court may choose its own form of expression,[70] it being sufficient if the substance of the requested instructions is given,[71] and

325, 108 Miss. 72; Scott v. State, 56 Miss. 287; Evans v. State, 44 Miss. 762; Boles v. State, 9 Smedes & M. 284.

Mont. State v. Wells, 83 P. 476, 33 Mont. 291.

Neb. Johnson v. State, 129 N. W. 281, 88 Neb. 328; Bradshaw v. State, 17 Neb. 147, 22 N. W. 361.

N. J. State v. Rombolo, 103 A. 203, 91 N. J. Law, 560; Gardner v. State, 55 N. J. Law, 17, 26 A. 30.

N. Y. People v. Katz, 103 N. E. 305, 209 N. Y. 311, Ann. Cas. 1915A, 501, affirming judgment 139 N. Y. S. 137, 154 App. Div. 44; People v. Williams, 92 Hun, 354, 36 N. Y. S. 511.

N. C. State v. Baldwin, 100 S. E. 345, 178 N. C. 693; State v. Fulcher, 97 S. E. 2, 176 N. C. 724; State v. Horner, 94 S. E. 291, 174 N. C. 788; State v. Price, 74 S. E. 587, 158 N. C. 641; State v. Bowman, 67 S. E. 1058, 152 N. C. 817; State v. Barrett, 65 S. E. 894, 151 N. C. 665; State v. Burnett, 55 S. E. 72, 142 N. C. 577; State v. Wilcox, 44 S. E. 625, 132 N. C. 1120; State v. Hicks, 41 S. E. 803, 130 N. C. 705; State v. Crews, 38 S. E. 293, 128 N. C. 581; State v. Mills, 116 N. C. 992, 21 S. E. 106; State v. Whitson, 111 N. C. 695, 16 S. E. 332; State v. Hargett, 65 N. C. 669; Hawkins v. House, 65 N. C. 614; State v. Massage, 65 N. C. 480; State v. Brantley, 63 N. C. 518.

Pa. Commonwealth v. Lewis, 71 A. 18, 222 Pa. 302; Commonwealth v. McManus, 143 Pa. 64, 21 A. 1018, 22 A. 761, 14 L. R. A. 89.

S. C. State v. Bethune, 67 S. E. 466, 86 S. C. 143; State v. Petsch, 43 S. C. 132, 20 S. E. 993.

S. D. State v. Kammel, 122 N. W. 420, 23 S. D. 465.

Tex. Shultz v. State, 13 Tex. 401.

Vt. State v. Eaton, 53 Vt. 574.

Wash. State v. Cherry Point Fish Co., 130 P. 499, 72 Wash. 420; State v. Anderson, 70 P. 104, 30 Wash. 14; State v. Baldwin, 15 Wash. 15, 45 P. 650.

W. Va. State v. Rice, 98 S. E. 432, 83 W. Va. 409.

Illustrations of proper modifications. Requested instruction in a homicide case that if the jury found upon the whole evidence that accused did not have mental capacity to enable him to judge the nature of his act, etc., "your verdict should be acquittal," was sufficiently covered by substituting for the quoted words, "then there could be no crime." State v. Saxon, 86 A. 590, 87 Conn. 5. Where the jury have been charged to give the accused the benefit of every reasonable doubt, and the court, in refusing to charge that, "should a reasonable doubt be entertained by one juror, the defendant cannot be found guilty," said, "I won't charge that in those words, but I charge you that as I have already charged you in my own language," the response must be taken to mean the same as the request; and, the charge given being equivalent to that requested, error cannot be predicated on the refusal. State v. Powers, 37 S. E. 690, 59 S. C. 200.

In Indiana, written special instructions in a criminal case may be modified in writing by the court. Kocher v. State, 127 N. E. 3.

[70] **Mo.** Harman v. Shotwell, 49 Mo. 423.

N. J. Gluckman v. Darling (Err. & App.) 95 A. 1078, 87 N. J. Law, 320, affirming judgment (Sup.) 89 A. 1016, 85 N. J. Law, 457.

Pa. Hufnagle v. Delaware & H. Co., 76 A. 205, 227 Pa. 476, 40 L. R. A. (N. S.) 982, 19 Ann. Cas. 850; Hanratty v. Dougherty, 71 Pa. Super. Ct. 248.

Wash. Lund v. Griffiths & Sprague Stevedoring Co., 183 P. 123, 108 Wash. 220.

[71] **U. S.** Sugarman v. United States, 39 S. Ct. 191, 249 U. S. 182, 63 L. Ed. 550, dismissing writ of error (D. C. Minn.) United States v. Sugarman, 245 F. 604; Cunningham v. Springer, 27 S. Ct. 301, 204 U. S. 647, 51 L. Ed. 662, 9 Ann. Cas. 897, affirming judgment 13 N. M. 259, 82 P. 232; (C. C. A. N. C.) United States

this is true although a request is patterned after express rulings of the court of last resort in another case;[72] and it is held that, since it is the duty of the court to simplify its charge to the jury,

Leather Co. v. Howell, 151 F. 444, 80 C. C. A. 674.

Cal. Colusa & H. R. Co. v. Leonard, 167 P. 878, 176 Cal. 109; Miller v. Fireman's Fund Ins. Co., of San Francisco, 92 P. 332, 6 Cal. App. 395; Jenson v. Will & Finck Co., 89 P. 113, 150 Cal. 398.

Conn. St. Paul's Episcopal Church v. Fields, 72 A. 145, 81 Conn. 670.

Ga. Atlantic Coast Line R. Co. v. Odum, 63 S. E. 1126, 5 Ga. App. 780.

Ill. Ramey v. Baltimore & O. S. W. R. Co., 85 N. E. 639, 235 Ill. 502, affirming judgment 140 Ill. App. 203; Koshinski v. Illinois Steel Co., 83 N. E. 149, 231 Ill. 198.

Mass. Rich v. Silverman, 103 N. E. 382, 216 Mass. 195; Poole v. Boston & M. R. R., 102 N. E. 918, 216 Mass. 12; Raymond v. Phipps, 102 N. E. 905, 215 Mass. 559; Delaney v. Berkshire St. Ry. Co., 102 N. E. 901, 215 Mass. 591; Hindle v. Healy, 90 N. E. 511, 204 Mass. 48; Lord v. Rowse, 80 N. E. 822, 195 Mass. 216.

Minn. Petterson v. Butler Bros., 144 N. W. 407, 123 Minn. 516.

Mo. McKay v. McKay, 182 S. W. 124, 192 Mo. App. 221; Miller v. Barnett, 101 S. W. 155, 124 Mo. App. 53.

N. H. Marcotte v. Maynard Shoe Co., 85 A. 284, 76 N. H. 507.

N. J. Karnitsky v. Machanic, 109 A. 303.

N. C. Reed Coal Co. v. Fain, 89 S. E. 29, 171 N. C. 646; Hopkins v. Southern Ry. Co., 87 S. E. 320, 170 N. C. 485; Lloyd v. Bowen, 86 S. E. 797, 170 N. C. 216; Carter v. Seaboard Air Line Ry. Co., 81 S. E. 321, 165 N. C. 244; Marcom v. Durham & S. R. Co., 81 S. E. 290, 165 N. C. 259; Irvin v. Southern Ry. Co., 80 S. E. 78, 164 N. C. 5; Security Life & Annuity Co. v. Forrest, 68 S. E. 139, 152 N. C. 621; Graves v. Jackson, 64 S. E. 128, 150 N. C. 383.

S. C. Bennett v. Colleton Cypress Co., 84 S. E. 882, 100 S. C. 335.

Va. Baltimore & O. R. Co. v. Laffertys, 14 Grat. 478; Baltimore & O. R. Co. v. Polly, 14 Grat. 447.

Wash. Jones v. Elliott, 189 P. 1007, 111 Wash. 138; Fehler v. City of Montesano, 188 P. 5, 110 Wash. 143; Perry Bros. v. Diamond Ice & Storage Co., 158 P. 1008, 92 Wash. 105, Ann. Cas. 1918C, 891; Harvey v. Tacoma Ry. & Power Co., 116 P. 644, 64 Wash. 143; Domke v. Gunning, 114 P. 436, 62 Wash. 629; Edwards v. Seattle, R. & S. Ry. Co., 113 P. 563, 62 Wash. 77; Harris v. Brown's Bay Logging Co., 106 P. 152, 57 Wash. 8; Conrad v. John W. Graham & Co., 103 P. 1122, 54 Wash. 641, 132 Am. St. Rep. 1137; Rangenier v. Seattle Electric Co., 100 P. 842, 52 Wash. 401; Payne v. Whatcom County Ry. & Light Co., 91 P. 1084, 47 Wash. 342.

Instructions held proper within rule. Where, in a prosecution for murder, with plea of self-defense, defendant requested an instruction that what is an overt act or demonstration of violence varies under the circumstances; that under some circumstances a slight movement may justify action, because of reasonable apprehension of danger, but that under other circumstances such will not be the case; and that it is for the jury to determine how it may be, and the court charged that threats or acts of hostility, however violent, will not avail, but that there must be some manifest act indicative of intent to injure; that the apprehension of danger must be founded on sufficient circumstances to authorize the opinion that a deadly purpose exists; that animosity, as indicated by words and actions, before and at the time, may be considered on the question of apprehension; and that the question of defendant's apprehension of danger is for the jury, it was held that the charge on the subject of "overt act" embraced the request. Ray v. State, 67 S. W. 553, 108 Tenn. 282.

[72] Brodie v. Carolina Midland Ry. Co., 46 S. C. 203, 24 S. E. 180.

the practice of taking the instructions as requested by the respective parties, and from them formulating a general charge embracing all the matters of law arising upon the pleadings and evidence, is always to be commended, because in this way the points in issue may be sufficiently declared and clearly presented to the jury without unnecessary repetition.[73] It is said in one case that there is a living reality imparted to a charge when the trial judge naturally and in his own words presents the vital principles of law which are considered important for the jury to know.[74] Under this rule the court may add other proper matters, which do not qualify the ideas contained in the instructions requested,[75] or may strike out of a request matter the omission of which does not change the meaning of the request, or which is but a repetition or restatement of other matters therein,[76] or may omit matters which follow as a necessary conclusion from the remainder of the request,[77] and it is proper to omit an independent proposition which should have been preferred as a separate request,[78] or to strike out an irrelevant clause not connected with the remainder of the request,[79] and where an instruction is

[73] Mountain Copper Co. v. Van Buren (C. C. A. Cal.) 133 F. 1, 66 C. C. A. 151; Bloch v. Detroit United Ry. (Mich.) 178 N. W. 670; Kinney v. Ferguson, 59 N. W. 401, 101 Mich. 178.

[74] State v. Aughtry, 26 S. E. 619, 49 S. C. 285.

[75] **Ark.** Zinn v. State, 205 S. W. 704, 135 Ark. 342.

Cal. Fitzgerald v. Southern Pac. Co., 173 P. 91, 36 Cal. App. 660; People v. Weber, 86 P. 671, 149 Cal. 325; People v. Kelly, 46 Cal. 355.

Ga. Waller v. State, 97 S. E. 876, 23 Ga. App. 156.

Ill. Chicago, B. & Q. R. Co. v. Pollock, 62 N. E. 831, 195 Ill. 156, affirming judgment 93 Ill. App. 483; North Chicago St. R. Co. v. Anderson, 52 N. E. 21, 176 Ill. 635, affirming judgment 70 Ill. App. 336; Kinney v. People, 108 Ill. 519.

Pa. Morris v. Guffey, 41 A. 731, 188 Pa. 534, 29 Pittsb. Leg. J. (N. S.) 233.

Va. Washington-Southern Ry. Co. v. Cheshire, 65 S. E. 27, 109 Va. 741.

[76] **Cal.** Colusa & H. R. Co. v. Leonard, 167 P. 878, 176 Cal. 109; People v. Ashland, 128 P. 798, 20 Cal. App. 168.

Ill. People v. Allegretti, 126 N. E. 158, 291 Ill. 364.

Mo. Berkshire v. Holcker, 216 S. W. 556, 202 Mo. App. 433; State v. Fannon, 59 S. W. 75, 158 Mo. 149.

Utah. Broadbent v. Denver & R. G. Ry. Co., 160 P. 1185, 48 Utah, 598.

Va. Vaughan v. Lytton, 101 S. E. 865, 126 Va. 671.

Wash. State v. Jones, 101 P. 708, 53 Wash. 142.

Instruction on willful negligence. From a requested instruction as to willful negligence, complete without them, it is not error to omit the words, "there is little distinction, except in degree, in a positive intention to do wrong and an indifference whether wrong is done or not." Sherfey v. Evansville & T. H. R. Co., 121 Ind. 427, 23 N. E. 273.

[77] Virginia Ry. & Power Co. v. N. H. Slack Grocery Co., 101 S. E. 878, 126 Va. 685; Seattle & M. R. Co. v. Roeder, 70 P. 498, 30 Wash. 244, 94 Am. St. Rep. 864.

[78] Kansas City, F. S. & M. R. Co. v. Stoner (C. C. A. Ark.) 49 F. 209, 1 C. C. A. 231.

[79] People v. Cotta, 49 Cal. 166.

calculated to mislead the jury by barren technicality the court may prevent the mischief by correcting the same.[80]

The court may substitute for the words "due care" the words "ordinary care" and "reasonable care,"[81] and, on the other hand, the striking out of the words "ordinary care" and substituting therefor the words "due care" does not alter their legal meaning.[82] A charge abstractly correct may be modified, so as to make it applicable to the case,[83] and modifications which simply render requested instructions more specific, definite, and certain are proper.[84]

A party cannot complain because an instruction requested by him, presenting his theory of the case, is modified so as to present the theory of his adversary at the same time,[85] nor because an instruction asked by him is modified, so as to conform to other instructions which he has requested;[86] nor can a party complain of the modification of a request from which he suffers no injury.[87]

§ 496. Rule that court should give or refuse a requested charge without alteration

In a few jurisdictions, and under some of the cases in other jurisdictions, where the authorities are conflicting on the question herein discussed, if requested instructions are relevant and correct, and free from any misleading tendencies, a party has a right to have them given precisely as written by him,[88] and where a

[80] Chicago Title & Trust Co. v. Brady, 165 Mo. 197, 65 S. W. 303.

[81] Chicago, B. & Q. R. Co. v. Yorty, 158 Ill. 321, 42 N. E. 64.

[82] St. Louis, I. M. & S. Ry. Co. v. Waren, 48 S. W. 222, 65 Ark. 619.

[83] **Fla.** Evans v. Givens, 22 Fla. 476.

Ind. Citizens' St. R. Co. v. Hoffbauer, 56 N. E. 54, 23 Ind. App. 614.

Iowa. Hall v. Hunter, 4 G. Greene, 539.

La. State v. Sehon, 68 So. 221, 137 La. 83.

Minn. Blackman v. Wheaton, 13 Minn. 326 (Gil. 299); Dodge v. Rogers, 9 Minn. 223 (Gil. 209).

[84] People v. Archibald, 101 N. E. 582, 258 Ill. 383; Kleet v. Southern Illinois Coal & Coke Co., 197 Ill. App. 243; Lefever v. Stephenson (Mo.) 193 S. W. 840.

[85] Livezy v. Miller, 61 Md. 336; Clark v. Soule, 137 Mass. 380; Smith v. State, 23 So. 260, 75 Miss. 542; Bingham v. Lipman, Wolfe & Co., 67 P. 98, 40 Or. 363; Missouri, K. & T. Ry. Co. of Texas v. Evans, 41 S. W. 80, 16 Tex. Civ. App. 68.

[86] Judy v. Sterrett, 153 Ill. 94, 38 N. E. 633, affirming 52 Ill. App. 265; Feary v. Metropolitan St. Ry. Co., 62 S. W. 452, 162 Mo. 75; Baltimore & O. R. Co. v. Few's Ex'rs, 94 Va. 82, 26 S. E. 406.

[87] Moore v. Chicago, B. & Q. Ry. Co., 65 Iowa, 505, 22 N. W. 650, 54 Am. Rep. 26; Commonwealth v. Gill, 14 B. Mon. (Ky.) 20; Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 580; Dillingham v. Fields, 9 Tex. Civ. App. 1, 29 S. W. 214.

[88] **Ala.** Brewer v. State, 74 So. 764, 15 Ala. App. 681; Northern Alabama Ry. Co. v. White, 69 So. 308, 14 Ala. App. 228; Franke v. Riggs, 93 Ala. 252, 9 So. 359; Elland v. State, 52 Ala. 322; Edgar v. State, 43 Ala. 45; Polly v. McCall, 37 Ala. 20; Bell v. Troy, 35 Ala. 184.

Mich. Cook v. Brown, 62 Mich. 473, 29 N. W. 46, 4 Am. St. Rep. 870.

statute provides that requested instructions must be given or refused without modification, the court cannot give a requested instruction with explanations which alter its tenor.[89] Under this rule a charge which is unintelligible unless some change is made in its phraseology is properly refused.[90]

Statutory provisions, however, which require that requested instructions, if given, shall not be changed or modified by the court, are not intended to preclude, and do not preclude, the giving of further and proper instructions on the same subject.[91] It may not be improper under the above rule to modify an abstract instruction to make it applicable to the concrete case presented by the evidence,[92] and such rule does not require a reversal because of a modification of a requested instruction, unless the complaining party has been harmed thereby.[93]

Miss. Cotton v. State, 31 Miss. 504.

Mo. Turner v. Butler, 161 S. W. 745. 253 Mo. 202.

Neb. Severance v. Melick, 15 Neb. 610, 19 N. W. 596.

N. D. Landis v. Fyles, 120 N. W. 566, 18 N. D. 587.

Ohio. Lake Shore & M. S. Ry. Co. v. Shultz, 19 Ohio Cir. Ct. R. 639, 9 O. C. D. 816; Lutterbeck v. Toledo Consol. St. Ry. Co., 5 O. C. D. 141.

W. Va. State v. Verto, 64 S. E. 1025, 65 W. Va. 628; Morrison v. Fairmont & C. Traction Co., 55 S. E. 669. 60 W. Va. 441; Jordan v. City of Benwood, 26 S. E. 266, 42 W. Va. 312, 36 L. R. A. 519, 57 Am. St. Rep. 859; State v. Evans, 33 W. Va. 417, 10 S. E. 792.

In Alabama, a statutory provision embodying the text rule does not apply to oral requests. Warren v. State, 46 Ala. 549. Under such provision the court may, on giving a requested instruction, accompany it with an explanatory statement, Montgomery Light & Water Power Co. v. Thombs, 87 So. 205, 204 Ala. 678; Callaway & Truitt v. Gay, 39 So. 277, 143 Ala. 524; Jackson v. State, 34 So. 188, 136 Ala. 22; Eiland v. State, 52 Ala. 322. Such provision is not violated by giving a request in connection with the general charge. Baker v. State, 49 Ala. 350.

In Wisconsin, where the statute requires that each instruction asked by counsel shall be given without change or modification, or refused in full, it is held that a modification is to be deemed a refusal to give as requested, and, that where the court modifies a requested instruction and then gives it, and such instruction includes all of that requested, and, as modified, correctly states the law applicable to the case, it is not prejudicial error. Grace v. Dempsey, 75 Wis. 313, 43 N. W. 1127.

Illustrations of improper modifications. The giving of a charge on reasonable doubt in a murder case, with the remark: "This is a fool charge, but I will give it to you, gentlemen of the jury, as the Supreme Court has said it was good law; but in my opinion it is misleading"—is a modification or a criticism of the charge, constituting reversible error. Barker v. State, 57 So. 88, 2 Ala. App. 92.

[89] Galloway v. McLean, 2 Dak. 372, 9 N. W. 98.

[90] Southern Industrial Institute v. Hellier, 39 So. 163, 142 Ala. 686.

[91] Doan v. Town of Willow Springs, 76 N. W. 1104, 101 Wis. 112.

[92] Greer v. Arrington, 79 S. E. 720, 72 W. Va. 693; Parfitt v. Sterling Veneer & Basket Co., 69 S. E. 985, 68 W. Va. 438.

[93] Tompkins v. Kanawha Board, 21 W. Va. 224.

In Texas the general rule is that the court should either give a requested charge as presented or refuse it in toto and not give the requested charge as modified,[94] and while the court, where the charge requested consists of separate subdivisions defining distinct conditions of fact essential to be found, and contains a subdivision which is erroneous as applied to the facts, may modify it by eliminating the erroneous subdivision, and give the special charge as modified, and the same will not be reversible error, yet the court is not required to make such modification and give the remaining portion in the terms asked.[95]

In Mississippi it is held that, while the court may decline the charges propounded by the parties, and may modify them, or reduce to writing its own conception of the law upon the points embraced in the charges asked, yet, if the charges as asked are correct and pertinent, the safe practice is to give them as propounded.[96]

In another jurisdiction the rule is stated to be that the qualification of a correct and pertinent instruction asked is error, if its force is essentially changed, unless the change merely states the law to cover the case more fully.[97]

§ 497. Power of court to substitute instructions of its own for correct instructions requested

The trial court may refuse correct instructions requested by a party, and instead thereof give instructions of its own covering the same ground, or expressing the rule embraced in the instructions requested from a different angle,[98] and, as a general rule, the im-

[94] Missouri, K. & T. Ry. Co. of Texas v. Gillenwater (Tex. Civ. App.) 146 S. W. 589; Gulf, C. & S. F. Ry. Co. v. Farmer (Tex. Civ. App.) 108 S. W. 729; St. Louis S. W. Ry. Co. v. Ball, 66 S. W. 879, 28 Tex. Civ. App. 287.

Harmless error. The mere fact that a modified requested instruction is given as one requested is not material if the instruction is otherwise unobjectionable. St. Louis Southwestern Ry. Co. of Texas v. Shipp, 109 S. W. 286, 48 Tex. Civ. App. 565.

[95] Grigsby v. Reib (Tex. Civ. App.) 139 S. W. 1027.

[96] Archer v. Sinclair, 49 Miss. 343.

[97] Young v. State, 24 Fla. 147, 3 So. 881.

[98] **Conn.** Board of Water Com'rs of City of New London v. Robbins & Potter, 74 A. 938, 82 Conn. 623.

Ill. City of Chicago v. Moore, 139 Ill. 201, 28 N. E. 1071, affirming 40 Ill. App. 332; Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598, affirming 27 Ill. App. 17; Hanchett v. Kimbark, 118 Ill. 121, 7 N. E. 491; Alexander v. Mandeville, 33 Ill. App. 589.

Ind. Williamson v. Yingling, 80 Ind. 379.

Iowa. National State Bank v. Delahaye, 82 Iowa, 34, 47 N. W. 999.

Kan. Evans v. Lafeyth, 29 Kan. 736.

Ky. The Blue Wing v. Buckner, 12 B. Mon. 246; Lowry v. Beekner, 5 B. Mon. 41.

Md. Rosenkovitz v. United Rys. & Electric Co. of Baltimore City, 70 A. 108, 108 Md. 306; Coates v. Sangston, 5 Md. 121.

Mich. Miller v. Sharp, 31 N. W.

proper refusal of a correct instruction will be cured by the giving by the court, either on its own motion or on request, of an instruction substantially equivalent to the one refused.[99]

Where, however, the court gives no explanation of its refusal of a correct instruction, and other instructions given by the court, in which it intends to embody the requested instruction, do not, by their phraseology, disclose such intention, such refusal may be ground for new trial,[1] and where instructions requested are pertinent they should be given, rather than others of a more general nature substituted by the court.[2]

§ 498. Manner of making modification

Where the court regards a part of a requested instruction as an incorrect statement of the law, the court should not tell the jury that it charges such request except, so far as modified by its general charge; it being the duty of the court to strike out of such request the erroneous part.[3] It is not fatal, however, to a requested instruction, that the court in amending it strikes out a portion in such a manner as to leave the part so stricken out to some extent legible,[4] when the instruction without the modification

608, 65 Mich. 21; Pound v. Port Huron & S. W. Ry. Co., 54 Mich. 13, 19 N. W. 570; Campau v. Dubois, 39 Mich. 274.

Mo. Mitchell v. City of Plattsburg, 33 Mo. App. 555.

Neb. Western Mattress Co. v. Ostergaard, 101 N. W. 334, 71 Neb. 572, affirming judgment on rehearing 99 N. W. 229, 71 Neb. 572.

N. C. Cuthbertson v. North Carolina Home Ins. Co., 96 N. C. 480, 2 S. E. 258.

Ohio. Rheinheimer v. Ætna Life Ins. Co., 83 N. E. 491, 77 Ohio St. 360, 15 L. R. A. (N. S.) 245.

Va. Rosenberg v. Turner, 98 S. E. 763, 124 Va. 769; Fitzgerald v. Southern Farm Agency, 94 S. E. 761, 122 Va. 264; Home Life Ins. Co. v. Sibert, 81 S. E. 519, 96 Va. 403.

[99] **Ark.** Ft. Smith Lumber Co. v. Cathey, 86 S. W. 806, 74 Ark. 604; Viser v. Bertrand, 16 Ark. 296.

Cal. Davis v. Perley, 30 Cal. 630.

Ill. Willard v. Swanson, 126 Ill. 381, 18 N. E. 548.

N. Y. Parkes v. Stafford, 61 Hun, 623, 16 N. Y. S. 756.

Va. Proctor v. Spratley, 78 Va. 254.

[1] Davis v. Richmond & D. R. Co., 30 S. C. 613, 9 S. E. 105.

Equivalency not apparent except upon critical examination. Where a charge conforms to the law and is authorized by the evidence, it should be given in the terms in which it is asked, though it may be necessary for the court to give additional or explanatory instructions; and the error of a refusal cannot be repaired by giving another charge, which, when critically examined, will be found to lay down substantially the same principle. Clealand v. Walker, 11 Ala. 1058, 46 Am. Dec. 238.

[2] State v. McCann, 49 P. 216, 16 Wash. 249.

[3] Avery v. House, 2 Ohio Cir. Ct. R. 246, 1 O. C. D. 468.

[4] Union Ry. & Transit Co. v. Kallaher, 114 Ill. 325, 2 N. E. 77.

Necessity that requesting party should ask leave to rewrite instruction. Where the court modified an instruction by erasing the words, "and the jury must find for the defendant," with one stroke of the pen, leaving them legible to the jury, it was held, that it was the privilege of appellant to ask leave to rewrite

would have been correct.[5] If the trial judge refuses to give a charge as asked, but gives it in a qualified form, the charge given should be explicit, and should immediately follow the refusal, or the jury should otherwise be made to understand that the charge asked is not entirely rejected.[6]

In some jurisdictions a requested instruction may be modified by inserting or striking out matters, and, as so modified, given to the jury without being rewritten.[7] In other jurisdictions statutes provide that the court, on giving a requested instruction with a modification, shall not make such modification by interlineation or erasure,[8] although such statutes have been considered to be merely directory, and not to make an erasure, not prejudicial to the party objecting thereto, a ground for reversal.[9]

In jurisdictions where the judge should give or refuse a charge asked in the very terms of the request, and if he wishes to give it with a qualification he should rewrite the instruction embodying the qualification, it has been held that when a modification is appended to a requested charge in such a manner as to show the precise charge requested and the precise modification, and the whole is intelligible to the jury, no injury results to the party making the request.[10] A modification necessary to certain numbered instructions may properly be given in instructions of a different number.[11]

H. Requests for Instructions Already Covered by Other Instructions

§ 499. General rule

While there are scattering decisions to the effect that it is error for the court to refuse an instruction on the ground that the same instruction has already been given in substance, both because a party has a right to instructions in his own language and because such refusal, if in the presence of the jury and unexplained, has a tendency to raise in their minds a presumption that the in-

the instruction, or obliterate the rejected words, and that, not having done so, he was not in a position to complain of the action of the court; the instruction being otherwise correct. Allison v. Hagan, 12 Nev. 38.

[5] State v. Patchen, 137 P. 406, 36 Nev. 510.

[6] Selden v. Bank of Commerce, 3 Minn. 166 (Gil. 108).

[7] People v. Foster, 123 N. E. 534, 288 Ill. 371.

[8] Ham v. Wisconsin, I. & N. Ry. Co., 61 Iowa, 716, 17 N. W. 157.

[9] Denver & R. G. Ry. Co. v. Harris, 3 N. M. (Johns.) 109, 2 Pac. 369.

[10] Missouri Pac. R. Co. v. Williams, 75 Tex. 4, 12 S. W. 835, 16 Am. St. Rep. 867.

[11] Columbia & P. S. R. Co. v. Hawthorne, 3 Wash. T. 353, 19 P. 25.

struction does not state the law,[12] the general rule is that it is proper to refuse an instruction embodying principles already substantially covered by other instructions given,[13] which state such

[12] People v. Bonds, 1 Nev. 33.

[13] **U. S.** (C. C. A. Ala.) United States Fidelity & Guaranty Co. v. Walker, 248 F. 42, 160 C. C. A. 182; (C. C. A. Ark.) Wayne v. Venable, 260 F. 64, 171 C. C. A. 100; Salmon v. Helena Box Co., 147 F. 408, 77 C. C. A. 586; (C. C. A. Cal.) American Trading Co. v. North Alaska Salmon Co., 248 F. 665, 160 C. C. A. 565, certiorari denied 38 S. Ct. 581, 247 U. S. 518, 62 L. Ed. 1245; Atchison, T. & S. F. Ry. Co. v. Phillips, 176 F. 663, 100 C. C. A. 215; (C. C. A. Colo.) Western Inv. Co. v. McFarland, 166 F. 76, 91 C. C. A. 504; (C. C. A. Iowa) Illinois Cent. Ry. Co. v. Nelson, 212 F. 69, 128 C. C. A. 525; Illinois Cent. R. Co. v. Egan, 203 F. 937, 122 C. C. A. 239; Chicago Great Western R. Co. v. McCormick, 200 F. 375, 118 C. C. A. 527, 47 L. R. A. (N. S.) 18; (C. C. A. Mass.) Boston & M. R. R. v. Baker, 236 F. 896, 150 C. C. A. 158; (C. C. A. Mich.) Detroit United Ry. v. Weintrobe, 259 F. 64, 170 C. C. A. 132; Farmers' & Merchants' Bank of Vandalia, Ill., v. Maines, 195 Fed. 62, 115 C. C. A. 64; (C. C. A. Mo.) Northern Central Coal Co. v. Barrowman, 246 F. 906, 159 C. C. A. 178; Ætna Life Ins. Co. v. Davis, 191 F. 343, 112 C. C. A. 87; (C. C. A. Neb.) Chicago, R. I. & P. Ry. Co. v. Baldwin, 204 F. 768, 123 C. C. A. 218; Chicago, B. & Q. R. Co. v. Upton, 194 F. 371, 115 C. C. A. 379; Gering v. Leyda, 186 F. 110, 108 C. C. A. 222; (C. C. A. N. H.) Lane v. Sargent, 217 F. 237, 133 C. C. A. 231; (C. C. A. N. J.) Mills Novelty Co. v. Peck, 158 F. 811, 86 C. C. A. 71; (C. C. A. N. Y.) Whitcomb v. Shultz, 215 F. 75, 131 C. C. A. 383; (C. C. A. Ohio) Toledo, St. L. & W. R. Co. v. Reardon, 159 F. 366, 86 C. C. A. 366; (C. C. A. Okl.) Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808, 114 C. C. A. 218; (C. C. A. Tenn.) Jackson Fibre Co. v. Meadows, 159 F. 110, 86 C. C. A. 300; (C. C. A. Va.) Missouri Valley Bridge & Iron Co. v. Blake, 231 F. 417, 145 C. C. A. 411; Pulaski Mining Co. v. Hagan, 196 F. 724, 116 C. C. A. 352; (C. C. A. Wash.) Tacoma Ry. & Power Co. v. Erpelding, 202 F. 187, 120 C. C. A. 401; Idaho & W. N. R. R. v. Wall, 184 F. 677, 106 C. C. A. 631; (C. C. A. W. Va.) Baer Grocer Co. v. Barber Milling Co., 223 F. 969, 139 C. C. A. 449; Fitch v. Huff, 218 F. 17, 134 C. C. A. 31; (C. C. A. Wis.) Simmons Mfg. Co. v. Eskridge, 168 F. 675, 94 C. C. A. 161; (C. C. A. Wyo.) Owl Creek Coal Co. v. Goleb, 232 F. 445, 146 C. C. A. 439.

Ala. Baker v. Green, 84 So. 545, 17 Ala. App. 290; Anders v. Wallace, 82 So. 644, 17 Ala. App. 154; Love v. State, 82 So. 639, 17 Ala. App. 149; Battles v. Whitley, 82 So. 573, 17 Ala. App. 125; Finney v. Newson, 82 So. 441, 203 Ala. 191; Alabama Water Co. v. Barnes, 82 So. 115, 203 Ala. 101; S. S. Steel & Iron Co. v. White, 82 So. 96, 203 Ala. 82; Shelby Iron Co. v. Bean, 82 So. 92, 203 Ala. 78; Birmingham Fuel Co. v. Taylor, 81 So. 630, 202 Ala. 674; Atlantic Coast Line R. Co. v. Jones, 78 So. 645, 16 Ala. App. 447; Johnson v. Johnson, 77 So. 335, 201 Ala. 41, 6 A. L. R. 1031; Smith v. Sharp Real Estate Co., 77 So. 40, 200 Ala. 666; Louisville & N. R. Co. v. Davis, 75 So. 977, 200 Ala. 219; Woodward Iron Co. v. Boswell, 75 So. 3, 199 Ala. 424; Southern States Fire Ins. Co. of Birmingham v. Kronenberg, 74 So. 63, 199 Ala. 164; Lewis v. Isbell Nat. Bank, 73 So. 655, 198 Ala. 484; City of Birmingham v. Muller, 73 So. 30, 197 Ala. 554; London v. G. L. Anderson Brass Works, 72 So. 359, 197 Ala. 16; Alabama Great Southern R. Co. v. Loveman Compress Co., 72 So. 311, 196 Ala. 683; Republic Iron & Steel Co. v. Howard, 72 So. 263, 196 Ala. 663.

Ariz. Albert Steinfeld & Co. v. Wing Wong, 128 P. 354, 14 Ariz. 336; Grant Bros. Const. Co. v. United States, 114 P. 955, 13 Ariz. 388; Southern Pac. Co. v. Svensden, 108 P. 262, 13 Ariz. 111; Southern Pac. Co. v. Hogan, 108 P. 240, 13 Ariz. 34, 29 L. R. A. (N. S.) 813; Title Guar-

anty & Surety Co. v. Nichols, 100 P. 825, 12 Ariz. 405; Greene v. Hereford, 95 P. 105, 12 Ariz. 85.

Ark. Stone v. Suckle, 224 S. W. 735; North American Union v. Oliphint, 217 S. W. 1, 141 Ark. 346; A. L. Clark Lumber Co. v. Edwards, 216 S. W. 18, 144 Ark. 641; Kansas City Southern Ry. Co. v. Simmons, 215 S. W. 167, 140 Ark. 80; Ft. Smith Iron & Steel Mills v. Southern Round Bale Press Co., 213 S. W. 21, 139 Ark. 101; C. H. Robinson Co. v. Hudgins Produce Co., 212 S. W. 305, 138 Ark. 500; Bocquin v. Theurer, 202 S. W. 845, 133 Ark. 448; Horton v. Huddleston, 200 S. W. 1003, 132 Ark. 396; Central Coal & Coke Co. v. Graham, 196 S. W. 940, 129 Ark. 550; Mutual Aid Union v. Blacknall, 196 S. W. 792, 129 Ark. 450; A. L. Clark Lumber Co. v. Pickett, 193 S. W. 793, 128 Ark. 639; Arnold v. Wood, 191 S. W. 960, 127 Ark. 234; St. Louis, I. M. & S. Ry. Co. v. Howard, 188 S. W. 14, 124 Ark. 588; Miller v. Summers, 187 S. W. 664, 124 Ark. 599; Chicago, R. I. & P. Ry. Co. v. Jones, 187 S. W. 436, 124 Ark. 523; Redman v. Hudson, 186 S. W. 312, 124 Ark. 26; City of Little Rock v. Holden, 186 S. W. 293, 124 Ark. 599; Shearer v. Farmers' & Merchants' Bank, 182 S. W. 262, 121 Ark. 599; National Fruit Products Co. v. Garrett, 181 S. W. 926, 121 Ark. 570; St. Louis, I. M. & S. Ry. Co. v. Gilley, 181 S. W. 918, 121 Ark. 507.

Cal. Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2, 182 Cal. 93; Baldarachi v. Leach (App.) 186 P. 1060; Commonwealth Bonding & Casualty Ins. Co. v. Pacific Electric Ry. Co. (App.) 184 P. 29; Baillargeon v. Myers, 182 P. 37, 180 Cal. 504; Gumpel v. San Diego Electric Ry. Co., 172 P. 605, 178 Cal. 166; Gerardi v. Bonoff, 172 P. 596, 178 Cal. 147; Titlow v. Florence Trading Co., 170 P. 172, 35 Cal. App. 457; Bruce v. Western Pipe & Steel Co., 169 P. 660, 177 Cal. 25; Braun v. Vallade, 164 P. 904, 33 Cal. App. 279; Fiori v. Agnew, 164 P. 899, 33 Cal. App. 284; Bannister v. H. Jevne Co., 151 P. 546, 28 Cal. App. 133; Neff v. Mattern, 151 P. 382, 28 Cal. App. 99; Bidwell v. Los Angeles & S. D. B. Ry. Co., 148 P. 197, 169 Cal. 780; Pacific Improvement Co. v. Maxwell, 146 P. 900, 26 Cal. App. 265; Price v. Northern Electric Ry. Co., 142 P. 91, 168 Cal. 173; In re Everts' Estate, 125 P. 1058, 163 Cal. 449; Worley v. Spreckles Bros. Commercial Co., 124 P. 697, 163 Cal. 60; Bonneau v. North Shore R. Co., 93 P. 106, 152 Cal. 406, 125 Am. St. Rep. 68; Central Pac. Ry. Co. v. Feldman, 92 P. 849, 152 Cal. 303; Henderson v. Los Angeles Traction Co., 89 P. 976, 150 Cal. 689.

Colo. Empson Packing Co. v. Hopkins, 182 P. 876, 66 Colo. 421; Western Investment & Land Co. v. First Nat. Bank, 172 P. 6, 64 Colo. 37; Independence Coffee & Spice Co. v. Kalkman, 156 P. 135, 61 Colo. 98; Kimmins v. City of Montrose, 151 P. 434, 59 Colo. 578, Ann. Cas. 1917A, 407; Denver & R. G. R. Co. v. A. Peterson Grocery Co., 147 P. 663, 59 Colo. 125; Finding v. Gitzen, 131 P. 1042, 24 Colo. App. 38; City and County of Denver v. Monroe, 121 P. 684, 21 Colo. 312; Denver Omnibus & Cab Co. v. Madigan, 120 P. 1044, 21 Colo. App. 131; Denver City Tramway Co. v. Brumley, 116 P. 1051, 51 Colo. 251; Denver City Tramway Co. v. Cowan, 116 P. 136, 51 Colo. 64; Denver City Tramway Co. v. Hills, 116 P. 125, 50 Colo. 328, 36 L. R. A. (N. S.) 213; Doty v. Helzer, 111 P. 67, 48 Colo. 490; Gutshall v. Cooper, 109 P. 428, 48 Colo. 160; Allen v. Shires, 107 P. 1072, 47 Colo. 139; Allen v. Shires, 107 P. 1070, 47 Colo. 433; Bonnet v. Foote, 107 P. 252, 47 Colo. 282, 28 L. R. A. (N. S.) 136; Mahler v. Beishline, 105 P. 874, 46 Colo. 603; Fidelity & Deposit Co. of Maryland v. Colorado Ice & Storage Co., 103 P. 383, 45 Colo. 443; Colorado Midland Ry. Co. v. Brady, 101 P. 62, 45 Colo. 203; Denver City Tramway Co. v. Martin, 98 P. 836, 44 Colo. 324.

Conn. Hawes v. Engler, 103 A. 975, 92 Conn. 608; Mills v. Davis, 101 A. 657, 92 Conn. 154; H. Wales Lines Co. v. Hartford City Gaslight Co., 93 A. 129, 89 Conn. 117; Easton v. Connecticut Co., 91 A. 644, 88 Conn. 494; Sansona v. Laraia, 90 A. 28, 88 Conn. 136; Eckler v. Wake, 88 A. 369, 87 Conn. 708; Koskoff v. Goldman, 85 A. 588, 86 Conn. 415; Temple v. Gilbert, 85 A. 380, 86 Conn. 335; Harper Ma-

chinery Co. v. Ryan-Unmack Co., 82 A. 1027, 85 Conn. 359; Stevens v. Smoker, 80 A. 788, 84 Conn. 569; Worden v. Gore-Meehan Co., 78 A. 422, 83 Conn. 642; Bogudsky v. Backes, 76 A. 540, 83 Conn. 208; Beattie v. McMullen, Weand & McDermott, 74 A. 767, 82 Conn. 484; Johnson County Sav. Bank v. Walker, 72 A. 579, 82 Conn. 24; Berman v. Kling, 71 A. 507, 81 Conn. 403; Joyce v. Joyce, 67 A. 374, 80 Conn. 88; Houghton v. City of New Haven, 66 A. 509, 79 Conn. 659.

Del. Philadelphia, B. & W. R. Co. v. Buchanan, 78 A. 776, 2 Boyce, 202; McFeat v. Philadelphia, W. & B. R. Co., 69 A. 744, 6 Pennewill, 513.

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Fla. Burnett v. Soule, 83 So. 461, 78 Fla. 507; Atlanta & St. A. B. Ry. Co. v. Kelly, 82 So. 57, 77 Fla. 479; Winfield v. Truitt, 70 So. 775, 71 Fla. 38; Atlantic Coast Line R. Co. v. Wallace, 63 So. 583, 66 Fla. 321; Louisville & N. R. Co. v. Croxton, 58 So. 369, 63 Fla. 223; Escambia County Electric Light & Power Co. v. Sutherland, 55 So. 83, 61 Fla. 167; Florala Sawmill Co. v. Britt-Carson Shoe Co., 47 So. 924, 56 Fla. 301; Clary v. Isom, 47 So. 919, 56 Fla. 236; Jacksonville Electric Co. v. Hellenthal, 47 So. 812, 56 Fla. 443; Florida East Coast Ry. Co. v. Welch, 44 So. 250, 53 Fla. 145, 12 Ann. Cas. 210; Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400; Jacksonville Electric Co. v. Schmetzer, 43 So. 85, 53 Fla. 370; Jacksonville Electric Co. v. Sloan, 42 So. 516, 52 Fla. 257.

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Co., 105 N. E. 731, 263 Ill. 589; Gibbons v. Aurora, E. & C. R. Co., 104 N. E. 1063, 263 Ill. 266, affirming judgment 177 Ill. App. 572; Newell v. Cleveland, C., C. & St. L. Ry. Co., 104 N. E. 223, 261 Ill. 505, reversing judgment 179 Ill. App. 497; Grannon v. Donk Bros., Coal & Coke Co., 102 N. E. 769, 259 Ill. 350, affirming judgment 173 Ill. App. 395; Loescher v. Consolidated Coal Co., 102 N. E. 196, 259 Ill. 126, affirming judgment 173 Ill. App. 526; Kellan v. Kellan, 101 N. E. 614, 258 Ill. 256; Doyle v. Doyle, 100 N. E. 950, 257 Ill. 229; Inlet Swamp Drainage Dist. v. Anderson, 100 N. E. 909, 257 Ill. 214; Shellabarger Elevator Co. v. Illinois Cent. R. Co., 212 Ill. App. 1; Yates v. Phillips, 211 Ill. App. 643; Brautigan v. Union Overall Laundry & Supply Co., 211 Ill. App. 356; Poland v. Supreme Tribe of Ben Hur, 211 Ill. App. 176; McCormick v. Decker, 204 Ill. App. 554.

Ind. Haskell & Barker Car Co. v. Erickson (App.) 128 N. E. 466; Walker Hospital v. Pulley (App.) 127 N. E. 559; Morgan v. Winship (App.) 126 N. E. 37; Lake Erie & W. R. Co. v. Douglas (App.) 125 N. E. 474; Chesapeake & O. Ry. Co. v. Perry (App.) 125 N. E. 414; Terre Haute, I. & E. Traction Co. v. Stevenson (Sup.) 123 N. E. 785, rehearing denied 126 N. E. 3; Cleveland, C., C. & St. L. Ry. Co. v. Markle, 119 N. E. 371, 187 Ind. 553, superseding opinion on rehearing 114 N. E. 440; Indiana Steel & Wire Co. v. Studes, 119 N. E. 2, 187 Ind. 469; Chicago & E. R. Co. v. Steele, 118 N. E. 824, 187 Ind. 358, rehearing denied 119 N. E. 483, 187 Ind. 358; Chicago, I. & L. Ry. Co. v. Medlock, 118 N. E. 810, 187 Ind. 224; Kawneer Mfg. Co. v. Kalter, 118 N. E. 561, 187 Ind. 99; Cleveland, C., C. & St. L. Ry. Co. v. Wise, 116 N. E. 299, 186 Ind. 316; Union Traction Co. of Indiana v. Haworth, 115 N. E. 753, 187 Ind. 451; Lavene v. Friedrichs, 115 N. E. 324, 186 Ind. 333, rehearing denied 116 N. E. 421, 186 Ind. 333; Guarantee Tire & Rubber Co. v. Vehicle Apron & Hood Co., 115 N. E. 89, 186 Ind. 145; Citizens' Bank of Michigan City v. Opperman, 115 N. E. 55, 188 Ind. 212; American Maize Products Co. v. Widiger, 114 N. E. 457, 186 Ind. 227; City of Kokomo v. Loy, 112 N. E. 994, 185 Ind. 18, reversing judgment (App.) 110 N. E. 694; New York, C. & St. L. R. Co. v. Shields, 112 N. E. 762, 185 Ind. 704; Vandalia Coal Co. v. Coakley, 111 N. E. 426, 184 Ind. 661.

Ind. T. Atoka Coal & Mining Co. v. Miller, 104 S. W. 555, 7 Ind. T. 104; (Ind. T. 1902) Ward v. Bass, 69 S. W. 879, 4 Ind. T. 291.

Iowa. Adami v. Fowler & Wilson Coal Co., 179 N. W. 422; Arnett v. Illinois Cent. R. Co., 176 N. W. 322, 188 Iowa, 540; Bennett v. Atchison, T. & S. F. Ry. Co., 174 N. W. 798; Bashaw-Joy Co. v. Walsh, 174 N. W. 399, 187 Iowa, 574; Fuller v. Illinois Cent. R. Co., 173 N. W. 137, 186 Iowa, 686; Turner v. Brien, 167 N. W. 584, 184 Iowa, 320, 3 A. L. R. 1585; Allen v. City of Ft. Dodge, 167 N. W. 577, 183 Iowa, 818; Hess v. McCardell, 166 N. W. 470, 182 Iowa, 1121; Smith v. Blakesburg Savings Bank, 164 N. W. 762, 182 Iowa, 1190; Schultz v. Starr, 164 N. W. 163, 180 Iowa, 1319; Hanley v. Travelers' Protective Ass'n, 161 N. W. 125; Hanley v. Fidelity & Casualty Co., 161 N. W. 114, 180 Iowa, 805; Clark v. Sioux County, 159 N. W. 664, 178 Iowa, 176; In re Eveleth's Will, 157 N. W. 257, 177 Iowa, 716; Garvey v. Boody-Holland & New, 155 N. W. 1027, 176 Iowa, 273; Johnston v. Delano, 154 N. W. 1013, 175 Iowa, 498; Hutchinson Purity Ice Cream Co. v. Des Moines City Ry. Co., 154 N. W. 890, 172 Iowa, 527; Ball v. Davenport, 152 N. W. 69, 170 Iowa, 33; Merchants' Transfer & Storage Co. v. Chicago, R. I. & P. Ry. Co., 150 N. W. 720, 170 Iowa, 378; Depugh v. Frazier, 149 N. W. 854, 167 Iowa, 742.

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Tenn. Middle Tennessee R. Co. v. McMillan, 184 S. W. 20, 134 Tenn. 490.

Tex. San Antonio & A. P. R. Co. v. McGill (Civ. App.) 222 S. W. 699; Wight v. Bell (Civ. App.) 218 S. W. 532; Lancaster v. Keebler (Civ. App.) 217 S. W. 1117; Buchannan v. Gribble (Civ. App.) 216 S. W. 899; Melton v. Manning (Civ. App.) 216 S. W. 488; Southwestern Portland Cement Co. v. Bustillos (Civ. App.) 216 S. W. 268, conforming to opinion of Supreme Court (Com. App.) Bustillos v. Southwestern Portland Cement Co., 211 S. W. 929, which reversed (Civ. App.)

Southwestern Portland Cement Co. v. Bustillos, 169 S. W. 638; Moye v. Park (Civ. App.) 216 S. W. 205; Ft. Worth & D. C. R. Co. v. Courtney (Civ. App.) 214 S. W. 839; Schaff v. Hollin (Civ. App.) 213 S. W. 279; Texas Electric Ry. Co. v. Crump (Civ. App.) 212 S. W. 827; Wofford v. Herndon (Civ. App.) 204 S. W. 353; Schaff v. Wilson (Civ. App.) 204 S. W. 251; Rachofsky v. Rachofsky (Civ. App.) 203 S. W. 1134; Schaub v. Rucker & Heartsill (Civ. App.) 203 S. W. 939; Durham v. Wichita Mill & Elevator Co. (Civ. App.) 202 S. W. 138; Corpus Christi Street & Interurban Ry. Co. v. Kjellberg (Civ. App.) 201 S. W. 1032; Hudson v. Salley (Civ. App.) 201 S. W. 665; Andrews v. Rice (Civ. App.) 198 S. W. 666; St. Louis, B. & M. R. Co. v. Green (Civ. App.) 196 S. W. 555; Sherman Ice Co. v. Klein (Civ. App.) 195 S. W. 918.

Utah. Emelle v. Salt Lake City, 181 P. 266, 54 Utah, 360; Arrascada v. Silver King Coalition Mines Co., 181 P. 159, 54 Utah, 386; Urich v. Utah Apex Mining Co., 169 P. 263, 51 Utah, 206; Eleganti v. Standard Coal Co., 168 P. 266, 50 Utah, 585; Murray Meat & Live Stock Co. v. New-House Realty Co., 155 P. 442, 47 Utah, 622; Hunt v. P. J. Moran, Inc., 150 P. 953, 46 Utah, 388; Salt Lake & U. R. Co. v. Butterfield, 150 P. 931, 46 Utah, 431; Boyd v. San Pedro, L. A. & S. L. R. Co., 146 P. 282, 45 Utah, 449; Jensen v. Denver & R. G. R. Co., 138 P. 1185, 44 Utah, 100; Lindsay Land & Livestock Co. v. Smart Land & Live Stock Co., 137 P. 837, 43 Utah, 554; Geanakoules v. Union Portland Cement Co., 126 P. 329, 41 Utah, 486; Hirabelli v. Daniels, 121 P. 966, 40 Utah, 513; Myers v. San Pedro, L. A. & S. L. R. Co., 116 P. 1119, 31 Utah, 198; Holt v. Nielson, 109 P. 470, 37 Utah, 566; Evans v. Oregon Short Line R. Co., 108 P. 638, 37 Utah, 431, Ann. Cas. 1912C, 259; Speight v. Rocky Mountain Bell Telephone Co., 107 P. 742, 36 Utah, 483; Wall Rice Mill. Co. v. Continental Supply Co., 103 P. 242, 36 Utah, 121, 140 Am. St. Rep. 815; In re Miller's Estate, 102 P. 996, 36 Utah, 228; Morris v. Oregon Short Line R. Co., 102 P. 629, 36 Utah, 14; Davidson v. Utah Independent Telephone Co., 97 P. 124, 34 Utah, 249.

Vt. De Nottbeck v. Chapman, 108 A. 338, 93 Vt. 378; Nemi v. Todd, 96 A. 14, 89 Vt. 502; Fitzgerald v. Connors, 92 A. 456, 88 Vt. 365; Green v. Stockwell, 89 A. 870, 87 Vt. 459; Lee v. Follensby, 85 A. 915, 86 Vt. 401; Duggan v. Heaphy, 83 A. 726, 85 Vt. 515; Lang v. Clark, 81 A. 625, 85 Vt. 222; Blanchard v. Vermont Shade Roller Co., 79 A. 911, 84 Vt. 442; Jenness v. Simpson, 78 A. 886, 84 Vt. 127.

Va. Nelson County v. Loving, 101 S. E. 406, 126 Va. 283; Eastern Coal & Export Corp. v. Beazley & Blanford, 92 S. E. 824, 121 Va. 4; City of Danville v. Lipford, 91 S. E. 168, 120 Va. 280; Ramsay v. Harrison, 89 S. E. 977, 119 Va. 682; Sutherland v. Wampler, 89 S. E. 875, 119 Va. 800; Carpenter v. Smithey, 88 S. E. 321, 118 Va. 533; Powhatan Lime Co. v. Whetzel's Adm'x, 86 S. E. 898, 118 Va. 161; Wygal v. Wilder, 86 S. E. 97, 117 Va. 896; Ney v. Wrenn, 84 S. E. 1, 117 Va. 85; Norfolk & W. Ry. Co. v. Perdue, 83 S. E. 1058; Chesapeake & O. Ry. Co. v. Swartz, 80 S. E. 568, 115 Va. 723; Southern Ry. Co. v. Rice's Adm'x, 78 S. E. 592, 115 Va. 235; Middle Atlantic Immigration Co. v. Ardan, 78 S. E. 588, 115 Va. 148; Washington-Virginia Ry. Co. v. Bouknight, 75 S. E. 1032, 113 Va. 696, Ann. Cas. 1913E, 546; Clinchfield Coal Corporation v. Osborne's Adm'r, 75 S. E. 750, 114 Va. 13; Williams Printing Co. v. Saunders, 73 S. E. 472, 113 Va. 156, Ann. Cas. 1913E, 693; Dudley v. Lewis Shoe Co., 73 S. E. 433, 113 Va. 41; Roanoke Ry. & Electric Co. v. Carroll, 72 S. E. 125, 112 Va. 598; Virginian Ry. Co. v. Jeffries' Adm'r, 66 S. E. 731, 110 Va. 471; Norfolk & P. Traction Co. v. Forrest's Adm'x, 64 S. E. 1034, 109 Va. 658.

Wash. Ziomko v. Puget Sound Electric Ry., 192 P. 1009, 112 Wash. 426; Buckley v. Massachusetts Bonding & Insurance Co. 192 P. 924; Seal v. Long, 192 P. 896, 112 Wash. 370; Johnson v. Pearson, 186 P. 667, 109 Wash. 147; McDonald v. Lawrence, 170 P. 576, 100 Wash. 215; Lagomarsino v. Pacific Alaska Nav. Co., 170 P. 368, 100 Wash. 105; Gilson v. Washington Water Power Co., 161 P.

352, 93 Wash. 480; George v. Kurdy, 158 P. 965, 92 Wash. 277; J. L. Mott Iron Works v. Metropolitan Bank, 156 P. 864, 90 Wash. 655; Hargrave v. City of Colfax, 154 P. 824, 89 Wash. 467; Payzant v. Caudill, 154 P. 170, 89 Wash. 250; Lehtinen v. Holpa, 151 P. 829, 87 Wash. 284; Blair v. Calhoun, 151 P. 259, 87 Wash. 154; Bagley v. Foley, 144 P. 25, 82 Wash. 222; Mickelson v. Fischer, 142 P. 1160, 81 Wash. 423; Woodard v. Cline Lumber Co., 142 P. 475, 81 Wash. 85; Norton v. Pacific Power & Light Co., 140 P. 905, 79 Wash. 625; Johansen v. Pioneer Mining Co., 137 P. 1019, 77 Wash. 421; Murray v. Wishkah Boom Co., 137 P. 130, 76 Wash. 605; McIlwaine v. Tacoma Ry. & Power Co., 129 P. 1093, 72 Wash. 184.

W. Va. Cain v. Kanawha Traction & Electric Co., 102 S. E. 119, 85 W. Va. 434; Bartlett v. Baltimore & O. R. Co., 99 S. E. 322, 84 W. Va. 120; Polino v. Keck, 92 S. E. 665, 80 W. Va. 426; Howes v. Baltimore & O. R. Co., 87 S. E. 456, 77 W. Va. 362; Angrist v. Burk, 87 S. E. 74, 77 W. Va. 192; Hains v. Parkersburg, M. & I. Ry. Co., 84 S. E. 923, 75 W. Va. 613; H. C. Powell Music Co. v. Parkersburg Transfer & Storage Co., 84 S. E. 563, 75 W. Va. 659; Adkinson v. Baltimore & O. R. Co., 83 S. E. 291, 75 W. Va. 156; Martin v. Reiniger, 82 S. E. 221, 74 W. Va. 439; Shires v. Boggess, 77 S. E. 542, 72 W. Va. 109; Bluefield Produce & Commission Co. v. City of Bluefield, 77 S. E. 277, 71 W. Va. 696; Duty v. Chesapeake & O. Ry. Co., 73 S. E. 331, 70 W. Va. 14; Mate Creek Coal Co. v. Todd, 66 S. E. 1066, 66 W. Va. 671; Pennington v. Gillaspie, 66 S. E. 1009, 66 W. Va. 643; Squilache v. Tidewater Coal & Coke Co., 62 S. E. 446, 64 W. Va. 337.

Wis. Olson v. Laun, 174 N. W. 473, 170 Wis. 106; Scheuer v. Manitowoc & Northern Traction Co., 159 N. W. 901, 164 Wis. 333; Koenig v. Sproesser, 152 N. W. 473, 161 Wis. 8; Taylor v. Northern Coal & Dock Co., 152 N. W. 465, 161 Wis. 223, Ann. Cas. 1915C, 167; Oleson v. Fader, 152 N. W. 290, 160 Wis. 473, Ann. Cas. 1917D, 314; Behling v. Wisconsin Bridge & Iron Co., 149 N. W. 484, 158 Wis. 584; Sobek v. George H. Smith Steel Casting Co., 149 N. W. 152, 158 Wis. 517; Dixon v. Russell, 145 N. W. 761, 156 Wis. 161; Panoff v. Chicago, M. & St. P. Ry. Co., 143 N. W. 1070, 155 Wis. 99; Hilton v. Hayes, 141 N. W. 1015, 154 Wis. 27; Langowski v. Wisconsin Cent. Ry. Co., 141 N. W. 236, 153 Wis. 418; Merchants' & Manufacturers' Bank of Milwaukee v. Moeller, 140 N. W. 335, 152 Wis. 600; Lemke v. Milwaukee Electric Ry. & Light Co., 136 N. W. 286, 140 Wis. 535; Herlitzke v. La Crosse Interurban Telephone Co., 130 N. W. 59, 145 Wis. 185; Hippler v. Quandt, 129 N. W. 1099, 145 Wis. 221; Fidelity Trust Co. v. Wisconsin Iron & Wire Works, 129 N. W. 615, 145 Wis. 385; Miske v. Thom, 128 N. W. 858, 144 Wis. 178; Jirachek v. Milwaukee Electric Ry. & Light Co., 121 N. W. 326, 139 Wis. 505, 131 Am. St. Rep. 1070; Gould v. Merrill Ry. & Lighting Co., 121 N. W. 161, 139 Wis. 433; Ryan v. Oshkosh Gaslight Co., 120 N. W. 264, 138 Wis. 466.

Wyo. Mutual Life Ins. Co. v. Summers, 120 P. 185, 19 Wyo. 441; Henderson v. Coleman, 115 P. 439, 19 Wyo. 183, rehearing denied 115 P. 1136, 19 Wyo. 183.

Illustration of requests properly refused within rule. Where, in an action against a carrier for injury to a shipment of horses, the court charged that for plaintiff to recover the jury must find that the carrier was negligent and that the horses were injured as the proximate result thereof, the refusal to charge that, unless the jury believed that rough handling of the horses was due to negligence which was the proximate cause of the injury, no damages could be awarded on account of rough handling, was not erroneous. Gulf, C. & S. F. Ry. Co. v. Cunningham, 113 S. W. 767, 51 Tex. Civ. App. 368. Where in an action for injuries by falling through a defective depot seat, the court instructed that plaintiff must have used ordinary care, and also charged on contributory negligence, an instruction that it was plaintiff's duty, before sitting, to look at the seat, and if he did not do so, or the defect was obvious, he was negligent was properly refused. St. Louis, I. M. & S. Ry. Co.

v. Grimsley, 117 S. W. 1064, 90 Ark. 64. Where, in an action for injuries to a passenger, the court charged that it was the duty of the carrier to exercise that degree of care for the passenger's personal safety which a very cautious and prudent person would exercise under the same circumstances, the refusal to charge that the carrier was required to exercise the highest degree of care that could reasonably be exercised to protect the passenger from injury, was not erroneous. Cornelison v. Ft. Worth & R. G. Ry. Co., 103 S. W. 1186, 46 Tex. Civ. App. 509. An instruction, in an action for injuries to a passenger, that defendant was bound to exercise the highest degree of care, consistent with the operation of the railway and taking into consideration the existing conditions, to prevent the injury, and that defendant was liable for the slightest negligence, covered all the substantial features of a refused instruction that defendant was not required to exercise the highest degree of care possible to avoid the accident, but only the highest degree reasonably practicable under the circumstances, and that by "highest degree of care" was meant that degree which would be exercised under like circumstances by careful and experienced conductors and motormen. Jordan v. Seattle, R. & S. Ry. Co., 92 P. 284, 47 Wash. 503. In an action against a carrier for injuries to an alighting passenger, where the only contributory negligence claimed was that plaintiff attempted to alight while the car was in motion, and the court fully charged that if he did so he was negligent, it was not error to refuse a request that a slight want of ordinary care by plaintiff contributing to his injury would render him negligent. Jirachek v. Milwaukee Electric Ry. & Light Co., 121 N. W. 326, 139 Wis. 505, 131 Am. St. Rep. 1070. Where, in an action against a railroad company for personal injuries, all the damages suffered by plaintiff were shown by the undisputed evidence to have been the proximate consequences of the injury, unless the evidence raised the issue that such damages were aggravated by plaintiff's failure to follow instructions given by the physician who treated him, and such issue was submitted to the jury in a charge requested by defendant, there was no error in refusing to charge at defendant's request on the issue whether the damages sustained were the proximate result of the injury. San Antonio & A. P. Ry. Co. v. Muecke, 105 S. W. 1009, 47 Tex. Civ. App. 380. Where a court, in an action for negligent death, charged that the damages recoverable were the damages occasioned to the estate of the decedent by his premature death, taking into consideration his age, health, occupation, earnings, ability to earn, and other matters showing the extent of the loss, the refusal to charge that in estimating the damages to decedent's estate the jury should not allow anything for decedent's pain and suffering or as exemplary damages, etc., was not erroneous. Kelly v. Chicago, R. I. & P. Ry. Co., 114 N. W. 536, 138 Iowa, 273, 128 Am. St. Rep. 195. Where an instruction on the issue of value of property in controversy directed that the jury might consider the return of the property for taxes as a circumstance with other circumstances in the case in determining the value of the property, the failure to charge that such return should be considered as an admission was not ground for a new trial. Western & A. R. Co. v. Tate, 59 S. E. 266, 129 Ga. 526. A requested instruction that if defendant had a mortgage on the goods of her husband, and that if the jury believed that plaintiff attempted to collect his notes against the husband, that he employed counsel and threatened to attack the mortgage, and that thereupon defendant executed the note, then the note was a valid contract and could be enforced, was fully covered by a charge that a wife may make a valid obligation in settlement of notes of her husband if they apparently constitute a prior claim against property derived from her husband and to which she has title. Sims v. Scheussler, 64 S. E. 99, 5 Ga. App. 850. In libel, where trial court charged the issue of privilege in the language of the statute, which clearly defines and enumerates the

matter made privileged thereby, a charge that defendant was not required to prove its defense of privilege literally, but only substantially, was properly refused. San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574, 52 Tex. Civ. App. 22. Where, in an action for injuries to an employé, the court charged that to find a verdict for the employé they must find by preponderance of the evidence that the injuries were not the result of the employé's own carelessness, or the result of the negligence of a fellow servant, the refusal to charge that if the injuries were occasioned by the employé's own negligence, or that of a fellow servant, the jury should render a verdict for defendant, was not erroneous. Clifford v. Pioneer Fireproofing Co., 83 N. E. 448, 232 Ill. 150. A requested charge, in an action for injuries sustained by a fall over an obstruction on a sidewalk, that plaintiff is required to exercise ordinary care for his own safety, was covered by an instruction given that, if plaintiff's injury was wholly or in part caused by his negligence "in failing to watch or observe his footsteps," the verdict must be for defendant. Lattimore v. Union Electric Light & Power Co., 106 S. W. 543, 128 Mo. App. 37. Where, in an action for injuries by falling down an unguarded cellar way in a store, the court charged that defendant was bound only to use ordinary care, and, if he discharged the obligation to warn plaintiff that the cellar way was open, the jury should find for defendant, there was no error, in denying defendant's request to charge that the mere existence of the trapdoor and the cellar way in the way in which defendant maintained it was not negligence per se. Montague v. Hanson, 99 P. 1063, 38 Mont. 376. Where plaintiff in an action for negligence had made out a prima facie case, it was not error to refuse to charge that the burden of proving negligence on the part of one defendant was on the plaintiff, where the court charged, not only that the jury should be satisfied that such defendant was negligent, but it must appear from all the evidence that such conclusion is established. Daggett v. North Jersey St. Ry. Co., 68 A. 179, 75 N. J. Law, 630. An instruction, as to the burden of proof as to contributory negligence, that the jury, in determining whether defendant had "discharged such burden," should look to all the evidence, whether introduced by either party, or both, is not materially different from a charge requested by defendant, to the effect that the jury should look to all such evidence in determining, not whether defendant had "discharged' the burden," but whether plaintiff was guilty of contributory negligence. Beaumont Traction Co. v. Happ, 122 S. W. 610, 57 Tex. Civ. App. 427. An instruction that, where a person deals with an agent, he must assure himself that the agent has the necessary authority in the transaction in question, sufficiently covered a request that it is not sufficient to establish agency that the agent had claimed to be such, but that it is the duty of the person dealing with the agent to ascertain the act of agency and his authority to do the particular act. Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 121 S. W. 883. Where, in an action for damages for a nuisance incident to the construction and operation of a railroad, the instructions only authorized a recovery for damages incident to the construction of the road along a strip lying between plaintiff's lots, and only in the event that such strip was not a part of a public street, defendant was not entitled to an instruction requiring the jury to find for defendant, if they were unable to separate the injuries caused by the construction of the road on the strip between plaintiff's lands from the injuries caused by the construction of the road on such strip and on other lands. St. Louis, S. F. & T. Ry. Co. v. Payne, 104 S. W. 1077, 47 Tex. Civ. App. 194. Where the court in its general charge restricted plaintiff's right to recover to defendant's negligence in operating a switch engine, refusal of an instruction that plaintiff could not recover because of the proximity of a post to the track was properly refused. Cunningham v. Neal, 109 S. W. 455, 49 Tex. Civ. App. 613. Where, in an

action for injuries to a child struck by a switch engine, the court left it to the jury whether there was proof that the trainmen exercised ordinary care, and might have seen the child in time to have avoided the injury, the refusal to give an instruction that, if the child was a licensee, he assumed the risk of dangers caused by the proper use of the tracks and operation of trains, was not erroneous. Tarashonsky v. Illinois Cent. R. Co., 117 N. W. 1074, 139 Iowa, 709. Where the court stated the nature of the mental disability to avoid a release for injury, and that the burden was on plaintiff to establish such disability, refusal to charge that the burden was on plaintiff to show himself incompetent when the release was executed was not erroneous. Schmidt v. Southwestern Brewery & Ice Co., 107 P. 677, 15 N. M. 232. Where, in an action for seduction, there was no evidence of loss of wages, an instruction that the jury could not find anything on that score, because there was nothing on which they could compute damages, sufficiently covered a request to charge that plaintiff could not recover for any loss of his daughter's services or earnings after the date of the writ. Thiebault v. Prendergast, (R. I.) 69 A. 922. In an action for injuries to plaintiff by being struck by a street car after being thrown from his bicycle at a cross-over switch, a request to charge that, though plaintiff was guilty of negligence in attempting to ride over the cross-over track, if the motorman saw the peril of plaintiff in time to have stopped the car by ordinary diligence before it ran onto plaintiff, and he failed to do so, then defendant was liable, and if the motorman, by reasonable care ought to have seen plaintiff, plaintiff was entitled to recover is substantially covered by an instruction given that, if plaintiff's negligence was the proximate cause of the injury, he could not recover, unless defendant, having knowledge of plaintiff's negligence could, by the use of ordinary care, have prevented the injury. Hall v. Washington Water Power Co., 89 P. 553, 46 Wash. 207. In an action against a street railroad company for injuries received while driving on the track, defendant's request for a ruling that, if plaintiff intrusted the care of the horse to the driver, in order to recover she must show that he exercised due care and diligence, is properly refused, where the court instructed that, if plaintiff had authority or control over the driver, she could not recover where he was at fault, but if she had no authority or control, and was under no duty to warn him, and had no reason to suspect want of care and skill on his part, she could recover, although he was at fault. Miller v. Boston & N. St. Ry. Co., 83 N. E. 990, 197 Mass. 535. In action for injury when struck by automobile, plaintiff's refused instruction that, even if its speed was lawful and reasonable, defendant might be liable if injury resulted from his failure to keep sufficient lookout, was properly covered by other instructions that he should have kept a lookout, and should have used ordinary care to avoid injury. Coughlin v. Layton, 180 P. 805, 104 Kan. 752. A requested instruction, in an action for the overflow of plaintiffs' land, that, if the washing of plaintiffs' land was caused by the breaking of a milldam, the verdict should be for defendant, although defendant had, by obstructing the stream, diverted it towards the bank on plaintiffs' side, was substantially covered by an instruction that the verdict should be for defendant unless it had thrown dirt or other obstructions into the stream, and thereby diverted it and caused the water to overflow the land of plaintiffs, in which case the verdict should be for plaintiffs. Louisville & N. R. Co. v. Ponder, 104 S. W. 279, 31 Ky. Law Rep. 878. In a will contest, it was not error to refuse a charge consisting of a definition of undue influence and a proposition as to the influence resulting from relationship, where the definition of undue influence was fully covered by the court's general charge, since it would not be proper to repeat the one, and it was not incumbent on the court to separate the propositions. Goodloe v. Goodloe, 105 S. W. 533, 47 Tex. Civ. App. 493.

Illustrations of requested instructions not within rule. In detinue for oxen which plaintiff claimed were sold to him by a third person authorized by defendant to do so, a requested charge that, though the jury might believe that he made an admission of authority, plaintiff could not recover unless the jury was reasonably satisfied that he in fact authorized the sale, was not covered by a charge that the burden of proof was on plaintiff to prove to the reasonable satisfaction of the jury that defendant authorized the third person to sell the steers. Boswell v. Thompson, 49 So. 73, 160 Ala. 306. A charge that damages in a libel case could not be awarded for injury to plaintiff's business does not fairly cover the theory of a requested charge that plaintiff could not recover such damages unless the plaintiff at such time was in the exercise of or actually performing such business. Age-Herald Pub. Co. v. Waterman, 81 So. 621, 202 Ala. 665. In an action for the wrongful discharge of an employé under contract to act as general manager of defendant's stores, an instruction that, if the jury found and believed from the evidence that, because of employé's refusal to change his employment to one materially different and inferior from that which he had contracted for, the keys of the store in which his headquarters as general manager were located were demanded from and surrendered by him, the plaintiff was wrongfully discharged was not objectionable as being covered by the main charge, where no reference to the surrender of the keys was made in the main charge. Wolf Cigar Stores Co. v. Kramer, 109 S. W. 990, 50 Tex. Civ. App. 411. Where, in an action against a railroad for injuries to an employé through a defective car step, the charge permitted a recovery only on the facts and theory alleged by plaintiff, and instructed that, unless the jury believed the facts set forth, they should find for defendant, the refusal of a charge that plaintiff alleged that he was injured by reason of the step or stirrup on the car being loose and by his attempting to get on the car by putting his foot on the stirrup, and that in so doing the stirrup moved, and he was injured, and that, if the jury believed he was injured in any other manner than in the manner alleged by him, the verdict must be for defendant, was error. El Paso & S. W. R. Co. v. O'Keefe, 110 S. W. 1002, 50 Tex. Civ. App. 579. A requested instruction that the employer was only obliged to use reasonable care for the safety of the employé held not sufficiently covered by an instruction merely that the employer was not an insurer of the employé's safety. Mitchell v. T. A. Gillespie Co., 137 N. Y. S. 550, 152 App. Div. 536. In an action for injuries to a servant, alleged to be due to the defective condition of a car, it was error to refuse an instruction that defendant was not an insurer of plaintiff's safety, but was obliged only to exercise reasonable care to provide a reasonably safe car, and was not bound to know of hidden defects not discoverable by the exercise of reasonable care, on the ground that it was covered by a given instruction that if the car was reasonably safe on the morning of the day of plaintiff's injury, and became out of repair later, so as to cause the accident, plaintiff could not recover unless defendant knew, or by the exercise of reasonable care might have known, of its defects. Clippard v. St. Louis Transit Co., 101 S. W. 44, 202 Mo. 432. Where, in an action for injuries to a pedestrian falling into a drain on the side of a public highway, there was evidence that she became confused and lost all sense of direction, and stumbled along in the dark without knowing where she was going and fell into the ditch, and that she knew of its existence near by, the refusal to charge that if she realized that she was confused, and did not know where she was going, but continued blindly, she was guilty of contributory negligence, was reversible error, though the court charged generally on contributory negligence. Hunt v. Douglass Tp., 130 N. W. 648, 165 Mich. 187. Instructions that the presumption of negligence arising from evidence that fire was communicated from defendant's engines was rebuttable, and might be overcome by

principles in as favorable a form to the party making the request as the instructions offered,[14] although the instruction refused embraces correct legal doctrine.[15]

proof that the engines alleged to have caused the fire were properly constructed, and had the most approved appliances for arresting sparks, and were carefully operated in a skillful manner by competent employés, that defendant was not bound to use the best and most approved appliances, but was bound to exercise reasonable care in obtaining the most approved mechanical engines and appliances to prevent the escape of fire and putting them into practical use, and that the gist of the action was negligence, which must be sustained by proof, as defendant could not be liable for unavoidable or unusual consequences of the proper operation of his trains, did not cover a requested charge that if the jury found defendant's servants, in operating the train in question, acted as reasonably prudent and careful persons having due regard of the rights of others would have acted under the same circumstances, defendant was not negligent, and that if defendant actually used on the engine the most approved appliances to arrest fire, or had exercised reasonable care and diligence to obtain and use them, defendant was not negligent in that respect, and the refusal of such request was error. Chenoweth v. Southern Pac. Co., 99 P. 86, 53 Or. 111. In action for injuries resulting from collision between automobiles, in which it was shown that a defendant, in whose car plaintiff was a passenger, turned to the left, a requested instruction that driver of car of other defendant could assume that a turn to the right would be made until such time as that an ordinarily prudent person would know otherwise, is not covered by given instruction in abstract terms of duty to avoid injury. John v. Pierce, 178 N. W. 297, 172 Wis. 44.

[14] Haman v. Preston, 173 N. W. 894, 186 Iowa, 1292; Fred Mercer Dry Goods Co. v. Fikes (Tex. Civ. App.) 211 S. W. 830.

[15] **U. S.** Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Chicago & N. W. R. Co. v. Whitton, 80 U. S. (13 Wall.) 270, 20 L. Ed. 571; St. Louis Public Schools v. Risley, 77 U. S. (10 Wall.) 91, 19 L. Ed. 850; Laber v. Cooper, 74 U. S. (7 Wall.) 565, 19 L. Ed. 151; Jelke v. United States, 255 F. 264, 166 C. C. A. 434.

Ark. Crisman v. McDonald, 28 Ark. 8.

Cal. People v. Shortridge, 177 P. 458, 179 Cal. 507.

Fla. Atlantic Coast Line R. Co. v. Dees, 48 So. 28, 56 Fla. 127; Seaboard Air Line Ry. v. Scarborough, 42 So. 706, 52 Fla. 425.

Ga. Henderson v. Francis, 75 Ga. 178; Powers v. State, 44 Ga. 209.

Ill. Town of Normal v. Bright, 79 N. E. 90, 223 Ill. 99, affirming judgment 125 Ill. App. 478; Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850; Germania Fire Ins. Co. v. Hick, 125 Ill. 361, 17 N. E. 792, 8 Am. St. Rep. 384; Fairbank Canning Co. v. Innes, 125 Ill. 410, 17 N. E. 720; Brace v. Black, 125 Ill. 33, 17 N. E. 66; City of Sterling v. Merrill, 124 Ill. 522, 17 N. E. 6, affirming 25 Ill. App. 596; Keeler v. Stuppe, 86 Ill. 309; Prior v. White, 12 Ill. 261; Andrews v. City of White Hall, 184 Ill. App. 298; Chicago City Ry. Co. v. Kastrzewa, 141 Ill. App. 10.

Ind. Deep Vein Coal Co. v. Ward (App.) 123 N. E. 228; Cleveland, C. C. & St. L. Ry. Co. v. Schneider, 82 N. E. 538, 40 Ind. App. 524; White v. Gregory, 126 Ind. 95, 25 N. E. 806.

Iowa. Parsons v. Thomas, 62 Iowa, 319, 17 N. W. 526.

Kan. Sibley v. Kansas City Cotton Mills Co., 116 P. 889, 85 Kan. 256; City of Emporia v. Schmidling, 33 Kan. 485, 6 P. 893.

Ky. Stafford v. Hussey, 33 S. W. 1115, 17 Ky. Law Rep. 1194.

Md. Mason v. Poulson, 43 Md. 161; Philadelphia, W. & B. R. Co. v. Harper, 29 Md. 330; Baltimore & O. R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578; Pettigrew v. Bar-

The above rule applies in criminal prosecutions,[16] and in a crim-

num, 11 Md. 434, 69 Am. Dec. 212; Mutual Safety Ins. Co. v. Cohen, 3 Gill, 459, 43 Am. Dec. 341.

Mich. Westra v. Westra's Estate, 101 Mich. 526, 60 N. W. 55; Anderson v. Walter, 34 Mich. 113.

Mo. Levering v. Union Transp. & Ins. Co., 42 Mo. 88, 97 Am. Dec. 320; Bay v. Sullivan, 30 Mo. 191; Carroll v. Paul's Adm'r, 19 Mo. 102; Young v. White, 18 Mo. 93; Phillips v. Smoot, 15 Mo. 598; Pond v. Wyman, 15 Mo. 175; Flynn v. St. Louis & S. F. Ry. Co., 43 Mo. App. 424; Teichman Commission Co. v. American Bank, 35 Mo. App. 472.

Neb. Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; Hitchcock v. Hassler, 16 Neb. 467, 20 N. W. 396.

N. J. Smith v. Irwin, 51 N. J. Law (22 Vroom) 507, 18 A. 852, 14 Am. St. Rep. 699.

N. Y. Garbaczewski v. Third Ave. R. Co., 5 App. Div. 186, 39 N. Y. S. 33.

N. C. Muse v. Seaboard Air Line Ry., 63 S. E. 102, 149 N. C. 443, 19 L. R. A. (N. S.) 453; Redmond v. Stepp, 100 N. C. 212, 6 S. E. 727.

Ohio. United States Home & Dower Ass'n v. Kirk, 8 Ohio Dec. 592, 9 Wkly. Law Bul. 48.

Or. Roth v. Northern Pacific Lumbering Co., 18 Or. 205, 22 P. 842.

Tex. Blackwell v. Speer (Civ. App.) 98 S. W. 903; Gulf, C. & S. F. Ry. Co. v. Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699; Bewley v. Massie (Civ. App.) 31 S. W. 1086; Wilson v. Lorane, 15 Tex. 492; Robinson v. State, 15 Tex. 311; Austin City Water Co. v. Capital Ice Co., 1 White & W. Civ. Cas. Ct. App. § 1132.

Utah. Cunningham v. Union Pac. Ry. Co., 4 Utah, 206, 7 P. 795.

Va. Harman v. Cundiff, 82 Va. 239.

[16] **U. S.** Sugarman v. United States, 39 S. Ct. 191, 249 U. S. 182, 63 L. Ed. 550, dismissing writ of error United States v. Sugarman (D. C. Minn.) 245 F. 604; Humes v. United States, 18 S. Ct. 602, 170 U. S. 210, 42 L. Ed. 1011; (C. C. A. Alaska) Stockslager v. United States, 116 F. 590, 54 C. C. A. 46; (C. C. A. Cal.) Pappens v. United States, 252 F. 55, 164 C. C. A. 167; Dimmick v. United States, 135 F. 257, 70 C. C. A. 141; (C. C. A. Ga.) Lamb v. U. S., 204 F. 660; (C. C. A. Ind.) Brown v. United States, 142 F. 1, 73 C. C. A. 187; (C. C. A. La.) Apgar v. United States, 255 F. 16, 166 C. C. A. 344, certiorari denied 39 S. Ct. 492, 250 U. S. 642, 63 L. Ed. 1185; Le More v. United States, 253 F. 887, 165 C. C. A. 367, certiorari denied 39 S. Ct. 184, 248 U. S. 586, 63 L. Ed. 434; Alexis v. United States, 129 F. 60, 63 C. C. A. 502; (C. C. A. Mo.) Hamilton v. United States, 255 F. 511, 167 C. C. A. 1, certiorari denied 39 S. Ct. 291, 249 U. S. 610, 63 L. Ed. 800; Dr. J. H. McLean Medicine Co. v. United States, 253 F. 694, 165 C. C. A. 288; (D. C. N. J.) United States v. Le Fanti, 255 F. 210, judgment affirmed Le Fanti v. United States, 259 F. 460, 170 C. C. A. 436; (C. C. A. N. Y.) Browne v. United States, 145 F. 1, 76 C. C. A. 31, affirming judgments United States v. Rosenthal (C. C.) 126 F. 766, and United States v. Cohn (C. C.) 128 F. 615; (C. C. A. N. D.) O'Hare v. United States, 253 F. 538, 165 C. C. A. 208, certiorari denied 39 S. Ct. 257, 249 U. S. 598, 63 L. Ed. 795; (C. C. A. Ohio) Shea v. United States, 251 F. 440, 163 C. C. A. 458, writ of certiorari denied 39 S. Ct. 132, 248 U. S. 581, 63 L. Ed. 431; (C. C. A. Okl.) Bradley v. United States, 254 F. 289, 165 C. C. A. 577; (C. C. A. Tex.) Roberts v. United States, 126 F. 897, 61 C. C. A. 427; (C. C. A. Wash.) Wells v. United States, 257 F. 605, 168 C. C. A. 555; (C. C. A. W. Va.) Showalter v. U. S., 260 F. 719, 171 C. C. A. 457, certiorari denied 40 S. Ct. 14, 250 U. S. 672, 63 L. Ed. 1200.

Ala. Castona v. State, 84 So. 871, 17 Ala. App. 421; Evans v. State, 82 So. 645, 17 Ala. App. 155; Id., 82 So. 625, 17 Ala. App. 141; Buckner v. State, 81 So. 687, 17 Ala. App. 57; Crawley v. State, 79 So. 804, 16 Ala. App. 545, certiorari denied Ex parte Crawley, 80 So. 893, 202 Ala. 698; Craut v. State, 79 So. 768, 16 Ala. App. 548; Barnett v. State, 79 So. 675, 16 Ala. App. 539, certiorari de-

inal case it is not reversible error to refuse an instruction requested

nied State v. Barnett, 79 So. 677, 202 Ala. 191; Kuhn v. State, 79 So. 394, 16 Ala. App. 489, certiorari denied 79 So. 877, 202 Ala. 697; Hardley v. State, 79 So. 362, 202 Ala. 24; Tucker v. State, 79 So. 303, 202 Ala. 5; Grizzard v. State, 79 So. 266, 16 Ala. App. 505; Moore v. State, 79 So. 201, 16 Ala. App. 503; Sims v. State, 41 So. 413, 146 Ala. 109; Patterson v. State, 41 So. 157, 146 Ala. 39; Whatley v. State, 39 So. 1014, 144 Ala. 68; Parrish v. State, 36 So. 1012, 139 Ala. 16; Rollings v. State, 34 So. 349, 136 Ala. 126; Jacobi v. State, 32 So. 158, 133 Ala. 1; Winter v. Same, 32 So. 125, 133 Ala. 176; Ragland v. State, 27 So. 983, 125 Ala. 12; Liner v. State, 27 So. 438, 124 Ala. 1; Lodge v. State, 26 So. 200, 122 Ala. 107; Koch v. State, 22 So. 471, 115 Ala. 99.

Ariz. Sheehy v. Territory, 80 P. 356, 9 Ariz. 269; Elias v. Territory, 76 P. 605, 9 Ariz. 1, 11 Ann. Cas. 1153.

Ark. Paxton v. State, 224 S. W. 437; Jordan v. State, 217 S. W. 788, 141 Ark. 504; McCully v. State, 217 S. W. 453, 141 Ark. 450; Dean v. State, 214 S. W. 38, 139 Ark. 433; Howard v. State, 208 S. W. 293, 137 Ark. 111; Lind v. State, 207 S. W. 47, 137 Ark. 92; Barker v. State, 205 S. W. 805, 135 Ark. 404; Lasater v. State, 94 S. W. 59, 77 Ark. 468; Holland v. State, 84 S. W. 468, 73 Ark. 425; Furlow v. State, 81 S. W. 232, 72 Ark. 384.

Cal. People v. Nunes (App.) 190 P. 486; People v. Luttrell (App.) 183 P. 681; People v. Bonfanti, 181 P. 80, 40 Cal. App. 614; People v. Bernal, 180 P. 825, 40 Cal. App. 358; People v. Seeley, 179 P. 541, 39 Cal. App. 586; People v. Tyren, 178 P. 132, 179 Cal. 575; People v. Hartwell, 177 P. 885, 39 Cal. App. 24; People v. Votaw, 177 P. 485, 38 Cal. App. 714; People v. Swenson, 173 P. 934, 37 Cal. App. 262; People v. Castile, 86 P. 746, 3 Cal. App. 487; People v. Castile, 86 P. 745, 3 Cal. App. 485; People v. Cook, 83 P. 43, 148 Cal. 334; People v. Jailles, 79 P. 965, 146 Cal. 301; People v. Donnolly, 77 P. 177, 143 Cal. 394; People v. Buckley, 77 P. 169, 143 Cal. 375; People v. Amaya, 66 P. 794, 134 Cal. 531; People v. Ross, 66 P. 229, 134 Cal. 256; People v. Clementshaw, 59 Cal. 385.

Colo. Covington v. People, 85 P. 832, 36 Colo. 183; Thompson v. People, 59 P. 51, 26 Colo. 496.

Conn. State v. Laudano, 51 A. 860, 74 Conn. 638.

D. C. Norman v. United States, 20 App. D. C. 494; Howgate v. United States, 7 App. D. C. 217; Travers v. United States, 6 App. D. C. 450.

Fla. Hall v. State, 83 So. 513, 78 Fla. 420, 8 A. L. R. 1234; Howard v. State, 83 So. 297, 78 Fla. 413; Long v. State, 83 So. 293, 78 Fla. 464; Russell v. State, 82 So. 805, 78 Fla. 223; Miller v. State, 80 So. 314, 76 Fla. 518; Maloy v. State, 41 So. 791, 52 Fla. 101; Blanton v. State, 41 So. 789, 52 Fla. 12; Robinson v. State, 39 So. 465, 50 Fla. 115; Jordan v. State, 39 So. 155, 50 Fla. 94; Snelling v. State, 37 So. 917, 49 Fla. 34; Starke v. State, 37 So. 850, 49 Fla. 41; Harmon v. State, 37 So. 520, 48 Fla. 44; Parnell v. State, 36 So. 165, 47 Fla. 90; Peaden v. State, 35 So. 204, 46 Fla. 124; Sylvester v. State, 35 So. 142, 46 Fla. 166; Brown v. State, 35 So. 82, 46 Fla. 159; Driggers v. State, 20 So. 758, 38 Fla. 7.

Ga. Hollingsworth v. State, 101 S. E. 115, 149 Ga. 512; Brown v. State, 100 S. E. 452, 24 Ga. App. 268; Phillips v. State, 99 S. E. 874, 149 Ga. 255; Wooten v. State, 99 S. E. 316, 23 Ga. App. 768; Smith v. State, 99 S. E. 142, 23 Ga. App. 541; Cook v. State, 97 S. E. 264, 22 Ga. App. 770; Coppedge v. State, 96 S. E. 1046, 22 Ga. App. 631; Darby v. State, 96 S. E. 707, 22 Ga. App. 606; Fordham v. State, 54 S. E. 694, 125 Ga. 791; White v. State, 54 S. E. 188, 125 Ga. 256; Napper v. State, 51 S. E. 592, 123 Ga. 571; McDuffie v. State, 49 S. E. 708, 121 Ga. 580; Griner v. State, 49 S. E. 700, 121 Ga. 614; Pike v. State, 49 S. E. 680, 121 Ga. 604; Jordan v. State, 48 S. E. 352, 120 Ga. 864; May v. State, 47 S. E. 548, 120 Ga. 135; Johnson v. State, 47 S. E. 510, 120 Ga. 135; Taylor v. State, 25 S. E. 320, 97 Ga. 432.

Idaho. State v. Cotterel, 86 P.

by the defendant, if one given for the state contains the same

527, 12 Idaho, 572; State v. Roland, 83 P. 337, 11 Idaho, 490; State v. Rooke, 79 P. 82, 10 Idaho, 388; State v. Rathbone, 67 P. 186, 8 Idaho, 161; State v. Lyons, 64 P. 236, 7 Idaho, 530.

Ill. People v. Marx, 125 N. E. 719, 291 Ill. 40; People v. Meyer, 124 N. E. 447, 289 Ill. 184; People v. Foster, 123 N. E. 534, 288 Ill. 371; People v. Dear, 121 N. E. 615, 286 Ill. 142, writ of error dismissed Dear v. People of State of Illinois, 39 S. Ct. 493, 250 U. S. 665, 63 L. Ed. 1182; People v. Findley, 121 N. E. 608, 286 Ill. 368; People v. Bopp, 120 N. E. 790, 285 Ill. 396; People v. Robertson, 120 N. E. 539, 284 Ill. 620, affirming judgment 210 Ill. App. 234; People v. Grove, 120 N. E. 277, 284 Ill. 429; Spears v. People, 77 N. E. 112, 220 Ill. 72, 4 L. R. A. (N. S.) 402; Mash v. People, 77 N. E. 92, 220 Ill. 86; Hoch v. People, 76 N. E. 356, 219 Ill. 265, 109 Am. St. Rep. 327; Parsons v. People, 75 N. E. 993, 218 Ill. 386; Donovan v. People, 74 N. E. 772, 215 Ill. 520; Kyle v. People, 74 N. E. 146, 215 Ill. 250; Delahoyde v. People, 72 N. E. 732, 212 Ill. 554; Moore v. People, 60 N. E. 535, 190 Ill. 331; Schintz v. People, 52 N. E. 903, 178 Ill. 320; People v. Susmarski, 210 Ill. App. 233; People v. Jones, 207 Ill. App. 218.

Ind. Bush v. State (Sup.) 128 N. E. 443; Jackson v. State, 121 N. E. 114, 187 Ind. 694; Guy v. State, 77 N. E. 855, 37 Ind. App. 691; Coolman v. State, 72 N. E. 568, 163 Ind. 503; Ginn v. State, 68 N. E. 294, 161 Ind. 292; Musser v. State, 61 N. E. 1, 157 Ind. 423; Whitney v. State, 57 N. E. 398, 154 Ind. 573; Blume v. State, 56 N. E. 771, 154 Ind. 343; Thrawley v. State, 55 N. E. 95, 153 Ind. 375; Cromer v. State, 52 N. E. 239, 21 Ind. App. 502; Hinshaw v. State, 47 N. E. 157, 147 Ind. 334; Siberry v. State, 39 N. E. 936, 149 Ind. 684; Richie v. State, 58 Ind. 355.

Ind. T. Jennings v. United States, 53 S. W. 456, 2 Ind. T. 670.

Iowa. State v. Schumann, 175 N. W. 75, 187 Iowa, 1212; State v. Athey, 108 N. W. 224, 133 Iowa, 382; State v. Linhoff, 97 N. W. 77, 121 Iowa, 632; State v. Soper, 91 N. W. 774, 118 Iowa, 1; State v. Maxwell, 91 N. W. 772, 117 Iowa, 482; State v. Comer, 90 N. W. 825; State v. Shunka, 89 N. W. 977, 116 Iowa, 206; State v. Mulholland, 88 N. W. 325, 115 Iowa, 170; State v. Easton, 85 N. W. 795, 113 Iowa, 516, 86 Am. St. Rep. 389, reversed Easton v. State of Iowa, 23 S. Ct. 288, 188 U. S. 220, 47 L. Ed. 452; State v. Hamann, 85 N. W. 614, 113 Iowa, 367; State v. Petersen, 82 N. W. 329, 110 Iowa, 647; State v. Fogerty, 74 N. W. 754, 105 Iowa, 32; State v. Case, 68 N. W. 434, 99 Iowa, 743.

Kan. State v. Tucker, 84 P. 126, 72 Kan. 481; State v. Buffington, 81 P. 465, 71 Kan. 804, 4 L. R. A. (N. S.) 154; State v. Appleton, 78 P. 445, 70 Kan. 217; State v. Elliott, 64 P. 1027, 63 Kan. 879; State v. Start, 63 P. 448, 10 Kan. App. 583; State v. Tulip, 60 P. 659, 9 Kan. App. 454.

Ky. Thomas v. Commonwealth, 214 S. W. 929, 185 Ky. 226; Ulrich v. Commonwealth, 205 S. W. 586, 181 Ky. 519; Havens v. Commonwealth, 82 S. W. 369, 26 Ky. Law Rep. 706; Alderson v. Commonwealth, 74 S. W. 679, 25 Ky. Law Rep. 32; Stevens v. Commonwealth, 45 S. W. 76, 20 Ky. Law Rep. 48; Temple v. Commonwealth, 14 Bush, 769, 29 Am. Rep. 442.

La. State v. Le Blanc, 41 So. 105, 116 La. 822; State v. Aspara, 37 So. 883, 113 La. 940; State v. Guidor, 37 So. 622, 113 La. 727; State v. Woods, 36 So. 626, 112 La. 617; State v. Brown, 35 So. 501, 111 La. 170; State v. Sims, 31 So. 645, 107 La. 188; State v. Cain, 31 So. 300, 106 La. 708.

Mass. Commonwealth v. Magoon, 51 N. E. 1082, 172 Mass. 214; Commonwealth v. Burns, 167 Mass. 374, 45 N. E. 755; Commonwealth v. Dill, 156 Mass. 226, 30 N. E. 1016.

Mich. People v. Rice, 173 N. W. 495, 206 Mich. 644; People v. Hawks, 172 N. W. 405, 206 Mich. 233; People v. Hutchings, 100 N. W. 753, 137 Mich. 527; People v. Hilliard, 77 N. W. 306, 119 Mich. 24; People v. Swartz, 76 N. W. 491, 118 Mich. 292;

legal principle and is aptly drawn, intelligible, and pertinent.[17] In Alabama the rule of the text is embodied in statutory form.[18]

People v. Hughes, 74 N. W. 309, 116 Mich. 80; People v. Hare, 24 N. W. 843, 57 Mich. 505; People v. Marion, 29 Mich. 31.

Minn. State v. Ronk, 98 N. W. 334, 91 Minn. 419.

Miss. Schrader v. State, 36 So. 385, 84 Miss. 593.

Mo. State v. Gallagher (Sup.) 222 S. W. 465; State v. Canton (Sup.) 222 S. W. 448; State v. Dooms, 217 S. W. 43, 280 Mo. 84; State v. Conley, 217 S. W. 29, 280 Mo. 21; State v. Cole (Sup.) 213 S. W. 110; State v. Bowman, 213 S. W. 64, 278 Mo. 492; State v. Mastin, 211 S. W. 15, 277 Mo. 495; State v. Jones, 207 S. W. 793, 276 Mo. 299; State v. Yocum (App.) 205 S. W. 232; State v. Martin (Sup.) 204 S. W. 537; State v. Barrington, 95 S. W. 235, 198 Mo. 23, writ of error dismissed 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890; State v. Valle, 93 S. W. 1115, 196 Mo. 29; State v. Maupin, 93 S. W. 379, 196 Mo. 164; State v. Davis, 92 S. W. 484, 194 Mo. 485, 4 L. R. A. (N. S.) 1023, 5 Ann. Cas. 1000; State v. Day, 87 S. W. 465, 188 Mo. 359; State v. Atchley, 84 S. W. 984, 186 Mo. 174; State v. Brown, 79 S. W. 1111, 181 Mo. 192; State v. Bauerle, 145 Mo. 1, 46 S. W. 609; State v. Breitweiser, 88 Mo. App. 648; State v. Baber, 11 Mo. App. 586.

Mont. State v. Kahn, 182 P. 107, 56 Mont. 108; State v. Kremer, 85 P. 736, 34 Mont. 6; State v. Martin, 74 P. 725, 29 Mont. 273; State v. Dotson, 67 P. 938, 26 Mont. 305; State v. Howell, 66 P. 291, 26 Mont. 3; State v. Mahoney, 61 P. 647, 24 Mont. 281; State v. Bowser, 53 P. 179, 21 Mont. 133.

Neb. Neal v. State, 175 N. W. 669, 104 Neb. 56; Williams v. State, 174 N. W. 302, 103 Neb. 710; Reed v. State, 106 N. W. 649, 75 Neb. 509; Sweet v. State, 106 N. W. 31, 75 Neb. 263; Keeler v. State, 103 N. W. 64, 73 Neb. 441; Palmer v. State, 97 N. W. 235, 70 Neb. 136; Lamb v. State, 95 N. W. 1050, 69 Neb. 212; McCormick v. State, 92 N. W. 606, 66 Neb. 337; Rhea v. State, 88 N. W. 789, 63 Neb. 461; Argabright v. State, 87 N. W. 146, 62 Neb. 402; Coil v. State, 86 N. W. 925, 62 Neb. 15; Chapman v. State, 86 N. W. 907, 61 Neb. 888; Spaulding v. State, 85 N. W. 80, 61 Neb. 289; Smith v. State, 85 N. W. 49, 61 Neb. 296; Kastner v. State, 79 N. W. 713, 58 Neb. 767.

Nev. State v. Burns, 74 P. 983, 27 Nev. 289; State v. Buraill, 71 P. 532, 27 Nev. 41; State v. Maher, 62 P. 236, 25 Nev. 465.

N. H. State v. Buzzell, 59 N. H. 65.

N. J. State v. Haines, 106 A. 27, 92 N. J. Law, 642.

N. M. State v. Martino, 192 P. 507; State v. Goodrich, 176 P. 813, 24 N. M. 660; State v. Sedillo, 174 P. 985, 24 N. M. 549; State v. Starr, 173 P. 674, 24 N. M. 180; Miera v. Territory, 81 P. 586, 13 N. M. 192; Territory v. Taylor, 71 P. 489, 11 N. M. 588.

N. Y. People v. Ammon, 71 N. E. 1135, 179 N. Y. 540, affirming judgment 87 N. Y. S. 358, 92 App. Div. 205; People v. Benham, 55 N. E. 11, 160 N. Y. 402; People v. Polstein, 171 N. Y. S. 501, 184 App. Div. 260; People v. Conrad, 92 N. Y. S. 606, 102 App. Div. 566, affirmed 74 N. E. 1122, 182 N. Y. 529; People v. Ammon, 87 N. Y. S. 358, 92 App. Div. 205, affirmed 71 N. E. 1135, 179 N. Y. 540; People v. Mills, 3 N. Y. Cr. R. 184.

N. C. State v. Baldwin, 100 S. E. 345, 178 N. C. 693; State v. Booker, 31 S. E. 376, 123 N. C. 713.

Ohio. Donald v. State, 21 Ohio Cir. Ct. R. 124, 11 O. C. D. 483.

Okl. Lamb v. State, 185 P. 1101, 16 Okl. Cr. 724; Welch v. State, 185 P. 119, 16 Okl. Cr. 513; Creek v. State, 184 P. 917, 16 Okl. Cr. 492; Johnson v. State, 183 P. 926, 16 Okl.

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[17] State v. Rice, 98 S. E. 432, 83 W. Va. 409.

[18] Welch v. Evans Bros. Const. Co., 78 So. 850, 201 Ala. 496; Hood & Wheeler Furniture Co. v. Royal, 76 So. 965, 200 Ala. 607; Southern Ry. Co. v. Fisher, 74 So. 580, 199 Ala. 377.

It is enough that the court by its charge concretely applies to the facts the principle of law which a party attempts to state ab-

Cr. 428; Harding v. State, 150 P. 391, 16 Okl. Cr. 47; Conley v. State, 179 P. 480, 15 Okl. Cr. 531; Clingan v. State, 178 P. 486, 15 Okl. Cr. 483; McClatchey v. State, 177 P. 922, 15 Okl. Cr. 448; Davis v. State, 177 P. 621, 15 Okl. Cr. 386; Lewis v. State, 174 P. 1094, 15 Okl. Cr. 1; Morgan v. Territory, 85 P. 718, 16 Okl. 530; Robinson v. Territory, 85 P. 451, 16 Okl. 241, reversed 148 F. 830, 78 C. C. A. 520; Wells v. Territory, 78 P. 124, 14 Okl. 436; Queenan v. Territory, 71 P. 218, 11 Okl. 261, 61 L. R. A. 324, judgment affirmed 23 S. Ct. 762, 190 U. S. 548, 47 L. Ed. 1175; Watkins v. United States, 50 P. 88, 5 Okl. 729.

Or. State v. Stickel, 176 P. 799, 99 Or. 415; State v. Gray, 79 P. 53, 46 Or. 24; State v. Eggleston, 77 P. 738, 45 Or. 346; State v. Sally, 70 P. 396, 41 Or. 366; State v. McDaniel, 56 P. 520, 39 Or. 161; State v. Tucker, 61 P. 894, 36 Or. 291, 51 L. R. A. 246; State v. Magers, 58 P. 892, 36 Or. 38; State v. Branton, 56 P. 267, 33 Or. 533.

Pa. Commonwealth v. Danz, 60 A. 1070, 211 Pa. 507.

R. I. State v. Quigley, 58 A. 905, 26 R. I. 263, 67 L. R. A. 322, 3 Ann. Cas. 920.

S. C. State v. Ready, 96 S. E. 287, 110 S. C. 177; State v. Dean, 51 S. E. 524, 72 S. C. 74; State v. Gadsen, 50 S. E. 16, 70 S. C. 430.

S. D. State v. Larson, 172 N. W. 114, 41 S. D. 553.

Tex. Earnest v. State, 224 S. W. 777, 87 Tex. Cr. R. 651; Narango v. State, 222 S. W. 564, 87 Tex. Cr. R. 493; Dollar v. State, 216 S. W. 1089, 86 Tex. Cr. R. 398; McCormick v. State, 216 S. W. 871, 86 Tex. Cr. R. 366; Brown v. State, 215 S. W. 97, 85 Tex. Cr. R. 618; Gribble v. State, 210 S. W. 215, 85 Tex. Cr. R. 52, 3 A. L. R. 1096; Alsup v. State, 210 S. W. 195, 85 Tex. Cr. R. 36; Gill v. State, 208 S. W. 926, 84 Tex. Cr. R. 531; Roach v. State, 208 S. W. 520, 84 Tex. Cr. R. 471; Ice v. State, 208 S. W. 343, 84 Tex. Cr. R. 509; Rice v. State, 94 S. W. 1024, 49 Tex. Cr. R. 569; Counts v. State, 94 S. W. 220, 49 Tex. Cr. R. 329; Willis v. State, 90 S. W. 1100, 49 Tex. Cr. R. 139; Grant v. State, 89 S. W. 274, 48 Tex. Cr. R. 418; Tones v. State, 88 S. W. 217, 48 Tex. Cr. R. 363, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455; Sanders v. State (Cr. App.) 85 S. W. 1147; Johnson v. State, 84 S. W. 824, 47 Tex. Cr. R. 523; Wright v. State, 84 S. W. 593, 47 Tex. Cr. R. 433; Bearden v. State, 83 S. W. 808, 47 Tex. Cr. R. 271; Kimberlain v. State, 82 S. W. 1043, 47 Tex. Cr. R. 235; Becknell v. State, 82 S. W. 1039, 47 Tex. Cr. R. 240; Fine v. State (Cr. App.) 81 S. W. 723; Teague v. State, 4 Tex. App. 147.

Utah. State v. Morgan, 74 P. 526, 27 Utah, 103; State v. Haworth, 68 P. 155, 24 Utah, 398; People v. Callaghan, 6 P. 49, 4 Utah, 49.

Vt. State v. Warm, 105 A. 244, 92 Vt. 447, 2 A. L. R. 811.

Va. Lufty v. Commonwealth, 100 S. E. 829, 126 Va. 707; Karnes v. Commonwealth, 99 S. E. 562, 125 Va. 758, 4 A. L. R. 1509; Robinson v. Commonwealth, 52 S. E. 690, 104 Va. 888; McCue v. Commonwealth, 49 S. E. 623, 103 Va. 870; Litton v. Commonwealth, 44 S. E. 923, 101 Va. 833; Longley v. Commonwealth, 37 S. E. 339, 99 Va. 807.

Wash. State v. Storrs, 192 P. 984, 112 Wash. 675; State v. Vane, 178 P. 456, 105 Wash. 421; State v. Vane, 177 P. 728, 105 Wash. 170; State v. Palmer, 176 P. 547, 105 Wash. 396; State v. Armstrong, 79 P. 490, 37 Wash. 51; State v. Clark, 76 P. 98, 34 Wash. 485, 101 Am. St. Rep. 1006; State v. Vance, 70 P. 34, 29 Wash. 435; State v. Webb, 55 P. 935, 20 Wash. 500; State v. Cushing, 50 P. 512, 17 Wash. 544.

W. Va. State v. Vineyard, 101 S. E. 440, 85 W. Va. 293; State v. Panetta, 101 S. E. 360, 85 W. Va. 212; State v. Dillard, 53 S. E. 117, 59 W. Va. 197; State v. Cottrill, 43 S. E. 244, 52 W. Va. 363; State v. Clark, 41 S. E. 204, 51 W. Va. 457; State v. Sheppard, 39 S. E. 676, 49 W. Va.

stractly in his request to warrant a refusal of the request,[19] and where instructions sufficiently set forth the concrete claims of a party to give the jury a proper understanding of the issues, it is not error to refuse instructions stating the claimed facts more in detail.[20]

§ 500. Specific applications of rule

The above rule has been applied in civil cases to sustain the refusal of the trial court to instruct on the issue of the abandonment of a contract,[21] on whether a broker suing for commissions was the procuring cause of a sale,[22] on the issue of the liability of a carrier for injuries to live stock,[23] on the care required to prevent injuries by fire,[24] on the care required from a master in supplying a safe place to work,[25] on the duty of a locomotive engineer to heed stop signals,[26] on the duty of a city to place warning signals around obstructions in the street,[27] on the liability of a landowner for the diversion of surface water,[28] on the issue of remote and proximate cause,[29] on the issue of contributory negligence,[30]

582; State v. Staley, 32 S. E. 198, 45 W. Va. 792.

Wis. Roszczyniala v. State, 104 N. W. 113, 125 Wis. 414; Murphy v. State, 102 N. W. 1087, 124 Wis. 635; Suckow v. State, 99 N. W. 440, 122 Wis. 156; Lowe v. State, 96 N. W. 417, 118 Wis. 641; Bannen v. State, 91 N. W. 107, 115 Wis. 317, reversed 91 N. W. 965, 115 Wis. 317; Cornell v. State, 80 N. W. 745, 104 Wis. 527; Buel v. State, 80 N. W. 78, 104 Wis. 132.

Wyo. Horn v. State, 73 P. 705, 12 Wyo. 80.

[19] Condie v. Rio Grande Western Ry. Co., 97 P. 120, 34 Utah, 237.

[20] Hopson v. Union Traction Co., 167 P. 1059, 101 Kan. 499.

[21] Bush v. Wofford, 213 S. W. 751, 139 Ark. 330.

[22] Thomas v. Wyckoff, 174 N. W. 26, 187 Iowa, 148.

[23] Missouri Pac. R. Co. v. Hill, 215 S. W. 676, 144 Ark. 641.

[24] Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

[25] Seitz v. Pelligreen Const. & Inv. Co. (Mo. App.) 215 S. W. 485.

[26] McGillivray v. Great Northern Ry. Co., 176 N. W. 200, 145 Minn. 51.

[27] Emelle v. Salt Lake City, 181 P. 266, 54 Utah, 360.

[28] Rehfuss v. Weeks, 182 P. 137, 93 Or. 25.

[29] Tillery v. Harvey (Mo. App.) 214 S. W. 246.

Issue of whether carrier liable for injuries caused by wild and unruly nature of animals. In action for injuries to shipper of stock caused by a member of the train crew flashing his lantern at night before horses and mules on loading chute, causing them to rush back and trample plaintiff, who was loading them on the chute, a requested charge that, if plaintiff was injured as the "sole proximate cause" of the wild and unruly nature and disposition of the mules and horses, verdict should be for defendant, even though defendant was guilty of negligence was sufficiently presented by a charge that if their wild and unruly nature and disposition, if any, was the sole proximate cause of plaintiff's injuries, to find for defendant. Galveston, H. & S. A. Ry. Co. v. Wilson (Tex. Civ. App.) 214 S. W. 773.

[30] **Ark.** Central Coal & Coke Co. v. Burns, 215 S. W. 265, 140 Ark. 147.

Cal. Fernald v. Eaton & Smith, 180 P. 944, 40 Cal. App. 498.

S. D. True v. Chicago & N. W. Ry. Co., 173 N. W. 642, 42 S. D. 35.

Tex. Texas Power & Light Co. v.

on the effect of the knowledge by a pedestrian of defects in a street as precluding recovery for injuries caused thereby,[31] on the issue of comparative negligence,[32] on the question of the burden of proof,[33] on the question of the credibility of witnesses,[34] and to the refusal to give instructions defining words.[35]

Where the court defines proximate cause, and clearly states that contributory negligence will not defeat a recovery, unless concurrent with the negligence of the defendant, it is not required to also define proximate and remote cause, with special reference to the doctrine of last clear chance.[36]

In criminal cases it has been held proper, on the ground of instructions already given, to refuse instructions on the issue of self-defense or certain phases thereof,[37] on the necessity for corroboration of the testimony of an accomplice,[38] on the effect of the good character of defendant,[39] on the issue of the voluntary character of an admission or confession,[40] on the effect of an explanation of the possession of stolen property,[41] on circumstantial evidence,[42] on the doctrine of reasonable doubt,[43] on principals and accesso-

Bristow (Civ. App.) 213 S. W. 702; Texas Electric Ry. v. Hooks (Civ. App.) 211 S. W. 654.

Wash. Reames v. Heymanson, 186 P. 325, 109 Wash. 132.

[31] Junkins v. Inhabitants of Town of Stoneham, 125 N. E. 140, 234 Mass. 130.

[32] Western & A. R. Co. v. Jarrett, 100 S. E. 231, 24 Ga. App. 175.

[33] Haun v. Tally, 181 P. 81, 40 Cal. App. 585.

[34] King v. Metropolitan Life Ins. Co. (Mo. App.) 211 S. W. 721.

[35] Missouri Pac. R. Co. v. Carey, 212 S. W. 80, 138 Ark. 563; Ætna Life Ins. Co. v. McCullagh, 215 S. W. 821, 185 Ky. 664.

[36] Duprat v. Chesmore, 110 A. 305, 94 Vt. 218.

[37] **Ark.** Smith v. State, 213 S. W. 403, 139 Ark. 356.

Cal. People v. Hopper (App.) 183 P. 836.

Miss. Higgins v. State, 83 So. 245, 120 Miss. 823.

Tex. Bozeman v. State, 215 S. W. 319, 85 Tex. Cr. R. 653; Mauney v. State, 210 S. W. 959, 85 Tex. Cr. R. 184; Davis v. State, 204 S. W. 652, 83 Tex. Cr. R. 539.

Reasonableness of apprehension of danger. In a prosecution for murder there was no need for special charges telling the jury that they could consider the weakened condition of accused's mind in deciding whether to him the danger of death or serious bodily injury was real or apparent, the court having instructed that defendant be discharged if the conduct of the deceased produced in accused's mind a reasonable apprehension of fear of death or serious bodily injury, viewed from accused's standpoint alone. Zimmerman v. State, 215 S. W. 101, 85 Tex. Cr. R. 630.

[38] Housley v. State, 220 S. W. 460, 143 Ark. 425.

[39] Le More v. United States (C. C. A. La.) 253 F. 887, 165 C. C. A. 367, certiorari denied 39 S. Ct. 184, 248 U. S. 586, 63 L. Ed. 434; Phillips v. State, 99 S. E. 874, 149 Ga. 255; State v. Jones, 123 N. W. 960, 145 Iowa, 176; People v. Mathews, 174 N. W. 532, 207 Mich. 526.

[40] Hardin v. State, 211 S. W. 233, 85 Tex. Cr. R. 220, 4 A. L. R. 1308.

[41] Vaughn v. State, 208 S. W. 527, 84 Tex. Cr. R. 483.

[42] Porter v. State, 215 S. W. 201, 86 Tex. Cr. R. 23; State v. Turfey, 176 P. 563, 100 Wash. 5.

[43] **Ala.** Vaughn v. State, 84 So. 879, 17 Ala. App. 383.

Ark. Barker v. State, 205 S. W.

ries,[44] on the issue of included offenses,[45] and to the refusal to instruct the jury to disregard certain matters not in evidence.[46]

The denial of a request that evidence of the good character of the defendant may alone create a reasonable doubt is not error, where the court charges that the reputation of the accused for good character should be considered together with all the other evidence in the case, and that if the jury should have a reasonable doubt of his guilt he should be acquitted;[47] and where the court charges correctly upon reasonable doubt and the presumption of innocence, it is not error to refuse to instruct that defendant is presumed to be innocent, and that that presumption goes to the jury as independent evidence.[48] So an instruction that each juror should adhere to his own opinion until convinced beyond a reasonable doubt is covered by an instruction that the jury will not be justified in finding a verdict of guilty unless they are convinced by the evidence beyond a reasonable doubt.[49]

§ 501. Limitations of rule

Where instructions are asked by either party to a suit which correctly state the law on the issues presented and the evidence, it is error to exclude them, unless the points are fairly covered by other instructions given by the court on its own motion.[50] Within such rule it is not sufficient that the instruction requested is inferentially given in the main charge of the court,[51] or in other

805, 135 Ark. 404; Gramlich v. State, 204 S. W. 848, 135 Ark. 243.

Cal. People v. Epperson, 176 P. 702, 38 Cal. App. 486.

Fla. Witherspoon v. State, 80 So. 61, 76 Fla. 445; Street v. State, 79 So. 729, 76 Fla. 217.

Ga. Brown v. State, 96 S. E. 435, 148 Ga. 264.

Mo. State v. Finley, 213 S. W. 463, 278 Mo. 474.

N. J. State v. Runyon, 107 A. 33, 93 N. J. Law, 16.

Okl. Burton v. State, 185 P. 842, 16 Okl. Cr. 602; Bornheim v. State, 183 P. 514, 16 Okl. Cr. 704.

Pa. Commonwealth v. Ross, 110 A. 327, 266 Pa. 580.

W. Va. State v. Panetta, 101 S. E. 360, 85 W. Va. 212.

[44] State v. Stickel, 176 P. 799, 90 Or. 415.

[45] Morris v. State, 206 S. W. 82, 84 Tex. Cr. R. 100.

[46] Grammer v. State, 172 N. W. 41, 103 Neb. 325.

[47] Warren v. United States (C. C. A. Okl.) 250 F. 89, 162 C. C. A. 261.

[48] Hall v. State, 83 So. 513, 78 Fla. 420, 8 A. L. R. 1234.

[49] People v. Epperson, 176 P. 702, 38 Cal. App. 486.

[50] Struble v. Village of De Witt, 116 N. W. 154, 81 Neb. 504.

[51] State v. Williams, 169 N. W. 371, 184 Iowa, 1070; Isley v. Virginia Bridge & Iron Co., 55 S. E. 416, 143 N. C. 51.

Instructions improperly refused within rule. In an action for the malicious prosecution of a replevin suit, an instruction that the burden of proof was upon plaintiff was insufficient to justify the refusal of requests to charge that it was incumbent on plaintiff to show that defendants acted without probable cause. Harris v. Thomas, 103 N. W. 863, 140 Mich. 462. Though the court instructed that plaintiff could not recover for injuries received in a prior accident, the refusal to instruct that plaintiff

special requests which the court has granted,[52] and a requested instruction correctly defining the special rule of law on which a party relies, and grouping the facts to establish it, should not be refused because the jury might infer from the general charge that the requested rule is correct,[53] or because the court has made a general and abstractly correct presentation of the issues involved.[54]

The court should not refuse, as having been already more correctly given in accordance with the evidence, a correct instruction requested by the accused, when the charge given makes conditions that are not contained in the proffered instruction essential to an acquittal.[55]

Although, technically speaking, a general statement in a charge may be said to include the specific application of the law to the evidence in the case as expressed in a request, yet if it is probable that the jury will not understand that the request is included

could not recover for aggravation of previous injuries, not pleaded, was error. Boatright v. Portland Ry., Light & Power Co., 135 P. 771, 68 Or. 26.

[52] People v. Taleisnik, 122 N. E. 615, 225 N. Y. 489, reversing judgment (Sup.) 172 N. Y. S. 912.

[53] Yellow Pine Oil Co. v. Noble, 105 S. W. 318, 101 Tex. 125, affirming judgment (Civ. App.) 101 S. W. 276; El Paso & S. W. R. Co. v. Foth, 105 S. W. 322, 101 Tex. 133, reversing judgment (Civ. App.) 100 S. W. 171.

[54] Western Coal & Mining Co. v. Buchanan, 102 S. W. 694, 82 Ark. 499; Texas & N. O. R. Co. v. McAllister (Tex. Civ. App.) 183 S. W. 82; Atchison, T. & S. F. Ry. Co. v. Hill (Tex. Civ. App.) 171 S. W. 1028; J. H. W. Steele Co. v. Dover (Tex. Civ. App.) 170 S. W. 809.

Effect of general instruction as dispensing with specific instructions. In an action on an insurance policy, the company is entitled to a special instruction as to any defect in or failure to furnish proof of loss within time, although the court has given a general instruction on that point. American Fire Ins. Co. v. Haynie, 120 S. W. 825, 91 Ark. 43. It is error in an action for negligence to refuse a request of defendant pointing out the concrete question of fact as to which the parties differ, but on which the existence of negligence is predicated, and a statement to the jury in lieu thereof of a general rule of law in general terms is insufficient. Mellon v. Victor Talking Mach. Co., 73 A. 494, 77 N. J. Law, 670. In an action for failure to deliver a telegram, where it appeared that upon the receipt of the message defendant's agent made inquiry, and learned that the plaintiff lived in the country several miles away, and immediately mailed the message to him, and thereafter sent a service message to the plaintiff's agent, stating that the message was not delivered, and that the party lived in the country, and that he had mailed it to him, it was error for the court to refuse an instruction grouping these facts, and charging that, if the defendant's agent in so doing exercised such care as an ordinarily prudent person would have exercised under the same circumstances, the verdict should be for defendant, although the court had instructed in its main charge in general terms that, if the agent acted with such ordinary care and diligence in attempting to deliver the message as an ordinarily prudent person would have exercised, then the verdict should be for the defendant. Western Union Telegraph Co. v. Timmons, 125 S. W. 376, 59 Tex. Civ. App. 146.

[55] Marshall v. State, 32 Fla. 462, 14 So. 92.

in the general charge, it will be error to refuse the request.[56] Thus the giving of a general instruction, as required by a statute, that to recover the plaintiff must prove the material allegations of the complaint by a preponderance of the evidence, does not authorize the refusal of a particular instruction applicable to the evidence and issues,[57] and a general charge upon the issue of contributory negligence is not sufficient to warrant refusing a special charge upon the issue of assumption of risk.[58]

In a criminal case a pertinent charge adjusted to the particular facts relied on as a defense should be given on request, although the judge in his charge states generally the abstract principle of law applicable to the facts.[59] The right of a party to have given an instruction presenting his theory of the case is not impaired by the fact that instructions presenting practically the same legal propositions from the viewpoint of his adversary have been given.[60]

In some jurisdictions under statutory provisions the court is not justified, in a criminal case, in refusing a special charge because it is covered by a paragraph of the general charge of the court.[61]

I. Erroneous Requests

§ 502. Rule that such requests may be refused without attempt at correction

It is not the duty of the court to grant a request for an instruction which is incorrect or inaccurate in the form in which it is prayed.[62] It is therefore proper to refuse, as an entirety, an in-

[56] Simoneau v. Keene Electric Ry., 100 A. 551, 78 N. H. 363, L. R. A. 1918A, 620.

[57] Baltimore & O. R. Co. v. Peck, 101 N. E. 674, 53 Ind. App. 281.

[58] Cleburne Electric & Gas Co. v. McCoy (Tex. Civ. App.) 128 S. W. 457.

[59] Stribling v. State, 65 S. E. 1068, 6 Ga. App. 864.

[60] Fujise v. Los Angeles Ry. Co., 107 P. 317, 12 Cal. App. 207; Kemendo v. Fruit Dispatch Co., 131 S. W. 73, 61 Tex. Civ. App. 631; Northern Texas Traction Co. v. Moberly (Tex. Civ. App.) 109 S. W. 483.

[61] Snyder v. State, 40 So. 978, 145 Ala. 33; Orr v. State, 23 So. 696, 117 Ala. 69.

[62] **U. S.** (C. C. Mass.) Locke v. United States, Fed. Cas. No. 8,442, 2 Cliff. 574a.

Ark. Newman v. Peay, 176 S. W. 143, 117 Ark. 579.

D. C. Jackson v. U. S., 48 App. D. C. 272.

Ga. Spillar v. Dickson, 95 S. E. 994, 148 Ga. 90; Macon, D. & S. R. Co. v. Joyner, 59 S. E. 902, 129 Ga. 683.

Ind. Crumrine v. Crumrine's Estate, 43 N. E. 322, 14 Ind. App. 641; Keller v. Reynolds, 40 N. E. 76, 12 Ind. App. 383; Goodwine v. State, 5 Ind. App. 63, 31 N. E. 554; Mosier v. Stoll, 20 N. E. 752, 119 Ind. 244.

Iowa. Mickey v. City of Indianola, 114 N. W. 1072.

Kan. Douglas v. Wolf, 6 Kan. 88.

Mass. Martineau v. National Blank Book Co., 166 Mass. 4, 43 N. E. 513.

Mich. Brown v. Harris, 102 N. W. 960, 139 Mich. 372.

struction which is erroneous in part,[63] or which needs to be quali-

Mont. Herrin v. Sieben, 127 P. 323, 46 Mont. 226.

N. M. State v. Starr, 173 P. 674, 24 N. M. 180.

N. Y. Gardner v. Clark, 17 Barb. 538; Doughty v. Hope, 3 Denio, 594.

R. I. Perry v. Sheldon, 75 A. 690, 30 R. I. 426.

S. D. Grant v. Whorton, 134 N. W. 803, 28 S. D. 599.

Tenn. Raine v. State, 226 S. W. 189, 143 Tenn. 168.

Tex. Turner v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 177 S. W. 204; Summerhill v. Wilkes, 133 S. W. 492, 63 Tex. Civ. App. 456; Boardman v. Woodward (Civ. App.) 118 S. W. 550; San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574, 52 Tex. Civ. App. 22.

Wash. Larson v. McMillan, 170 P. 324, 99 Wash. 626.

[63] **U. S.** Sweeney v. Erving, 33 S. Ct. 416, 228 U. S. 233, 57 L. Ed. 815, Ann. Cas. 1914D, 905, affirming judgment 35 App. D. C. 57, 43 L. R. A. (N. S.) 734; (C. C. A. Colo.) Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co., 203 F. 795, 122 C. C. A. 113; (C. C. A. Minn.) Chicago Great Western Ry. Co. v. Roddy, 131 F. 712, 65 C. C. A. 470; (C. C. A. Mo.) Kercheval v. Allen, 220 F. 262, 135 C. C. A. 1; (C. C. A. N. J.) Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., 223 F. 881, 139 C. C. A. 319; Porter v. Buckley, 147 F. 140, 78 C. C. A. 138; (C. C. A. Ohio) Monarch Cycle Mfg. Co. v. Royer Wheel Co., 105 F. 324, 44 C. C. A. 523; (C. C. A. Okl.) Chicago, R. I. & P. Ry. Co. v. Hale, 176 F. 71, 99 C. C. A. 379.

Ala. Dunaway v. Roden, 71 So. 70, 14 Ala. App. 501, certiorari denied Ex parte Dunaway, 72 So. 1019, 196 Ala. 701; Williamson Iron Co. v. McQueen, 40 So. 306, 144 Ala. 265; Southern Ry. Co. v. Bradford, 40 So. 100, 145 Ala. 684; Southern Ry. Co. v. Douglass, 39 So. 268, 144 Ala. 351; United States Life Ins. Co. v. Lesser, 28 So. 646, 126 Ala. 568; Alabama State Land Co. v. Slaton, 24 So. 720, 120 Ala. 259.

Ariz. Arizona Eastern R. Co. v. Bryan, 157 P. 376, 18 Ariz. 106.

Ark. Kanis v. Rogers, 177 S. W. 413, 119 Ark. 120; Randleman v. Taylor, 127 S. W. 723, 94 Ark. 511, 140 Am. St. Rep. 141; C. H. Smith Tie & Timber Co. v. Weatherford, 121 S. W. 943, 92 Ark. 6.

Cal. People v. Wong Sang Lung, 84 P. 843, 3 Cal. App. 221; Williamson v. Tobey, 86 Cal. 497, 25 P. 65; Smith v. Richmond, 19 Cal. 476.

Colo. Gill v. Schneider, 110 P. 62, 48 Colo. 382; Greeley Irr. Co. v. Von Trotha, 108 P. 985, 48 Colo. 12; Allen v. Shires, 107 P. 1072, 47 Colo. 439; Allen v. Shires, 107 P. 1070, 47 Colo. 433.

Conn. Urbansky v. Kutinsky, 84 A. 317, 86 Conn. 22; Johnson v. Connecticut Co., 83 A. 530, 85 Conn. 438; Allen v. Lyness, 71 A. 936, 81 Conn. 626; Stern v. Leopold Simons & Co., 58 A. 696, 77 Conn. 150.

Fla. Florida Ry. Co. v. Dorsey, 52 So. 963, 59 Fla. 260; Jacksonville Electric Co. v. Schmetzer, 43 So. 85, 53 Fla. 370.

Ga. Seaboard Air Line Ry. v. Moseley, 85 S. E. 1021, 144 Ga. 35; Bush v. Fourcher, 59 S. E. 459, 3 Ga. App. 43; Roberts, Cranford & Co. v. Devane, 59 S. E. 289, 129 Ga. 604; City of Rome v. Sudduth, 49 S. E. 300, 121 Ga. 420; Thompson v. O'Connor, 41 S. E. 242, 115 Ga. 120; Grace v. McKinney, 37 S. E. 737, 112 Ga. 425.

Ill. Kelly v. Chicago City Ry. Co., 119 N. E. 622, 283 Ill. 640; Indiana, I. & I. R. Co. v. Otstot, 72 N. E. 387, 212 Ill. 429, affirming judgment 113 Ill. App. 37; Chicago & E. I. R. Co. v. Burridge, 71 N. E. 838, 211 Ill. 9, reversing judgment 107 Ill. App. 23; Smythe's Estate v. Evans, 70 N. E. 906, 209 Ill. 376, reversing judgment 108 Ill. App. 145; Nelson v. Fehd, 67 N. E. 828, 203 Ill. 120, affirming judgment 104 Ill. App. 114.

Ind. Howlett v. Dilts, 30 N. E. 313, 4 Ind. App. 23.

Kan. Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co., 61 P. 504, 9 Kan. App. 863; Kansas Ins. Co. v. Berry, 8 Kan. 159; Mayberry v. Kelly, 1 Kan. 116.

Ky. Stringtown & B. Turnpike Road Co. v. Riley (Super.) 8 Ky. Law Rep. (abstract) 267.

Me. National Furniture Co. v.

fied or explained,[64] although a charge on the subject of the re-

Prussian Nat. Ins. Co., 91 A. 785, 112 Me. 557; York v. Parker, 84 A. 939, 109 Me. 414.

Md. F. W. Dodge Co. v. H. A. Hughes Co., 72 A. 1036, 110 Md. 374.

Mass. Gardiner v. City of Brookline, 181 Mass. 162, 63 N. E. 397; Twomey v. Linnehan, 161 Mass. 91, 36 N. E. 590.

Mich. Williams v. City of Lansing, 115 N. W. 961, 152 Mich. 169; Courtemanche v. Supreme Court, I. O. O. F., 98 N. W. 749, 136 Mich. 30, 64 L. R. A. 668, 112 Am. St. Rep. 345; Bedford v. Penny, 25 N. W. 381, 58 Mich. 424; Weschester Fire Ins. Co. v. Earle, 33 Mich. 143.

Minn. Hayward v. Knapp, 23 Minn. 430; Simmons v. St. Paul & C. Ry. Co., 18 Minn. 184 (Gil. 168); Village of Mankato v. Meagher, 17 Minn. 265 (Gil. 243); Dodge v. Rogers, 9 Minn. 223 (Gil. 209); Selden v. Bank of Commerce, 3 Minn. 166 (Gil. 108); Bond v. Corbett, 2 Minn. 248 (Gil. 209); Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51).

Miss. Doe v. King, 3 How. 125.

Mo. Viles v. Viles (App.) 190 S. W. 41; Thomas v. Thomas, 186 S. W. 993; Fisher v. St. Louis Transit Co., 95 S. W. 917, 198 Mo. 562; McManus v. Metropolitan St. Ry. Co., 92 S. W. 176, 116 Mo. App. 110; Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; Trustees of Christian University v. Hoffman, 69 S. W. 474, 95 Mo. App. 488; Lail v. Pacific Exp. Co., 81 Mo. App. 232.

Mont. Ford v. Drake, 127 P. 1019, 46 Mont. 314; Pelican v. Mutual Life Ins. Co. of New York, 119 P. 778, 44 Mont. 277.

Neb. Buck v. Hogeboom, 90 N. W. 635, 2 Neb. (Unof.) 853.

N. J. Max v. Kahn, 102 A. 737, 91 N. J. Law, 170; Dederick v. Central R. Co. of New Jersey (Sup.) 65 A. 833, 74 N. J. Law, 424; Consolidated Traction Co. v. Chenowith, 58 N. J. Law, 416, 34 A. 817.

N. Y. Kenney v. South Shore Natural Gas & Fuel Co., 119 N. Y. S. 363, 134 App. Div. 859; Wittleder v. Citizens' Electric Illuminating Co. of Brooklyn, 62 N. Y. S. 297, 47 App. Div. 410; Hodges v. Cooper, 43 N. Y. 216; Keller v. New York Cent. R. Co., 24 How. Prac. 172; Vallance v. King, 3 Barb. 548; Halsey v. Rome, W. & O. R. Co., 12 N. Y. St. Rep. 319.

N. C. Washington Horse Exchange v. Louisville & N. R. Co., 87 S. E. 941, 171 N. C. 65; Phifer v. Commissioners of Cabarrus County, 72 S. E. 852, 157 N. C. 150; Vanderbilt v. Brown, 39 S. E. 36, 128 N. C. 498.

Ohio. Columbus Ry. v. Connor, 27 Ohio Cir. Ct. R. 229; Holmes v. Ashtabula Rapid Transit Co., 10 O. C. D. 638.

Okl. Missouri, O. & G. Ry. Co. v. Collins, 150 P. 142, 47 Okl. 761; Missouri, K. & T. Ry. Co. v. West, 134 P. 655, 38 Okl. 581; Continental Casualty Co. v. Owen, 131 P. 1084, 38 Okl. 107; Sanders v. Cline, 101 P. 267, 22 Okl. 154; Friedman v. Weisz, 58 P. 613, 8 Okl. 392.

Pa. Seifred v. Pennsylvania R. Co., 55 A. 1061, 206 Pa. 399.

S. C. McMahan v. Walhalla Light & Power Co., 86 S. E. 194, 102 S. C. 57; Lorenzo v. Atlantic Coast Line R.

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[64] **Ala.** Knowles v. Ogletree, 93 Ala. 555, 12 So. 397; Callan v. McDaniel, 72 Ala. 96; Kirkland v. Trott, 66 Ala. 417; Godbold v. Blair, 27 Ala. 592; Rolston v. Langdon, 26 Ala. 660.

Cal. Garlick v. Bowers, 66 Cal. 122, 4 P. 1138.

Ill. Coney v. Pepperdine, 38 Ill. App. 403.

Ind. Kluse v. Sparks, 10 Ind. App. 444, 37 N. E. 1047; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Over v. Schiffling, 102 Ind. 191, 26 N. E. 91; Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325; Howard County Com'rs v. Legg, 93 Ind. 523, 47 Am. Rep. 390; Roots v. Fyner, 10 Ind. 87.

Iowa. Bevan v. Hayden, 13 Iowa, 122; Keenan v. Missouri State Mut. Ins. Co., 12 Iowa, 126; Morrison v. Myers, 11 Iowa, 538; Grimes v. Martin, 10 Iowa, 347; Tifield v. Adams, 3 Iowa (3 Clarke) 487.

Kan. Douglas v. Wolf, 6 Kan. 88.

Me. Tower v. Haslam, 84 Me. 86, 24 A. 587.

Okl. Fulsom-Morris Coal & Mining Co. v. Mitchell, 132 P. 1103, 37 Okl. 575.

quest should be given;[65] it not being considered that the court is under any obligation to reform a requested instruction, and to cast out such parts as render it improper as a whole.[66]

Co., 85 S. E. 964, 101 S. C. 409; Earle v. Poat. 41 S. E. 525, 63 S. C. 439; Ragsdale v. Southern Ry. Co., 38 S. E. 609, 60 S. C. 381; Pickens v. South Carolina & G. R. Co., 32 S. E. 567, 54 S. C. 498; McGee v. Wells, 30 S. E. 602, 52 S. C. 472; Gandy v. Orient Ins. Co., 29 S. E. 655, 52 S. C. 224.

Tenn. Louisville & N. R. Co. v. Smith, 134 S. W. 866, 123 Tenn. 678; Pennsylvania R. Co. v. Naive, 79 S. W. 124, 112 Tenn. 239, 64 L. R. A. 443; City of Knoxville v. Cox, 53 S. W. 734, 103 Tenn. 368.

Tex. Quanah, A. & P. Ry. Co. v. Bone (Civ. App.) 199 S. W. 332; Bennett v. Foster (Civ. App.) 161 S. W. 1078; Peacock v. Coltrane (Civ. App.) 156 S. W. 1087; Souther v. Hunt (Civ. App.) 141 S. W. 359; Evart v. Dalrymple (Civ. App.) 131 S. W. 223; Lyon v. Bedgood, 117 S. W. 897, 54 Tex. Civ. App. 19; Arthur v. Porter (Civ. App.) 116 S. W. 127; Missouri, K. & T. Ry. Co. of Texas v. Wall (Civ. App.) 110 S. W. 453; Galveston, H. & S. A. Ry. Co. v. Still, 100 S. W. 176, 45 Tex. Civ. App. 169; St. Louis Southwestern Ry. Co. of Texas v. Baer, 86 S. W. 653, 39 Tex. Civ. App. 16; Dolan v. Meehan (Civ. App.) 80 S. W. 99; Cranfill v. Hayden (Civ. App.) 75 S. W. 573, reversed 80 S. W. 609, 97 Tex. 544; Western Union Tel. Co. v. McConnico, 66 S. W. 592, 27 Tex. Civ. App. 610; Milmo Nat. Bank v. Convery (Civ. App.) 49 S. W. 926; St. Louis S. W. Ry. Co. of Texas v. Casseday (Civ. App.) 48 S. W. 6, reversed 50 S. W. 125, 92 Tex. 525; Clack v. Wood (Civ. App.) 46 S. W. 1132; Dublin Cotton-Oil Co. v. Jarrard, 42 S. W. 939, 91 Tex. 289, affirming judgment (Civ. App.) 40 S. W. 531; Riviere v. Missouri, K. & T. Ry. Co. (Civ. App.) 40 S. W. 1074.

Utah. Jensen v. Denver & R. G. R. Co., 138 P. 1185, 44 Utah, 100; Evans v. Oregon Short Line R. Co., 108 P. 638, 37 Utah, 431, Ann. Cas. 1912C, 259.

Vt. Needham v. Boston & M. R. Co., 74 A. 226, 82 Vt. 518; Terrill v. Tillison, 54 A. 187, 75 Vt. 193; Amsden v. Atwood, 38 A. 263, 69 Vt. 527.

Va. Keen's Ex'r v. Monroe, 75 Va. 424; Kincheloe v. Tracewells, 11 Grat. 587.

Wash. Singer v. Martin, 164 P. 1105, 96 Wash. 231; Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595; Howe v. West Seattle Land & Improvement Co., 59 P. 495, 21 Wash. 594.

W. Va. Berry v. Huntington Masonic Temple Ass'n, 93 S. E. 355, 80 W. Va. 342.

Wis. Lyle v. McCormick Harvesting Mach. Co., 84 N. W. 18, 108 Wis. 81, 51 L. R. A. 906; Stucke v. Milwaukee, C. M. R. Co., 9 Wis. 202.

[65] Rudolph v. Holmes, 78 So. 839, 201 Ala. 461; Hydraulic Cement Block Co. v. Christensen, 114 P. 524, 38 Utah, 525.

[66] **U. S.** (C. C. A. Mo.) Exchange Bank v. Moss, 149 F. 340, 79 C. C. A. 278.

Ark. American Fire Ins. Co. v. Haynie, 120 S. W. 825, 91 Ark. 43.

Colo. Blackmore v. Neale, 60 P. 952, 15 Colo. App. 49.

Conn. Rathbone v. City Fire Ins. Co., 31 Conn. 193.

D. C. Robinson v. Parker, 11 App. D. C. 132.

Ga. Seaboard Air Line Ry. v. Blackshear, 75 S. E. 902, 11 Ga. App. 579; Carter & Ford v. Brown, 61 S. E. 142, 4 Ga. App. 238.

Ill. Rolfe v. Rich, 149 Ill. 436, 35 N. E. 352, affirming 46 Ill. App. 406; Weeks v. Jones, 200 Ill. App. 215; Swigart v. Savely, 176 Ill. App. 369.

Ind. Town of Newcastle v. Grubbs, 86 N. E. 757, 171 Ind. 482; Toops v. State, 92 Ind. 13.

Ind. T. Gulf, C. & S. F. Ry. Co. v. Moseley, 98 S. W. 129, 6 Ind. T. 369.

Mo. Davis v. Springfield Hospital (App.) 196 S. W. 104.

Mont. Anderson v. Northern Pac. Ry. Co., 85 P. 884, 34 Mont. 181.

N. J. Christy v. New York Cent. & H. R. R. Co., 101 A. 372, 90 N. J. Law,

This rule applies where a number of propositions are requested en masse and one or more of them are improper,[67] or where an in-

540; Manchester Building & Loan Ass'n v. Allee, 80 A. 466, 81 N. J. Law, 605, reversing judgment (Sup.) 76 A. 1012, 80 N. J. Law, 185.

N. Y. Dooling v. City of New York, 132 N. Y. S. 1012, 148 App. Div. 713, Appeal to Court of Appeals denied 133 N. Y. S. 1119; Lee v. Sterling Silk Mfg. Co., 118 N. Y. S. 852, 134 App. Div. 123; Frank v. Metropolitan St. Ry. Co., 86 N. Y. S. 1018, 91 App. Div. 485; Smith v. New York Cent. & H. R. R. Co., 9 N. Y. St. Rep. 612.

N. C. Edwards v. Western Union Telegraph Co., 60 S. E. 900, 147 N. C. 126; Harris v. Atlantic Coast Line R. Co., 43 S. E. 589, 132 N. C. 160.

S. C. Stanton v. Southern Ry. Co., 34 S. E. 695, 56 S. C. 398.

Tex. Cunningham v. State, 166 S. W. 519, 73 Tex. Cr. R. 565; San Antonio & A. P. Ry. Co. v. McBride & Dillard, 116 S. W. 638; Houston & T. C. R. Co. v. Oram, 107 S. W. 74, 47 Tex. Civ. App. 526; Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 100 S. W. 182; Gulf, C. & S. F. Ry. Co. v. Minter, 93 S. W. 516, 42 Tex. Civ. App. 235; Creager v. Yarborough (Civ. App.) 87 S. W. 376; Citizens' Nat. Bank v. Cammer (Civ. App.) 86 S. W. 625; International & G. N. R. Co. v. Shuford, 81 S. W. 1189, 36 Tex. Civ. App. 251; St. Louis Southwestern Ry. Co. of Texas v. Kennemore (Civ. App.) 81 S. W. 802; Williams v. Yoe, 54 S. W. 614, 22 Tex. Civ. App. 446; Waco Artesian Water Co. v. Cauble, 47 S. W. 538, 19 Tex. Civ. App. 417; Harris v. First Nat. Bank (Civ. App.) 45 S. W. 311; Lawrence v. State, 20 Tex. App. 536.

Va. Peele v. Bright, 89 S. E. 238, 119 Va. 182; Chesapeake & O. Ry. Co. v. F. W. Stock & Sons, 51 S. E. 161, 104 Va. 97.

Wash. Croft v. Northwestern S. S. Co., 55 P. 42, 20 Wash. 175.

W. Va. Shrewsbury v. Tufts, 41 W. Va. 212, 23 S. E. 692.

[67] **Ala.** Goldstein v. Self, 62 So. 369, 9 Ala. App. 100; Bohanan v. Dodd, 60 So. 955, 7 Ala. App. 220; Mobile & Ohio R. Co. v. Minor, 60 So. 951, 6 Ala. App. 633, certiorari denied Ex parte Mobile & O. R. Co. (Sup.) 61 So. 1005; Birmingham Ry., Light & Power Co. v. Leach, 59 So. 358, 5 Ala. App. 546; Stowers Furniture Co. v. Brake, 48 So. 89, 158 Ala. 639; McEntyre v. Hairston, 44 So. 417, 152 Ala. 251.

Ga. Atlantic Coast Line R. Co. v. Hill, 77 S. E. 316, 12 Ga. App. 392.

Ill. Springfield Electric Light & Power Co. v. Mott, 120 Ill. App. 39.

N. J. Schreiber v. Public Service Ry. Co., 98 A. 316, 89 N. J. Law, 183; Miller v. I. P. Thomas & Son Co., 98 A. 193, 89 N. J. Law, 364.

N. C. Johnson County Sav. Bank v. Chase, 65 S. E. 745, 151 N. C. 108.

Tex. Merchants' Ice Co. v. Scott & Dodson (Civ. App.) 186 S. W. 418; Hermann v. Bailey (Civ. App.) 174 S. W. 865; Western Union Telegraph Co. v. Glass (Civ. App.) 154 S. W. 604; Wall v. Lubbock, 118 S. W. 886, 52 Tex. Civ. App. 405; Gulf, C. & S. F. Ry. Co. v. Garrett (Civ. App.) 98 S. W. 657; International & G. N. R. Co. v. Sein, 26 S. W. 788; International & G. N. R. Co. v. Neff (Civ. App.) 26 S. W. 784; Missouri Pac. Ry. Co. v. King, 2 Tex. Civ. App. 122, 20 S. W. 1014, 23 S. W. 917.

Contrary rule. In some jurisdictions, where a request to charge contains two independent and distinct propositions, one of which is proper to be given and the other not, the proper course is, not to refuse it as a whole, but to refuse the erroneous proposition, and grant that which is correct. Sword v. Keith, 31 Mich. 247; Peshine v. Shepperson, 17 Grat. (Va.) 472, 94 Am. Dec. 468.

Charges written on separate sheets of paper. Where five special charges requested are written on separate sheets of paper, which are pinned together so as to be easily separated, and the style of the cause appears only on the first one, and the signature of counsel only on the last, they must be considered together; and, if one is incorrect, all are prop-

struction contains several alternative propositions, one of which is unsound,[68] or where, in an action based on two counts, instructions asked as applicable to the whole complaint are good only as to one count,[69] or where part of an instruction is argumentative,[70] or where a requested charge contains an incorrect statement of fact,[71] or requests the withdrawal of both improper and proper evidence,[72] or where a part of a request to charge is not applicable to the facts,[73] or invades the province of the jury.[74] So requested instructions, unintelligible for lack of punctuation, may be refused.[75]

§ 503. Qualifications of rule

If instructions, taken as a whole, present the law correctly, and are neither inconsistent nor misleading, they should be given, although one of them, considered by itself, is defective or erroneous;[76] and where different charges, although written upon a single piece of paper, are acted upon by the court as separate charges, and a separate exception is reserved to the refusal of each charge, the fact that one of them is faulty will not absolve the court from error in refusing them all,[77] and while in some jurisdictions it is not error to refuse an instruction unless it ought to be given precisely in the terms prayed,[78] and in one jurisdiction the court has no power to correct even mere verbal inaccuracies, being bound to give or refuse instructions as requested,[79] it is held in some jurisdictions that an error in a requested instruction may be so apparently clerical that it will be the duty of the court to reform the

erly refused. International & G. N. R. Co. v. Neff (Tex. Civ. App.) 26 S. W. 784; Same v. Sein, Id. 788.

[68] Whitsett v. Belue, 54 So. 677, 172 Ala. 256; Boyden v. Fitchburg R. Co., 47 A. 409, 72 Vt. 89.

[69] Manchester Fire Assur. Co. v. Feibelman, 23 So. 759, 118 Ala. 308.

[70] Sloss-Sheffield Steel & Iron Co. v. Sampson, 48 So. 493, 158 Ala. 590.

[71] McNetton v. Herb, 123 N. W. 17, 158 Mich. 525.

[72] Kendrick v. Ryus, 123 S. W. 937, 225 Mo. 150, 135 Am. St. Rep. 585.

[73] Knecht v. Mooney, 85 A. 775, 118 Md. 583; Jackson v. Southwest Missouri R. Co., 156 S. W. 1005, 171 Mo. 430; Zarate v. Villareal (Tex. Civ. App.) 155 S. W. 328; Sabine & E. T. Ry. Co. v. Ewing, 21 S. W. 700, 1 Tex. Civ. App. 531.

[74] Mesker v. Bishop, 103 N. E. 492, 56 Ind. App. 455; International & G. N. R. Co. v. Haddox, 81 S. W. 1036, 36 Tex. Civ. App. 385; Brooke v. Young, 3 Rand. (Va.) 106.

[75] Bailey v. State, 53 So. 296, 168 Ala. 4.

[76] Whalen v. St. Louis, K. C. & N. Ry. Co., 60 Mo. 323; Callaway v. Fash, 50 Mo. 420.

[77] Tennessee Coal, Iron & R. Co. v. Bonner, 51 So. 145, 164 Ala. 57.

[78] American Motor Car Co. v. Robbins, 103 N. E. 641, 181 Ind. 417; Pittsburg, C., C. & St. L. Ry. Co. v. Sudhoff, 90 N. E. 467, 173 Ind. 314; transferred from Appellate Court 88 N. E. 702; Lawrenceburgh & U. M. R. Co. v. Montgomery, 7 Ind. 474; Childers v. Southern Pac. Co., 149 P. 307, 20 N. M. 366; Lynch v. Town of Waldwick, 101 N. W. 925, 123 Wis. 351.

[79] Barfield v. Evans, 65 So. 928, 187 Ala. 579; Louisville & N. R. Co. v. Lile, 45 So. 699, 154 Ala. 556; Banks v. State (Ala.) 39 So. 921.

request, so as to eliminate such error, and to charge the request as so reformed,[80] as where a request improperly uses the word "plaintiff," instead of "defendant."[81]

In Virginia the rule is that, while the court may, as a general rule, refuse to give an instruction which does not correctly expound the law, and is not bound to modify it, or give any other instruction in its place,[82] yet, where the request is so equivocal that to give or generally refuse it might mislead the jury, the court should either accompany a refusal with an explanation to the jury,[83] or should substitute a correct instruction for the one requested,[84] or should modify the request, so as to clearly give it the meaning which will make it proper, and then give the request as so modified.[85] In West Virginia a similar rule prevails.[86]

§ 504. Power of court to reform an erroneous request

In some jurisdictions, where an instruction requested is in part correct and in part erroneous, the court may give the part which is correct,[87] or may modify the instruction asked, so as to make it correct as a whole,[88] as by eliminating argumentative matter,[89]

[80] Kenny v. Marquette Cement Mfg. Co., 149 Ill. App. 173, judgment affirmed 90 N. E. 724, 243 Ill. 396; Ft. Worth & D. C. Ry. Co. v. Anderson (Tex. Civ. App.) 194 S. W. 847; Montgomery v. State, 107 N. W. 14, 128 Wis. 183.

[81] Haney v. Mann (Tex. Civ. App.) 81 S. W. 66.

In Alabama, where, as stated elsewhere, requests must be given, if given at all, in the exact language in which they are framed, the improper use of the word "defendant" for "plaintiff" in a requested instruction need not be corrected by the trial court, but the instruction may be refused. Western Ry. of Alabama v. Stone, 39 So. 723, 145 Ala. 663.

[82] Keen's Ex'r v. Monroe, 75 Va. 424.

[83] Peshine v. Shepperson, 17 Grat. (Va.) 472, 94 Am. Dec. 468.

[84] Lufty v. Commonwealth, 100 S. E. 829, 126 Va. 707.

[85] Virginian Ry. Co. v. Bell, 79 S. E. 396, 115 Va. 429, Ann. Cas. 1915A, 804; Rosenbaum v. Weeden, 18 Grat. (Va.) 785, 98 Am. Dec. 737; Ward v. Chum, 18 Grat. (Va.) 801, 98 Am. Dec. 749; Baltimore & O. R. Co. v. Polly, 14 Grat. (Va.) 447.

[86] Carrico v. West Virginia Cent. & P. Ry. Co., 35 W. Va. 389, 14 S. E. 12.

[87] Marlborough v. Sisson, 23 Conn. 44; Bush v. Fourcher, 59 S. E. 459, 3 Ga. App. 43; French v. Millard, 2 Ohio St. 44; St. Louis, I. M. & S. Ry. Co. v. Berry, 93 S. W. 1107, 42 Tex. Civ. App. 470.

[88] **U. S.** (C. C. A. Mass.) American Agricultural Chemical Co. v. Hogan, 213 F. 416, 130 C. C. A. 52.

Ark. Texas & P. Ry. Co. v. Krieger, 185 S. W. 448, 123 Ark. 619; Dent v. People's Bank of Imboden, 175 S. W. 1154, 118 Ark. 157, 1 A. L. R. 688.

Cal. Fitzgerald v. Southern Pac. Co., 173 P. 91, 36 Cal. App. 660; Fiori v. Agnew, 164 P. 899, 33 Cal. App. 284; Boyce v. California Stage Co., 25 Cal. 460.

Fla. Western Union Telegraph Co. v. Merritt, 46 So. 1024, 55 Fla. 462, 127 Am. St. Rep. 169.

Ill. Chenoweth v. Burr, 89 N. E. 1008, 242 Ill. 312, affirming judgment 146 Ill. App. 443; Pauckner v. Wakem, 83 N. E. 202, 231 Ill. 276, 14 L. R.

[89] Koshinski v. Illinois Steel Co., 83 N. E. 149, 231 Ill. 198; Gibson v. George C. Doyle & Co., 106 P. 512, 37 Utah, 21.

or by reforming the instruction, so as to prevent it from invading the province of the jury,[90] or from being misleading.[91] In other jurisdictions, however, under statutes, if instructions are given at all, they must be given in the precise terms in which they are asked, and the court has no power to amend or correct them.[92]

§ 505. Effect of erroneous request as making it duty of court to give a proper charge

In some jurisdictions the rule is that the court, on refusing a requested instruction which is incorrect in some particular, is not bound, of its own motion, to give a proper instruction upon the question involved in the request.[93] In Missouri this is the rule in civil cases,[94] but in criminal cases, in which the court is required to give all the law of the case necessary for the information

A. (N. S.) 1118; Illinois Collieries Co. v. Haveron, 137 Ill. App. 22; Illinois Collieries Co. v. Davis, 137 Ill. App. 15, judgment affirmed Davis v. Illinois Collieries Co., 83 N. E. 836, 232 Ill. 284; Citizens' Sav., Loan & Building Ass'n v. Weaver, 127 Ill. App. 252; Cary v. Norton, 35 Ill. App. 365.

Kan. St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47.

Ky. Theobald v. Hare, 47 Ky. (8 B. Mon.) 39; Pleak v. Chambers, 46 Ky. (7 B. Mon.) 565.

Md. Blackburn v. Beall, 21 Md. 208.

Miss. Louisville, N. O. & T. R. Co. v. Suddoth, 70 Miss. 265, 12 So. 205.

Mo. Richardson v. St. Louis & H. Ry. Co., 123 S. W. 22, 223 Mo. 325.

Nev. Burch v. Southern Pac. Co., 104 P. 225, 32 Nev. 75, Ann. Cas. 1912B, 1166.

S. C. Dutton v. Atlantic Coast Line R. Co., 88 S. E. 263, 104 S. C. 16.

Tex. Industrial Lumber Co. v. Bivens, 105 S. W. 831, 47 Tex. Civ. App. 396; Wells v. Barrent, 7 Tex. 584.

Wash. Kennedy v. Supreme Tent of Knights of Maccabees of the World, 170 P. 371, 100 Wash. 36.

W. Va. Griffith v. American Coal Co. of Allegheny County, 88 S. E. 595, 78 W. Va. 34.

Wis. Sterling v. Ripley, 3 Chand. (Wis.) 166.

[90] Bidwell v. Los Angeles & S. D. B. Ry. Co., 148 P. 197, 169 Cal. 780; Scott v. Sovereign Camp of Woodmen of the World, 129 N. W. 302, 149 Iowa, 562; Miller v. Mantik, 81 A. 797, 116 Md. 279; Gill v. Ruggles, 78 S. E. 536, 95 S. C. 90.

[91] East St. Louis & St. Louis Express Co. v. Illinois Traction Co., 169 Ill. App. 24; Commonwealth v. McMurray, 47 A. 952, 198 Pa. 51, 82 Am. St. Rep. 787.

[92] Pensacola & A. R. Co. v. Atkinson, 20 Fla. 450.

[93] **Ark.** Atkinson v. State, 202 S. W. 709, 133 Ark. 341; St. Louis, I. M. & S. R. Co. v. Duncan, 177 S. W. 1132, 119 Ark. 287; Lucius v. State, 116 Ark. 260, 170 S. W. 1016; Horton v. Jackson, 113 S. W. 45, 87 Ark. 528.

Ill. Willison v. Dering Coal Co., 156 Ill. App. 209.

Ind. Spurlin v. State, 124 N. E. 753.

Or. Naftzger v. Henneman, 185 P. 233, 94 Or. 109.

Va. Ratcliffe v. Walker, 85 S. E. 575, 117 Va. 569, Ann. Cas. 1917E, 1022; Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

Wash. Ramm v. Hewitt-Lea Lumber Co., 94 P. 1081, 49 Wash. 263.

[94] **Mo.** Alexander v. Star-Chronicle Pub. Co., 198 S. W. 467, 197 Mo. App. 601; Lester v. Sampson (App.) 180 S. W. 419; D'Arcy v. Catherine Lead Co., 133 S. W. 1191, 155 Mo. App. 266; Voelker v. Hill-O'Meara Const. Co., 131 S. W. 907, 153 Mo. App. 1; Barnett v. Sweringen, 77 Mo. App. 64; Dempsey v. Reinsedler, 22 Mo. App. 43.

of the jury, whether so requested or not, the rule is otherwise.[95]

In other jurisdictions the rule prevails that, although error may be so intermingled in a requested charge as to make the refusal of such request proper, it will nevertheless be error for the court, whose attention has thus been called to the subject of the erroneous request, to fail to give an instruction of its own thereon,[96] where the matters involved in such erroneous request are important, and not sufficiently covered by the general charge.[97] Thus, where a requested instruction in a criminal case, although faulty, is sufficient to challenge the court's attention to the only defense on which the accused relies, and in support of which some substantial evidence has been offered, it will be error to give no instruction stating the law in reference to such defense.[98]

In Texas, although there are cases to the contrary,[99] a large number of the decisions support the proposition that if the court, in its main charge, has failed to instruct on a material issue raised by the pleadings and the evidence, and a special charge requested, although incorrect in itself, is sufficient to call the attention of the court to the omission, it is error to fail to correctly instruct on the subject indicated.[100] In Kentucky the rule is that, where a party is entitled to an instruction on the point attempted to be

[95] State v. Goode (Mo.) 220 S. W. 854; State v. Lewkowitz, 178 S. W. 58, 265 Mo. 613; Grant City v. Simmons, 151 S. W. 187, 167 Mo. App. 183; State v. Little, 128 S. W. 971, 228 Mo. 273.

Contra. State v. McNamara, 100 Mo. 100, 13 S. W. 938.

[96] **U. S.** (C. C. A. La.) Audubon Bldg. Co. v. F. M. Andrews & Co., 187 F. 254, 111 C. C. A. 92.

Colo. Harris v. People, 135 P. 785, 55 Colo. 407.

Conn. State v. Wakefield, 90 A. 230, 88 Conn. 164.

D. C. Freed v. U. S., 266 F. 1012, 49 App. D. C. 392; Henry v. U. S., 263 F. 459, 49 App. D. C. 207.

Iowa. State v. Cessna, 153 N. W. 194, 170 Iowa, 726, Ann. Cas. 1917D, 289.

Kan. Kansas City, M. & O. Ry. Co. v. Loosley, 90 P. 990, 76 Kan. 103.

Mich. Dodge v. Brown, 22 Mich. 446.

Okl. McIntosh v. State, 128 P. 735, 8 Okl. Cr. 469; Robison v. United States, 111 P. 984, 4 Okl. Cr. 336; Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617, rehearing denied 101 P. 111, 1 Okl. Cr. 617.

Utah. State v. Terrell, 186 P. 108, 55 Utah, 314.

Vt. Hazard v. Smith, 21 Vt. 123.

Wis. Borchardt v. Wausau Boom Co., 54 Wis. 107, 11 N. W. 440, 41 Am. Rep. 12.

Wyo. Union Pac. Ry. Co. v. Jarvi, 3 Wyo. 375, 23 P. 398.

[97] Rothe v. Pennsylvania Co. (C. C. A. Ohio) 195 F. 21, 114 C. C. A. 627; People v. Scott, 10 Utah, 217, 37 P. 335. See Rome Ins. Co. v. Thomas, 75 S. E. 894, 11 Ga. App. 539.

[98] State v. Miller, 114 P. 855, 84 Kan. 667, reversing judgment on rehearing 111 P. 437, 83 Kan. 410.

[99] Missouri, K. & T. Ry. Co. of Texas v. Dunn (Tex. Civ. App.) 157 S. W. 434; Texas Telegraph & Telephone Co. v. Scott, 127 S. W. 587, 60 Tex. Civ. App. 39.

[100] Hines v. Parry (Tex. Civ. App.) 227 S. W. 339; Alamo Iron Works v. Prado (Tex. Civ. App.) 220 S. W. 282; Chicago, R. I. & G. Ry. Co. v. Wentzel (Tex. Civ. App.) 214 S. W. 710; Rounds v. Coleman (Tex. Civ. App.)

covered by a request, and the court refuses it because of error

214 S. W. 496; Roberts v. Houston Motor Car Co. (Tex. Civ. App.) 188 S. W. 257; Stirling v. Bettis Mfg. Co. (Tex. Civ. App.) 159 S. W. 915; Quanah, A. & P. Ry. Co. v. Galloway (Tex. Civ. App.) 154 S. W. 653; Wichita Falls & W. Ry. Co. v. Wyrick (Tex. Civ. App.) 147 S. W. 694; Davis, Pruner & Howell v. Woods (Tex. Civ. App.) 143 S. W. 950; Warren v. Kimmell (Tex. Civ. App.) 141 S. W. 159; Southwestern Portland Cement Co. v. McBrayer (Tex. Civ. App.) 140 S. W. 388; Porter v. State, 132 S. W. 935, 60 Tex. Cr. R. 588; Cox v. State, 126 S. W. 886, 58 Tex. Cr. R. 545; Moore v. State, 125 S. W. 34, 58 Tex. Cr. R. 183; Johnson v. State, 122 S. W. 877, 57 Tex. Cr. R. 308; Eubanks v. State, 122 S. W. 35, 57 Tex. Cr. R. 153; Lee v. Hail, 114 S. W. 403, 51 Tex. Civ. App. 632; Rushing v. Lanier, 111 S. W. 1089, 51 Tex. Civ. App. 278; Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84; McAdams v. Hooks, 104 S. W. 432, 47 Tex. Civ. App. 79; St. Louis Southwestern Ry. Co. of Texas v. Fowler (Tex. Civ. App.) 93 S. W. 484; McNeese v. Carver, 89 S. W. 430, 40 Tex. Civ. App. 129; Ray v. Pecos & N. T. Ry. Co., 88 S. W. 466, 40 Tex. Civ. App. 99; St. Louis Southwestern Ry. Co. of Texas v. Lowe (Tex. Civ. App.) 86 S. W. 1059; Texas Loan & Trust Co. v. Angel, 86 S. W. 1056, 39 Tex. Civ. App. 166; Gulf, C. & S. F. Ry. Co. v. Minter, 85 S. W. 477, 38 Tex. Civ. App. 8; Rea v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 73 S. W. 555; City of Sherman v. Greening (Tex. Civ. App.) 73 S. W. 424; Gulf, C. & S. F. Ry. Co. v. Mangham, 69 S. W. 80, 29 Tex. Civ. App. 486; Johnston v. Johnston (Tex. Civ. App.) 67 S. W. 123; Neville v. Mitchell, 66 S. W. 579, 28 Tex. Civ. App. 89; Corsicana Nat. Bank v. Baum (Tex. Civ. App.) 62 S. W. 812; Gulf, C. & S. F. Ry. Co. v. Hill (Tex. Civ. App.) 58 S. W. 255; Texas & P. Ry. Co. v. Short (Tex. Civ. App.) 58 S. W. 56; Williams v. Emberson, 55 S. W. 595, 22 Tex. Civ. App. 522; Texas & Ft. S. Ry. Co. v. Atchison (Tex. Civ. App.) 54 S. W. 1075; Missouri, K. & T. Ry. of Texas v. Miles, 50 S. W. 168, 20 Tex. Civ. App. 570; Denison & P. Suburban Ry. Co. v. James, 49 S. W. 660, 20 Tex. Civ. App. 358; Missouri, K. & T. Ry. Co. of Texas v. Webb, 49 S. W. 526, 20 Tex. Civ. App. 431; San Antonio & A. P. Ry. Co. v. Horkan (Tex. Civ. App.) 45 S. W. 391; Sharrock v. Ritter (Tex. Civ. App.) 45 S. W. 156; Leeds v. Reed (Tex. Civ. App.) 36 S. W. 347; Gulf, C. & S. F. Ry. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43; Carpenter v. Dowe (Civ. App.) 26 S. W. 1002; Cleveland v. Empire Mills, 6 Tex. Civ. App. 479, 25 S. W. 1055; Bexar Bldg. & Loan Ass'n v. Newman (Tex. Civ. App.) 25 S. W. 461; Willis v. Smith, 72 Tex. 565, 10 S. W. 683.

Illustrations of cases within rule. A carrier's conductor having claimed that his assault was in self-defense, a request to charge that if plaintiff struck the conductor or jerked his arm violently, or both, and the conductor in slapping plaintiff was only resisting the force used by plaintiff, and was acting in self-defense and used no more force than was necessary, defendant was entitled to a verdict, though objectionable, was sufficient to require the court to give a proper charge on such subject. Dallas Consol. Electric St. Ry. Co. v. Pettit, 105 S. W. 42, 47 Tex. Civ. App. 354. Where, in an action for injuries to a servant, the court failed to charge on an issue as to defendant's alleged violation of a speed ordinance, a requested instruction that, if the movement of the cars was at a speed not greater than that allowed by the ordinance, plaintiff could not recover on the alleged ground of negligence that the speed of the cars was unlawful, was sufficient to call the court's attention to such issue. Houston & T. C. R. Co. v. Turner, 78 S. W. 712, 34 Tex. Civ. App. 397.

The rule of the text does not apply as indicated by the statement thereof, where the issue involved in the request has been substantially covered, or where it is sought merely to have placed before

therein, it is its duty to give a proper charge on the subject involved.[101]

The above rule as to the effect of an erroneous request, as making it the duty of the trial court to give a proper charge, is vigorously opposed in a well-considered case in Oregon, where the court says that such a rule makes it unnecessary for counsel to carefully prepare requested instructions and that such a course of practice is not fair to the court, which at the close of a trial has not the time to carefully consider all the matters that may be thus thrust upon it. This criticism of the Oregon court, however, so far as it is directed against the injustice to the trial court, seems to ignore the fact that such rule is intended to remedy the original dereliction of the court in failing to charge on a material issue.[102]

the jury, the converse of that which has already been submitted. Jacksonville Ice & Electric Co. v. Moses, 134 S. W. 379, 63 Tex. Civ. App. 496; Vicksburg, S. & P. Ry. Co. v. Jackson (Tex. Civ. App. 133 S. W. 925.

[101] Louisville & N. R. Co. v. Stephens, 220 S. W. 746, 188 Ky. 1; Cincinnati, N. O. & T. P. Ry. Co. v. Francis, 220 S. W. 739, 187 Ky. 703; Clifton Land Co. v. Reister, 216 S. W. 342, 186 Ky. 155; Louisville & N. R. Co. v. McCoy, 197 S. W. 801, 177 Ky. 415; Stearns Coal & Lumber Co. v. Spradlin, 195 S. W. 781, 176 Ky. 405; Cumberland R. Co. v. Girdner, 192 S. W. 873, 174 Ky. 761; Stearns Coal & Lumber Co. v. Williams, 186 S. W. 931, 171 Ky. 46; Charles Taylor Sons Co. v. Hunt, 173 S. W. 333, 163 Ky. 120; Western Union Telegraph Co. v. Sisson, 160 S. W. 168, 155 Ky. 624; Illinois Cent. R. Co. v. Dallas' Adm'x, 150 S. W. 536, 150 Ky. 442; Louisville, H. & St. L. Ry. Co. v. Roberts, 139 S. W. 1073, 144 Ky. 820; Lewis, Wilson & Hicks v. Durham, 139 S. W. 952, 144 Ky. 704; West Kentucky Coal Co. v. Davis, 128 S. W. 1074, 138 Ky. 667; Crane v. T. J. Congleton & Bro., 116 S. W. 341; Louisville & N. R. Co. v. King's Adm'r, 115 S. W. 196, 131 Ky. 347; Whitley v. Whitley's Adm'r, 108 S. W. 241, 32 Ky. Law Rep. 1211, rehearing denied 109 S. W. 908, 33 Ky. Law Rep. 281; Troutwine v. Louisville & N. R. Co., 105 S. W. 142, 32 Ky. Law Rep. 5; South Covington & C. St. Ry. Co. v. Core, 96 S. W. 562, 29 Ky. Law Rep. 836; Blimm v. Commonwealth, 70 Ky. (7 Bush) 320.

Effect of erroneous request as to measure of damages. Where it was a contested issue whether defendant had erected a depot which complied with its contract, but the instruction on damages applied only to damage in case of failure to construct, an incorrect instruction requested by defendant on the measure of damages if the company had erected the depot as agreed, but not within the time provided by the contract, was sufficient to cast on the court the duty to give a correct instruction on the subject. Elkhorn & B. V. Ry. Co. v. Dingus, 220 S. W. 1047, 187 Ky. 812.

Necessity of written request. To make applicable the rule requiring the court to give a correct instruction in lieu of one asked, which is incorrect, either in form or substance, the instruction must be properly asked—that is, presented in writing. Bell's Adm'r v. Louisville Ry. Co., 146 S. W. 383, 148 Ky. 189.

[102] Sorenson v. Kribs, 161 P. 405, 82 Or. 130.

CHAPTER XXXVII

OBJECTIONS AND EXCEPTIONS

A. RIGHT TO OBJECT OR EXCEPT AS AFFECTED BY WAIVER AND ESTOPPEL

§ 506. General rule.
507. Specific applications of rule.
508. Limitations of rule.

B. TIME FOR OBJECTIONS OR EXCEPTIONS

509. Rule that objections should be made before retirement of jury or before verdict.
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F. EFFECT OF FAILURE TO OBJECT OR EXCEPT

527. General rule.
528. Limitations of rule.
529. Specific applications of rule.

A. RIGHT TO OBJECT OR EXCEPT AS AFFECTED BY WAIVER AND ESTOPPEL

§ 506. General rule

Objections to the substance of instructions, or to their form or the mode of giving them, or with respect to the failure of the

court to charge on certain matters, may be waived by a party, or he may be estopped by his conduct to raise such objections.[1]

§ 507. Specific applications of rule

Under the above rule, a party cannot found an objection on errors in instructions given at his own request,[2] and the consent

[1] **Ill.** Northwestern Elevator & Grain Co. v. Smiley, 154 Ill. App. 351.

Iowa. Ottoway v. Milroy, 123 N. W. 467, 144 Iowa, 631; Kinney v. McFaul, 98 N. W. 276, 122 Iowa, 452; Shoemaker v. Turner, 90 N. W. 709, 117 Iowa, 340; Delmonica Hotel Co. v. Smith, 84 N. W. 906, 112 Iowa, 659.

Kan. Chicago, R. I. & P. Ry. Co. v. Spring Hill Cemetery Ass'n, 57 P. 252, 9 Kan. App. 882.

Ky. Elizabethtown Milling & Coal Co. v. Elizabethtown Milling Co., 13 Ky. Law Rep. (abstract) 96.

Mass. Rand v. Farquhar, 115 N. E. 286, 226 Mass. 91.

Minn. Shattuck v. Shattuck's Estate, 136 N. W. 409, 118 Minn. 60.

Mo. Welland v. Metropolitan St. Ry. Co., 129 S. W. 441, 144 Mo. App. 205.

N. Y. Person v. Stoll, 67 N. E. 1089, 174 N. Y. 548, affirming judgment 76 N. Y. S. 324, 72 App. Div. 141.

Pa. Fern v. Pennsylvania R. Co., 95 A. 590, 250 P. 487.

S. C. Bedenbaugh v. Southern Ry. Co., 48 S. E. 53, 69 S. C. 1.

S. D. Kirby v. Berguin, 90 N. W. 856, 15 S. D. 444.

Tex. Taylor v. Lafevers (Civ. App.) 198 S. W. 651; Galveston, H. & S. A. Ry. Co. v. Sanchez, 122 S. W. 44, 57 Tex. Civ. App. 87.

Illustrations of estoppel or waiver. Where, in an action for injuries at a crossing, defendant contends that an instruction is erroneous as using the words "contributed to," instead of "caused," and also contends that the complaint is erroneous as using the word "caused," instead of the words "contributed to," the contentions are inconsistent and untenable. Lee v. Northwestern R. Co., 65 S. E. 1031, 84 S. C. 125.

[2] **Ala.** Dunn & Lallande Bros. v. Gunn, 42 So. 686, 149 Ala. 583; Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130.

Ark. Dunnington v. Frick Co., 60 Ark. 250, 30 S. W. 212.

Cal. Emerson v. Santa Clara County, 40 Cal. 543.

Colo. Orman v. Mannix, 17 Colo. 564, 30 P. 1037, 17 L. R. A. 602, 31 Am. St. Rep. 340.

Ill. Illinois Cent. R. Co. v. Harris, 162 Ill. 200, 44 N. E. 498, affirming 63 Ill. App. 172; Chicago & A. R. Co. v. Sanders, 154 Ill. 531, 39 N. E. 481; Ives v. McHard, 103 Ill. 97; City of Farmington v. Wallace, 134 Ill. App. 366, judgment affirmed Wallace v. City of Farmington, 83 N. E. 180, 231 Ill. 232; Wabash R. Co. v. Howard, 57 Ill. App. 66; Solomon v. Friend, 42 Ill. App. 407.

Iowa. Hamilton v. Hartinger, 96 Iowa, 7, 64 N. W. 592.

Kan. Ft. Scott, W. & W. Ry. Co. v. Fortney, 51 Kan. 287, 32 P. 904.

Me. Frye v. Hinkley, 18 Me. 320.

Md. Hess v. Newcomer, 7 Md. 325.

Mass. Copp v. Williams, 135 Mass. 401; Commonwealth v. Brigham, 123 Mass. 248.

Mich. Alberts v. Village of Vernon, 96 Mich. 549, 55 N. W. 1022; Silsby v. Michigan Car Co., 95 Mich. 204, 54 N. W. 761.

Minn. Redmond v. St. Paul, M. & M. Ry. Co., 39 Minn. 248, 40 N. W. 64.

Miss. Queen City Mfg. Co. v. Blalack, 18 So. 800, 31 L. R. A. 222; Wilson v. Zook, 69 Miss. 694, 13 So. 351.

Mo. Olfermann v. Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483; Kansas City Suburban Belt R. Co. v. Kansas City St. L. & C. R. Co., 118 Mo. 599, 24 S. W. 478; Hazell v. Bank of Tipton, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22; Reilly v. Hannibal & St. J. R.

of a party to an objectionable instruction waives the same objection to another instruction.[3] So an error in an instruction given at the request of a party is waived by his adversary by requesting an instruction containing the same error,[4] and a party cannot complain of an instruction which is in full accord with his theory of the case.[5] So, where the court gives an instruction of its own motion, on a subject concerning which it is prohibited from charging, except on the request of a party, the error is cured by the subsequent giving of the same instruction on request,[6] and error in an instruction is waived by asking for a modification thereof which does not cover the error.[7] A party who asks for an improper instruction cannot complain of the action of the court in modifying it, even though, according to some of the cases, the modification is wrong.[8]

The above rule has been applied in criminal cases to the failure of the court to reduce its charge to writing,[9] to the failure to read the instructions to the jury,[10] to the failure to accord the right

Co., 94 Mo. 600, 7 S. W. 407; Thorne v. Missouri Pac. Ry. Co., 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; Holmes v. Braidwood, 82 Mo. 610; McGonigle v. Daugherty, 71 Mo. 259; Crutchfield v. St. Louis, K. C. & N. Ry. Co., 64 Mo. 255; Flowers v. Helm, 29 Mo. 324; Farrell v. Farmers' Mut. Fire Ins. Co., 66 Mo. App. 153; Hall v. St. Joseph Water Co., 48 Mo. App. 356; Bybee v. Irons, 33 Mo. App. 659.

Neb. Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co., 42 Neb. 105, 60 N. W. 330; Richards v. Borowsky, 39 Neb. 774, 58 N. W. 277; Dawson v. Williams, 37 Neb. 1, 55 N. W. 284.

N. C. McLennan v. Chisholm, 66 N. C. 100; Buie v. Buie, 24 N. C. 87.

Tenn. East Tennessee, V. & G. R. Co. v. Fain, 12 Lea, 35.

Tex. Byrd v. Ellis (Civ. App.) 35 S. W. 1070; International & G. N. R. Co. v. Sein, 33 S. W. 558, 11 Tex. Civ. App. 386; Id., 89 Tex. 63, 33 S. W. 215; Needham v. State, 19 Tex. 332.

Wash. State v. Duncan, 7 Wash. 336, 35 P. 117, 38 Am. St. Rep. 888.

[3] Boecker v. City of Naperville, 48 N. E. 1061, 166 Ill. 151.

[4] Chicago, R. I. & P. Ry. Co. v. Smith, 127 S. W. 715, 94 Ark. 524; Gracy v. Atlantic Coast Line R. Co., 42 So. 903, 53 Fla. 350.

[5] Rehfuss v. Hill, 90 N. E. 187, 243 Ill. 140.

[6] Gulf City Shingling Co. v. Boyles, 29 So. 800, 129 Ala. 192.

[7] Southern Anthracite Coal Co. v. Bowen, 124 S. W. 1048, 93 Ark. 140.

[8] **Ala.** Southern Ry. Co. v. Howell, 34 So. 6, 135 Ala. 639.

Cal. Harrington v. Los Angeles Ry. Co., 74 P. 15, 140 Cal. 514, 63 L. R. A. 238, 98 Am. St. Rep. 85; Cook v. Los Angeles & P. Electric Ry. Co., 66 P. 306, 134 Cal. 279.

Ill. Crown Coal & Tow Co. v. Taylor, 56 N. E. 328, 184 Ill. 250, affirming judgment 81 Ill. App. 66; Decatur Cereal-Mill Co. v. Gogerty, 54 N. E. 231, 180 Ill. 197.

N. Y. Cochran v. Sess, 62 N. Y. S. 1088, 49 App. Div. 223, judgment reversed 61 N. E. 639, 168 N. Y. 372.

[9] Lane v. State, 70 S. E. 1118, 9 Ga App. 294; Spence v. Commonwealth, 204 S. W. 80, 181 Ky. 206.

[10] Boyd v. State, 45 So. 634, 154 Ala. 9.

to the accused to examine the charge before giving it to the jury,[11] and to the omission to charge on certain matters.[12]

§ 508. Limitations of rule

Acquiescence by a party in an erroneous view of the law taken by the court, by amending the pleadings and introducing evidence to meet the opinion, is not a waiver of the error, and does not preclude such party from insisting on a correct statement of the law in the instructions,[13] and an objection to an erroneous instruction is not waived by a failure to request an instruction in relation to the subject-matter of such instruction.[14]

B. Time for Objections or Exceptions

§ 509. Rule that objections should be made before retirement of jury or before verdict

A party deeming himself aggrieved by the instructions of the court or by omissions therefrom should seasonably call the attention of the court to such errors of commission or omission, in order that it may have an opportunity to correct the same,[15] as a party will not be permitted to speculate on a favorable verdict, and, if disappointed, seek to question the proceedings by a motion for new trial,[16] and undoubtedly good practice requires that objections or exceptions to instructions or to the failure or refusal of the court to instruct should be made at the time the charge is given or the request refused, and before the jury retire, and this is the rule in many jurisdictions.[17] This rule is generally applica-

[11] Freeman v. State, 188 S. W. 425, 80 Tex. Cr. R. 20.

[12] State v. Paxton, 126 Mo. 500, 29 S. W. 705; State v. Debnam, 98 N. C. 712, 3 S. E. 742; State v. Reynolds, 87 N. C. 544; State v. Owens, 44 S. C. 324, 22 S. E. 244; State v. Davis, 27 S. C. 609, 4 S. E. 567.

[13] M. M. Walker Co. v. Dubuque Fruit & Produce Co., 85 N. W. 614, 113 Iowa, 428, 53 L. R. A. 775.

[14] Warrington v. Kallauner, 115 S. W. 492, 135 Mo. App. 5. See, also, ante, § 472.

[15] Jacobs v. Mitchell, 2 Colo. App. 456, 31 P. 235; Busch v. Tjentland, 165 N. W. 999, 182 Iowa, 360; R. W. Bonyea Piano Co. v. Wendt, 160 N. W. 1030, 135 Minn. 378; Middleton v. State, 217 S. W. 1046, 86 Tex. Cr. R. 307.

[16] Colgan v. Farmers' & Mechanics' Bank, 114 P. 460, 59 Or. 469.

[17] **U. S.** United States v. Carey, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67; Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113; Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983; French v. Edwards, 13 Wall. 506, 20 L. Ed. 702; Barton v. Forsyth, 20 How. 532, 15 L. Ed. 1012; United States v. Breitling, 20 How. 252, 15 L. Ed. 900; Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643; (C. C. A. Ark.) St. Louis, I. M. & S. Ry. Co. v. Spencer, 71 F. 93, 18 C. C. A. 114; (C. C. A. Ga.) Greene v. United States, 154 F. 401, 85 C. C. A. 251, certiorari denied 28 S. Ct. 261, 207 U. S. 596, 52 L. Ed. 357, affirming judgment United States v. Greene (D. C.) 146 F. 803; (C. C. A. Ky.) Hindman v. First Nat.

ble to criminal cases,[18] and has been applied to objections based

Bank, 112 F. 931, 50 C. C. A. 623, 57 L. R. A. 108; (C. C. A. Minn.) Wells Fargo & Co. v. Zimmer, 186 F. 130, 108 C. C. A. 242; (C. C. A. Mo.) Northern Central Coal Co. v. Milburn, 205 F. 270, 123 C. C. A. 450; (C. C. A. Neb.) Bracken v. Union Pac. Ry. Co., 56 F. 447, 5 C. C. A. 548; (C. C. A. N. Y.) Mann v. Dempster, 181 F. 76, 104 C. C. A. 110; Klaw v. Life Pub. Co., 145 F. 184, 76 C. C. A. 154; Park Bros. & Co. v. Bushnell, 60 F. 583, 9 C. C. A. 138; (C. C. A. Ohio) American Issue Pub. Co. v. Sloan, 248 F. 251, 160 C. C. A. 329; Sutherland v. Round, 57 F. 467, 6 C. C. A. 428; (C. C. A. Tex.) Emanuel v. Gates, 53 F. 772, 3 C. C. A. 663; (C. C. A. Utah) Southern Pac. Co. v. Arnett, 126 F. 75, 61 C. C. A. 131; (C. C. A. Wash.) Western Union Tel. Co. v. Baker, 85 F. 690, 29 C. C. A. 392; Stone v. United States, 64 F. 667, 12 C. C. A. 451.

Ala. Meadows v. State, 62 So. 737, 182 Ala. 51, Ann. Cas. 1915D, 663; City Council of Montgomery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Cal. Sharp v. Hoffman 79 Cal. 404, 21 P. 846; Sierra Union Water & Mining Co. v. Baker, 70 Cal. 572, 8 P. 305; Mallett v. Swain, 56 Cal. 171; Robinson v. Western Pac. R. Co., 48 Cal. 409; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Colo. Taylor v. Randall, 3 Colo. 399; Smith v. Cisson, 1 Colo. 29.

Fla. Clark v. State, 52 So. 518, 59 Fla. 9, 15; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Ill. Edson Keith & Co. v. Eisendrath, 192 Ill. App. 155; Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659.

Ind. Blacketer v. House, 67 Ind. 414; Murray v. State, 26 Ind. 141; Atkinson v. Gwin, 8 Ind. 376; Ledley v. State, 4 Ind. 580.

Kan. State v. Sparks, 99 P. 1130, 79 Kan. 548.

Ky. Letton v. Young, 2 Metc. 558; Kennedy v. Cunningham, 2 Metc. 538; Carey v. Callan's Ex'rs, 6 B. Mon. 44; Hughes v. Robinson, 1 T. B. Mon. 215, 15 Am. Dec. 104; Hallowell v. Hallowell, 1 T. B. Mon. 130.

La. State v. Ryan, 30 La. Ann. 1176; Hathcock v. Gray, 22 La. Ann. 472; State v. McClanahan, 9 La. Ann. 210; Buel v. The New York, 17 La. 541; Penn v. Collins, 5 Rob. 213.

Me. Poland v. McDowell, 96 A. 834, 114 Me. 511; McKown v. Powers, 86 Me. 291, 29 A. 1079; State v. Richards, 85 Me. 252, 27 A. 122; State v. Wilkinson, 76 Me. 317.

Mass. Jones v. Newton St. Ry. Co., 71 N. E. 114, 186 Mass. 113; McCoy v. Jordan, 69 N. E. 358, 184 Mass. 575; Spooner v. Handley, 151 Mass. 313, 23 N. E. 840; Lee v. Gibbs (10 Allen) 248.

Mich. People v. Wallin, 55 Mich. 497, 22 N. W. 15; Maclean v. Scripps,

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[18] **Fla.** Lester v. State, 37 Fla. 382, 20 So. 232; Shepherd v. State, 36 Fla. 374, 18 So. 773.

Ky. Reed v. Commonwealth, 7 Bush, 641; Burns v. Commonwealth, 3 Metc. 13.

La. State v. Johnson, 68 So. 843, 137 La. 505; State v. Harris, 31 So. 782, 107 La. 325; State v. West, 30 So. 119, 105 La. 639; State v. Wright, 28 So. 909, 104 La. 44.

Minn. State v. Shtemme, 158 N. W. 48, 133 Minn. 184.

Mo. State v. Bailey, 88 S. W. 733, 190 Mo. 257; State v. Westlake, 61 S. W. 243, 159 Mo. 669; State v. Sacre, 141 Mo. 64, 41 S. W. 905; State v. Hilsabeck, 132 Mo. 348, 34 S. W. 38.

Mont. Territory v. O'Brien, 7 Mont. 38, 14 P. 631.

N. M. Territory v. Watson, 78 P. 504, 12 N. M. 419.

N. C. State v. Foster, 90 S. E. 785, 172 N. C. 960.

Okl. Patterson v. State, 113 P. 216, 4 Okl. Cr. 542.

Tex. Gould v. State, 146 S. W. 172, 66 Tex. Cr. R. 122; Id., 146 S. W. 179 (first and second cases), 65 Tex. Cr. R. 662; Id., 146 S. W. 179 (third case); Martin v. State, 25 Tex. App. 557, 8 S. W. 682; Robinson v. State, 24 Tex. 152.

In capital cases, an exception to the text rule exists in Louisiana. State v. Wright, 28 So. 909, 104 La. 44.

on the failure of the court to reduce its instructions to writing,[19]

18 N. W. 209, 52 Mich. 214, denying rehearing 17 N. W. 815, 52 Mich. 214.

Minn. Skaggs v. Illinois Cent. R. Co., 145 N. W. 381, 124 Minn. 503; Sembum v. Duluth Iron Range R. Co., 141 N. W. 523, 121 Minn. 439; Block v. Great Northern Ry. Co., 118 N. W. 1019, 106 Minn. 285.

Miss. Georgia Pac. Ry. Co. v. West, 66 Miss. 310, 6 So. 207; Haynie v. State, 32 Miss. 400.

Mo. State v. Cantlin, 118 Mo. 100, 23 S. W. 1091; Waller v. Hannibal & St. J. R. Co., 83 Mo. 608; Devlin v. Clark, 31 Mo. 22; Thompson v. Russell, 30 Mo. 498; Bradley v. Creath, 27 Mo. 415; Powers v. Allen, 14 Mo. 367; Bompart v. Boyer, 8 Mo. 234; Naughton v. Stagg, 4 Mo. App. 271.

Neb. Smith v. Kennard, 74 N. W. 859, 54 Neb. 523; Glaze v. Parcel, 40 Neb. 732, 59 N. W. 382; Levi v. Fred, 38 Neb. 564, 57 N. W. 386; Roach v. Hawkinson, 34 Neb. 658, 52 N. W. 373; Schroeder v. Rinehard, 25 Neb. 75, 40 N. W. 593; Nyce v. Shaffer, 20 Neb. 507, 30 N. W. 943; Warrick v. Rounds, 17 Neb. 411, 22 N. W. 785; Black v. Winterstein, 6 Neb. 224.

Nev. Lobdell v. Hall, 3 Nev. 507.

N. H. Nadeau v. Sawyer, 59 A. 369, 73 N. H. 70; Pitman v. Mauran, 40 A. 392, 69 N. H. 230; First Nat. Bank of Gonic v. Ferguson, 58 N. H. 403.

N. C. State v. Wiseman, 101 S. E. 629, 178 N. C. 784, rehearing denied 102 S. E. 706.

Okl. St. Louis & S. F. R. Co. v. Fling, 127 P. 473, 36 Okl. 25.

Pa. General Roofing Mfg. Co. v. Greensburg Title & Trust Co., 71 Pa. Super. Ct. 373.

S. C. Parks v. Laurens Cotton Mills, 56 S. E. 234, 75 S. C. 560; Hatchell v. Chandler, 40 S. E. 777, 62 S. C. 380; South Carolina R. Co. v. Wilmington, C. & A. R. Co. 7 S. C. 410; Fox v. Savannah & C. R. Co., 4 S. C. 543.

Tex. Colorado & S. Ry. Co. v. Rowe (Civ. App.) 224 S. W. 928; Thomas v. Corbett (Civ. App.) 211 S. W. 806; Edwards v. State, 166 S. W. 517, 73 Tex. Cr. R. 380; Texas Brewing Co. v. Walters (Civ. App.) 43 S. W. 548; Corn v. State, 41 Tex. 301; Williams v. State, 4 Tex. App. 5.

Vt. State v. Clark, 37 Vt. 471.

Limiting time after delivery of charge for formulating objections thereto. In a broker's action for commission, where the court's charge submitted only three issues and the controlling issues were exceedingly few and simple, and the court adjourned from 11:45 a. m. until 2:30 p. m., requiring that all special issues be prepared in the interval, and appellant prepared and filed objections to the court's charge, and it does not appear what further objections appellant wanted to prepare, the assignment that the court erred in not granting more time must be overruled. Yarn v. Moeller (Tex. Civ. App.) 216 S. W. 234.

Exception to refusal of request. Where defendant's counsel seasonably presented his requests for rulings, he was not required to except to their refusal until the end of the charge. Maxwell v. Massachusetts Title Ins. Co., 92 N. E. 42, 206 Mass. 197.

Inability of party to present objections before retirement of jury. Where a case was submitted to the jury two hours before the expiration of the term by limitation, and the court refused to detain the jury to give a party time to reduce his objections to the instructions to writing and present the same; but gave him permission to present them within a reasonable time after the jury had retired, which was done, the fact that the objections were not taken before the jury retired does not deprive such party of the benefit thereof. Dalton v. Moore (C. C. A. Alaska) 141 F. 311, 72 C. C. A. 459. An exception to a refusal to grant a request for an instruction, made immediately after the jury had retired, was not too late where the judge had directed the jury to take the case as soon as he had concluded his remarks about said request. State v. Pirlot, 38 A. 656, 20 R. I. 273.

[19] **Ala.** Louisville & N. R. Co. v.

on its failure to observe the statutory requirement that the charge be written in consecutively numbered paragraphs,[20] on its failure to read the charge to the jury,[21] on misstatements by the court of the evidence,[22] and on the alteration of written instructions by interlineation.[23]

In some jurisdictions objections to the charge, not made prior to the reading of it to the jury, cannot be considered.[24] Under this rule exceptions taken after the jury have retired, and when they have returned to ask for further instructions, are too late.[25] In the great majority of jurisdictions objections or exceptions made or taken after verdict to the action of the court with respect to charging the jury are too late,[26] and such rule cannot be waived by the parties after the verdict.[27]

Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863.

Ark. E. O. Barnett Bros. v. Porter, 203 S. W. 842, 134 Ark. 268.

Fla. Hubbard v. State, 37 Fla. 156, 20 So. 235; Gibson v. State, 26 Fla. 109, 7 So. 376; Baker v. Chatfield, 23 Fla. 540, 2 So. 822; West v. Blackshear, 20 Fla. 457.

Mich. Garton v. Union City Nat. Bank, 34 Mich. 279.

Mo. State v. Dewitt, 53 S. W. 429, 152 Mo. 76.

Tex. Franklin v. State, 2 Tex. App. 8; Browning v. State, 1 Tex. App. 96.

Utah. United States v. Gough, 8 Utah, 428, 32 P. 695.

[20] Gibson v. Sullivan, 18 Neb. 558, 26 N. W. 368.

[21] State v. Clark, 63 S. E. 402, 64 W. Va. 625.

[22] **Me.** Skene v. Graham, 100 A. 938, 116 Me. 202; State v. Fenlason, 78 Me. 495, 7 A. 385; Jameson v. Weld, 45 A. 299, 93 Me. 345; Knight v. Thomas, 7 A. 538.

Mich. Middlebrook v. Slocum, 116 N. W. 422, 152 Mich. 286.

N. C. State v. Wiseman, 101 S. E. 629, 178 N. C. 784, rehearing denied 102 S. E. 706; State v. Caylor, 101 S. E. 627, 178 N. C. 807; Ball-Thrash Co. v. McCormick, 90 S. E. 916, 172 N. C. 677.

S. C. State v. Jones, 21 S. C. 596.

[23] Tracy v. State, 46 Neb. 361, 64 N. W. 1069.

[24] **N. M.** State v. Lucero, 171 P. 785, 24 N. M. 343.

Tex. Shumaker v. Byrd (Civ. App.) 208 S. W. 461; Ochoa v. Edwards (Civ. App.) 189 S. W. 1022; Arensman v. State, 187 S. W. 471, 79 Tex. Cr. R. 546; McPherson v. State, 182 S. W. 1114, 79 Tex. Cr. R. 93; Walker v. State, 181 S. W. 191, 78 Tex. Cr. R. 237; McLaughlin v. Terrell Bros. (Civ. App.) 179 S. W. 932; Consolidated Kansas City Smelting & Refining Co. v. Schulte (Civ. App.) 176 S. W. 94; Glasper v. State, 174 S. W. 585, 76 Tex. Cr. R. 310; Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 172 S. W. 750; Bodkins v. State, 172 S. W. 216, 75 Tex. Cr. R. 499; Guiterrez v. State, 170 S. W. 717, 75 Tex. Cr. R. 119; Eldridge v. Citizens' Ry. Co. (Civ. App.) 169 S. W. 375; Hawkins v. State, 168 S. W. 93, 74 Tex. Cr. R. 452.

[25] Hayes v. Solomon, 90 Ala. 520, 7 So. 921; Garoutte v. Williamson, 108 Cal. 135, 41 P. 35, 413.

[26] **U. S.** Illinois Cent. R. Co. v. Skaggs, 36 S. Ct. 249, 240 U. S. 66, 60 L. Ed. 528, affirming judgment Skaggs v. Illinois Cent. R. Co., 147 N. W. 1135, 125 Minn. 532; Reagan v. Aiken, 138 U. S. 109, 11 Sup. Ct. 283, ⇒

[27] Farr v. Swigart, 13 Utah, 150, 44 P. 711.

§ 510. Rule permitting objections after retirement of jury or after verdict

In some jurisdictions, in the absence of any rule to the contrary or under statutory provisions, such an objection or exception may be taken after the retirement of the jury and before the return of their verdict,[28] and in a few jurisdictions there is statutory au-

34 L. Ed. 892; (D. C. Wash.) Brent v. Chas. H. Lilly Co., 202 F. 335.

Ala. Bynum v. Southern Pump & Pipe Co., 63 Ala. 462.

Colo. Taylor v. Randall, 3 Colo. 399.

Dak. Cheatham v. Wilber, 1 Dak. 335, 46 N. W. 580.

Fla. Weightnovel v. State, 35 So. 856, 46 Fla. 1; Easterlin v. State, 31 So. 350, 43 Fla. 565; Morrison v. State, 28 So. 97, 42 Fla. 149.

Idaho. State v. Hurst, 39 P. 554, 4 Idaho, 345.

Ind. Neff v. Masters, 89 N. E. 846, 173 Ind. 196; Vaughn v. Ferrall, 57 Ind. 182; Wood v. McClure, 7 Ind. 155; Roberts v. Higgins, 5 Ind. 542; Jones v. Van Patten, 3 Ind. 107.

La. State v. Mitchell, 53 So. 561, 127 La. 270; State v. Bush, 41 So. 793, 117 La. 463; Vaughan v. Vaughan, 3 Mart. (O. S.) 215.

Mass. Nagle v. Laxton, 77 N. E. 719, 191 Mass. 402; Nixon v. Hammond, 12 Cush. 285.

Minn. Turritin v. Chicago, St. P., M. & O. Ry. Co., 104 N. W. 225, 95 Minn. 408; Barker v. Todd, 37 Minn. 370, 34 N. W. 895.

Miss. Anderson v. Hill, 12 Smedes & M. 679, 51 Am. Dec. 130.

Mo. Houston v. Lane, 39 Mo. 495; Devlin v. Clark, 31 Mo. 22; Mattingly v. Moranville. 11 Mo. 604; Randolph v. Alsey, 8 Mo. 656.

Neb. Bradstreet v. Grand Island Banking Co., 131 N. W. 956, 89 Neb. 590; Watson v. Roode, 30 Neb. 264, 46 N. W. 491.

N. H. Willard v. Stevens, 24 N. H. 271.

N. Y. People v. Spohr. 100 N. E. 444, 206 N. Y. 516; Banker v. Fisher, 55 Hun, 605, 7 N. Y. S. 732; De Leon v. Echeverria, 45 N. Y. Super. Ct. 240; Koster v. Noonan, 8 Daly, 231.

N. C. Barefoot v. Lee, 83 S. E. 247, 168 N. C. 89; Phifer v. Commissioners of Cabarrus County, 72 S. E. 852, 157 N. C. 150; State v. Hart, 116 N. C. 976, 20 S. E. 1014; State v. Nicholson, 85 N. C. 548; State v. Caveness, 78 N. C. 484.

R. I. Meyers v. Briggs, 11 R. I. 180; Sarle v. Arnold, 7 R. I. 582.

S. C. Warren v. Lagrone, 12 S. C. 45.

Tex. Hall v. Stancell, 3 Tex. 400.

Utah. People v. Thiede, 11 Utah, 241, 39 P. 837.

Va. Newport News & O. P. Ry. & Electric Co. v. Bradford, 37 S. E. 807, 99 Va. 117; Collins v. George, 46 S. E. 684, 102 Va. 509.

W. Va. Carder v. Bank of West Virginia, 34 W. Va. 38, 11 S. E. 716; Wustland v. Porterfield, 9 W. Va. 438.

Wis. Thrasher v. Postel, 79 Wis. 503, 48 N. W. 600; Nicks v. Town of Marshall, 24 Wis. 139.

In Massachusetts, the rule formerly was that exceptions to the instructions to the jury in the court of common pleas might be first alleged after verdict returned. Inhabitants of Buckland v. Inhabitants of Charlemont, 3 Pick. 173. But see Train v. Collins, 2 Pick. 145.

[28] **N. Y.** Hunt v. Becker, 160 N. Y. S. 45, 173 App. Civ. 9; Broadway Trust Co. v. Fry, 83 N. Y. S. 103, 40 Misc. Rep. 680; Polykranas v. Krausz, 77 N. Y. S. 46, 73 App. Div. 583; Panama R. Co. v. Johnson, 58 Hun, 557, 12 N. Y. S. 499.

Wash. Radburn v. Fir Tree Lumber Co., 145 P. 632, 83 Wash. 643; State v. Nels, 123 P. 1022, 68 Wash. 599; State v. Vance, 70 P. 34, 29 Wash. 435.

W. Va. Nadenbousch v. Sharer, 2 W. Va. 285.

Wis. Gehl v. Milwaukee Produce Co., 93 N. W. 26, 116 Wis. 263.

In Michigan the rule of the text

thority for the taking of such exceptions after verdict,[29] or at any time before the entry of final judgment,[30] and in one jurisdiction

obtained under R. S. 1846, p. 161, § 62. Doyle v. Stevens, 4 Mich. 87.

Discretion of court. The court may, in the exercise of its discretion, allow exceptions to instructions to the jury, although they were not taken until after the jury had withdrawn to consider of their verdict. St. John v. Kidd, 26 Cal. 263.

Requirement that exceptions be taken, if practicable, before the return of the verdict. Rule 58 of the Circuit Court for the District of Montana, which permits exceptions to the charge of the court or to the refusal of instructions requested to be taken after the jury have retired, but, if practicable, before the verdict has been returned, was intended to permit such course to be followed, where it would be in the interest of justice by avoiding the confusion of the jury or where further instructions were given in the absence of counsel, and not to permit exceptions generally to be taken after the close of the trial contrary to the settled rule of the federal courts; and where the judge, after instructing the jury but before sending them out, retired to his room with counsel and there heard and allowed the exceptions, the rule does not require him to afterward entertain or allow further exceptions. Montana Min. Co. v. St. Louis Min. & Mill. Co., 147 F. 897, 78 C. C. A. 33, judgment reversed 27 S. Ct. 254, 204 U. S. 204, 51 L. Ed. 444.

Failure to reduce to writing. Exceptions to instructions because given orally must be taken at the time notwithstanding the statutory provision that exceptions to instructions may be taken at any time before the motion for a new trial. Taylor v. Kidd, 129 P. 406, 72 Wash. 18.

[29] **Iowa.** State v. Smith, 180 N. W. 4; Patterson v. Chicago, M. & St. P. Ry. Co., 70 Iowa, 593, 33 N. W. 228; Parker v. Middleton, 65 Iowa, 200, 21 N. W. 562; Deere v. Needles, 65 Iowa, 101, 21 N. W. 203; Bailey v. Anderson, 61 Iowa, 749, 16 N. W. 134.

Pa. Sikorski v. Philadelphia & R. Ry. Co., 103 A. 618, 260 Pa. 243; Commonwealth v. Shobert, 49 Pa. Super. Ct. 371; Same v. Debussey, Id.; Commonwealth v. Lynch, 49 Pa. Super. Ct. 370; Commonwealth v. Sweeney, Id.; Commonwealth v. Duffy, 49 Pa. Super. Ct. 344.

Wash. State v. Peeples, 129 P. 108, 71 Wash. 451.

In Iowa, section 3705a of the 1913 Supplement to the Code, which specifically required that all objections or exceptions must be made before the reading of the instructions to the jury, and on which section the decisions in Freeby v. Town of Sibley, 167 N. W. 770, 183 Iowa, 827, and Seitsinger v. Iowa City Electric Ry. Co., 165 N. W. 205, 182 Iowa, 739, are based, was repealed by Acts 37th Gen. Assem. c. 24. Haman v. Preston, 173 N. W. 894, 186 Iowa, 1292.

In North Carolina exceptions for omission to charge must be before verdict, though for error in the charge they may be taken within 10 days after adjournment. State v. Harris, 26 S. E. 774, 120 N. C. 577.

In Pennsylvania, the former practice required that the attention of the court should be called to errors in its charge before the retirement of the jury. McGinley v. Philadelphia & R. Ry. Co., 101 A. 825, 257 Pa. 519; First Nat. Bank of Hanover v. Delone, 98 A. 1042, 254 Pa. 409; Tolson v. Philadelphia Rapid Transit Co., 93 A. 1017, 248 Pa. 227; Commonwealth v. Minney, 65 A. 31, 216 Pa. 149, 116 Am. St. Rep. 763; Commonwealth v. Haskell, 2 Brewst. 491; Commonwealth v. Taylor, 65 Pa. Super. Ct. 113; Thompson v. W. P. Zartman Lumber Co., 55 Pa. Super. Ct. 302; Harter v. Whitebread, 38 Pa. Super. Ct. 10.

Extension of time. The giving of time within which to file a motion for a new trial, and in arrest of judgment, does not extend the time for filing exceptions to instructions. Leach v. Hill. 97 Iowa, 81, 66 N. W. 69; Henry v. Henry (Iowa) 179 N. W. 856.

[30] Keck v. Bushway, 90 N. E. 196 242 Ill. 441; Collins Ice Cream Co. v. Stephens, 59 N. E. 524, 189 Ill. 200;

an error upon the face of the charge may be availed of by an exception entered within a specified time after adjournment for the term.[31]

§ 511. Extension of time

Trial courts should give reasonable opportunity to counsel to reserve exceptions to any instructions which they deem injurious to the rights of their clients,[32] and in some jurisdictions the court has power, on good cause shown, to extend the time within which exceptions to a charge may be taken, either before or after the time limited therefor has elapsed.[33] Such a power should not be exercised to condone an unreasonable delay in preparing exceptions,[34] or, under some of the statutes, in the absence of a showing of excusable neglect.[35]

C. Mode of Making Objections and Manner of Taking and Noting Exceptions

§ 512. Mode of making objections in general

A party complaining of an instruction should first state his particular objection to it when it is given, and if such objection is overruled an exception should then be reserved.[36] An exception once properly taken to an instruction is not waived by the failure of the party so excepting to object to a subsequent instruction embodying the same principle.[37] In some jurisdictions a request by a litigant for a special charge may fulfill the function of an exception to the main charge because of its failure to cover the subject of the special request.[38] Indeed, it is held that the proper remedy

State v. Hofer, 164 N. W. 79, 39 S. D. 281; Uhe v. Chicago, M. & St. P. Ry. Co., 4 S. D. 505, 57 N. W. 484.

Application of rule. In South Dakota, under the statute providing that "exceptions to the giving or refusing any instruction, or to its modification or change, may be taken at any time before the entry of final judgment," there is no distinction between instructions given at the request of counsel and those given by the court of its own motion. Uhe v. Chicago, M. & St. P. Ry. Co., 4 S. D. 505, 57 N. W. 484.

[31] H. G. Williams & Co. v. Harris, 49 S. E. 954, 137 N. C. 460.

Failure to reduce to writing. An objection to a failure to put a charge in writing is waived by not excepting before verdict, when the mistake, if any, can be corrected. Phillips v. Wilmington & W. R. Co., 41 S. E. 805, 130 N. C. 582.

[32] Brewer v. State, 165 P. 634, 13 Okl. Cr. 514; Fowler v. State, 126 P. 831, 8 Okl. Cr. 130.

[33] Lindblom v. Sonstelie, 86 N. W. 357, 10 N. D. 140.

[34] State v. Lucker, 40 S. C. 549, 18 S. E. 797.

[35] State v. Brown, 165 N. W. 987, 39 S. D. 567.

[36] Sheets v. Iowa State Ins. Co., 126 S. W. 413, 226 Mo. 613; Ross v. Saylor, 104 P. 864, 39 Mont. 559.

[37] Baltimore & O. R. Co. v. Lee, 55 S. E. 1, 106 Va. 32.

[38] Ft. Worth & D. C. Ry. Co. v. Alcorn (Tex. Civ. App.) 178 S. W. 833.

for an omission in an instruction is not an exception to the instruction given, but a request to the court to give one supplying or covering the omission and the saving of a proper exception to a refusal of such request,[39] and a party who has excepted to the refusal of the court to grant a request properly declaring a rule of law is not required to again except to a subsequent instruction of the court declaring the law to be otherwise than that contained in the request.[40]

Where, however, a request for an instruction is refused, and a modified or independent proposition is given instead, the party who considers himself aggrieved must except to the refusal to charge as requested and also take an independent exception to the charge as given.[41] A party objecting to an instruction which has been given on his own request should accompany his objection by a withdrawal of such request.[42]

§ 513. General requirements with respect to manner of taking and noting exceptions

At some time exceptions to the charge of the court must be reduced to writing, together with so much of the charge as is necessary to explain them.[43] If exceptions are taken orally under a statute so permitting, they must be noted on the minutes of the court.[44]

That counsel indicates to the court that he believes it is about to make an erroneous ruling on instructions does not constitute a sufficient exception to the ruling when made.[45] In some jurisdictions the points of exceptions to instructions should be designated while the jury are at the bar, and it is improper practice to permit formal exceptions to be then noted and the specification of the objection to be supplied in the record later.[46]

Exceptions to instructions may be reserved by bill of exceptions,[47] and under some statutory provisions a party taking an exception to an instruction must preserve it by a bill of exceptions signed by the trial judge.[48]

[39] Taggart v. McKinsey, 85 Ind. 392.

[40] Long-Bell Lumber Co. v. Stump (C. C. A. Ark.) 86 F. 574, 30 C. C. A. 260; Evans v. Clark, 40 S. W. 771, 1 Ind. T. 216.

[41] Brozek v. Steinway Ry. Co. of Long Island City, 55 N. E. 395, 161 N. Y. 63, affirming judgment 48 N. Y. S. 345, 23 App. Div. 623; 48 N. Y. S. 1101, 23 App. Div. 626.

[42] Texas & P. Ry. Co. v. Williams (Tex. Civ. App.) 196 S. W. 230.

[43] Territory v. O'Brien, 7 Mont. 38, 14 P. 631; Monroe v. Elburt, 1 Neb. 174.

[44] Roach v. Cumberland Bank, 111 N. E. 320, 60 Ind. App. 547.

[45] Gerber v. Ætna Indemnity Co., 112 P. 272, 61 Wash. 184.

[46] Mountain Copper Co. v. Van Buren (C. C. A. Cal.) 133 F. 1, 66 C. C. A. 151.

[47] Landers v. Beck, 92 Ind. 49.

[48] Owens v. Missouri Pac. Ry. Co., 67 Tex. 679, 4 S. W. 593.

§ 514. Noting exceptions on margin of instructions

In a considerable number of jurisdictions, however, an exception to an instruction is sufficiently preserved by a notation by the trial court on the margin of such instruction of the fact of such exception.[49] In some jurisdictions there are statutory provisions dispensing with the filing of a formal bill of exceptions, and permitting a party to preserve his exceptions to the giving or refusal of instructions by writing, at the close of each instruction, "Given and excepted to" or "Refused and excepted to."[50]

Such a provision is not satisfied by an omnibus exception to a number of instructions,[51] and such a memorandum under some of these provisions is required to be signed by the party or his attorney, or by the trial judge, and dated.[52] In one jurisdiction a signing of such notation by either the party or his attorney, or the trial judge, is sufficient,[53] and it has been held that the failure of the trial judge to sign an instruction so excepted to cannot prejudice the rights of an appellant.[54] Where such a memorandum is signed by the attorneys of a party, however, the court should be made acquainted with what has been done.[55]

§ 515. Knowledge of court or opposing party

A mere statement by counsel to the official reporter that he wishes it understood that he saves an exception to the charge of the

[49] Clement v. Drybread, 78 N. W. 235, 108 Iowa, 701; Bennett v. McDonald, 72 N. W. 268, 52 Neb. 278.

[50] Muncie & P. Traction Co. v. Black, 89 N. E. 845, 173 Ind. 142; Indiana, I. & I. R. Co. v. Bundy, 53 N. E. 175, 152 Ind. 590; Lower v. Franks, 115 Ind. 334, 17 N. E. 630; Wade v. Guppinger, 60 Ind. 376.

[51] Inland Steel Co. v. Smith, 75 N. E. 852, 39 Ind. App. 636, judgment affirmed 80 N. E. 538, 168 Ind. 245; Sherlock v. First Nat. Bank of Bloomington, 53 Ind. 73; Ludwig v. Blackshere, 71 N. W. 356, 102 Iowa, 366.

[52] **Ind.** Retseck v. Harbart, 96 N. E. 386, 176 Ind. 441; Neff v. Masters, 89 N. E. 846, 173 Ind. 196; Muncie & P. Traction Co. v. Black, 89 N. E. 845, 173 Ind. 142; Grand Rapids & I. Ry. Co. v. King, 83 N. E. 778, 41 Ind. App. 701; Inland Steel Co. v. Smith, 80 N. E. 538, 168 Ind. 245, affirming judgment 75 N. E. 852, 39 Ind. App. 636; Malott v. Hawkins, 63 N. E. 308, 159 Ind. 127; Ayres v. Blevins, 62 N. E. 305, 28 Ind. App. 101; Roose v. Roose, 145 Ind. 162, 44 N. E. 1; Wade v. Guppinger, 60 Ind. 376; Ledley v. State, 4 Ind. 580.

Md. Central Ry. Co. of Baltimore v. Coleman, 80 Md. 328, 30 A. 918.

Ratification of memorandum without actual signature. Where counsel, when instructions were given, indicated in open court their desire to except thereto, and afterwards themselves noted their exceptions by a memorandum on the margin of the instructions, it was held that the court, in overruling a motion to strike from the record such memorandum, ratified the notation, and, such notation being in accordance with the facts, there was no error in the ruling. Blumer v. Bennett, 44 Neb. 873, 63 N. W. 14.

[53] Gwinn v. Hobbs (Ind. App.) 118 N. E. 155.

[54] Gibbs v. Wall, 10 Colo. 153, 14 P. 216.

[55] Hawley v. State, 69 Ind. 98.

court does not amount to an exception.[56] The requirement found in some statutes that exceptions to instructions be filed is probably for the purpose of bringing them to the attention of the court,[57] and under a statute requiring that exceptions to instructions be stated to the court, specifying the parts of the charge excepted to, and that they be, by him or by the clerk, noted in the minutes or embodied in the record, exceptions which are merely filed, and never called to the attention of the court, are not available on appeal.[58]

Exceptions to instructions are sufficient, although the trial judge does not hear them, if they are dictated by the attorneys in his presence in open court and he has opportunity to hear them.[59]

In some jurisdictions a party is not required to submit to the opposing counsel his objections to the charges given,[60] but in other jurisdictions it has been held that, since a party is entitled to full notice of all the proceedings in the case, the taking of exceptions to instructions outside of the court room and without the knowledge of the adverse party, even if done by the consent of the court, is as much a wrong to such adverse party as it would be to the court, if its consent had not been previously obtained.[61]

§ 516. Necessity of formal exception

A formal exception to rulings on instructions may be unnecessary, where the court states, on making such rulings, that it grants an exception to the party complaining thereof.[62] By virtue of a custom or statutory provision the rulings of the court in giving or refusing instructions may be deemed excepted to although no exceptions were actually taken,[63] but in absence of such a custom or statute the mere agreement of counsel cannot have such an effect.[64] The mere handing to the trial judge of written requests for

[56] Coleman v. Gilmore, 49 Cal. 340.

[57] Territory v. O'Brien, 14 P. 631, 7 Mont. 38.

[58] Coffey v. Seattle Electric Co., 109 P. 202, 59 Wash. 686.

[59] Ongaro v. Twohy, 94 P. 916, 49 Wash. 93.

[60] Atchison, T. & S. F. Ry. Co. v. Smith (Tex. Civ. App.) 190 S. W. 761.

[61] Ober v. Schenck, 65 P. 1073, 23 Utah, 614.

[62] Mitchell v. Turner, 149 N. Y. 39, 43 N. E. 403.

[63] Watson v. Dickens, 12 Smedes & M. (Miss.) 608; Union Loan, Storage & Mercantile Co. v. Farbstein, 127 S. W. 656, 148 Mo. App. 216; State v. Reilly, 141 N. W. 720, 25 N. D. 339; Missouri Pac. Ry. Co. v. Rabb, 3 Willson, Civ. Cas. Ct. App. § 37.

Effect of election to file exceptions. In North Dakota, a party may, if he sees fit, elect to file exceptions with the clerk of court to the instructions given to the jury, and if he does so elect he must be governed by such election and will be limited to the exceptions which he has filed. State v. Campbell, 72 N. W. 935, 7 N. D. 58.

[64] Herman v. Jeffries, 4 Mont. 513, 1 P. 11.

instructions does not necessarily imply that if the requests are not granted an exception is saved.[65]

D. Sufficiency of Objections or Exceptions with Respect to Their Substance

§ 517. Oral charges

An exception to a charge on the ground that it is oral must be taken by objecting to the manner in which it is given and not to the matter thereof.[66] Where oral instructions are given as a continuous and connected charge, it is not proper to treat each paragraph thereof as a separate instruction for the purpose of objection.[67]

An exception to an oral charge is sufficiently saved, where it is excepted to orally and the exceptions are taken by the stenographer and certified in the case made.[68] In one jurisdiction it is held that there is no practice allowing an exception taken by description of a subject treated by the court in an oral charge, without precisely designating the statement of the court objected to.[69]

§ 518. Joint exceptions

A joint exception by two defendants to the giving of certain instructions, which are incorrect as to only one of the defendants, constitutes no basis for a reversal of a judgment rendered against them.[70]

E. Rule That Exceptions to Instructions or the Refusal Thereof Should be Specific

§ 519. In general

While in some jurisdictions a general exception to the charge of the court is authorized,[71] and is sufficient without pointing out

[65] Leyland v. Pingree, 134 Mass. 367; South Carolina R. Co. v. Wilmington, C. & A. R. Co., 7 S. C. 410.

[66] Moses v. Loomis, 55 Ill. App. 342.

[67] Harmon v. Callahan, 187 Ill. App. 312.

[68] Hurst v. Hill, 122 P. 513, 32 Okl. 532.

[69] Birmingham Ry., Light & Power Co. v. Friedman, 65 So. 939, 187 Ala. 562.

[70] Marshall v. Lewark, 117 Ind. 377, 20 N. E. 253; Jones v. Gould, 103 N. E. 720, 209 N. Y. 419, reversing judgment 136 N. Y. S. 600, 152 App. Div. 881.

[71] Williams v. Commonwealth, 80 Ky. 313, 4 Ky. Law Rep. 3; City of Cincinnati v. Anderson, 19 Ohio Cir. Ct. R. 603, 10 O. C. D. 522.

Failure to require specific objection. A general exception is sufficient when the charge is erroneous and the party is not asked to more specifically state his exception. Strader v. Marietta & C. Ry. Co., 13 Ohio Dec. 895, 2 Cin. Super. Ct. Rep'r, 268.

In Iowa, the rule prior to the Re-

in detail the specific instructions challenged,[72] the practice of taking general and obscure exceptions to the charge at the moment, in order to cover the case and enable counsel, on subsequent critical examination, to raise points which have never been suggested at all to the mind of the trial judge, is objectionable on many grounds,[73] and the general rule in most jurisdictions is that an exception to the instructions as an entirety is not tenable,[74] but that, on the contrary, exceptions to the charge of the court must point out some definite or specific defect,[75] this rule requiring, in

vision was that a general exception taken to the whole of the judge's charge entitled the excepting party to present for review an erroneous position in any portion of the charge, and this rule governs in all actions begun before the Revision took effect. Wilhelmi v. Leonard, 13 Iowa, 330.

[72] Ervin v. St. Louis, I. M. & S. Ry. Co., 139 S. W. 498, 158 Mo. App. 1.

Even in this jurisdiction, it is said that the practice so much indulged in of using a general objection as a cover for a trap to be sprung in the appellate court should not be countenanced in cases where the trial court has endeavored to guard against error by calling for specific objections. De Ford v. Johnson, 133 S. W. 393, 152 Mo. App. 209.

[73] Turner v. People, 33 Mich. 363.

[74] **U. S.** (C. C. A. N. C.) Newman v. Virginia, T. & C. Steel & Iron Co., 80 F. 228, 25 C. C. A. 382; (C. C. A. Ohio) American Issue Pub. Co. v. Sloan, 248 F. 251, 160 C. C. A. 329.

Cal. Love v. Anchor Raisin Vineyard Co., 45 P. 1044, 114 Cal. xvi.

D. C. Ryan v. Washington & G. R. Co., 8 App. D. C. 542.

Ill. St. Louis & S. F. R. Co. v. Puterbaugh, 117 Ill. App. 569; Continental Investment & Loan Soc. v. Schubnell, 63 Ill. App. 379.

Ind. Kelly v. John, 13 Ind. App. 579, 41 N. E. 1069.

Mass. Savage v. Marlborough St. Ry. Co., 71 N. E. 531, 186 Mass. 203.

Neb. Penn v. Trompen, 100 N. W. 312, 72 Neb. 273; Barton v. Shull, 97 N. W. 292, 70 Neb. 324; American Fire Ins. Co. v. Landfare, 76 N. W. 1068, 56 Neb. 482.

N. H. Guertin v. Town of Hudson, 53 A. 736, 71 N. H. 505; Harris v. Smith, 52 A. 854, 71 N. H. 330.

N. Y. Ebenreiter v. Dahlman, 42 N. Y. S. 867, 19 Misc. Rep. 9.

N. C. Roberts v. Baldwin, 71 S. E. 319, 155 N. C. 276; State v. Melton, 26 S. E. 933, 120 N. C. 591; Burnett v. Wilmington, N. & N. Ry. Co., 26 S. E. 819, 120 N. C. 517; Andrews v. Postal Tel. Co., 25 S. E. 955, 119 N. C. 403.

S. C. Gable v. Rauch, 27 S. E. 555, 50 S. C. 95.

Vt. Luce v. Hassam, 58 A. 725, 76 Vt. 450; Gregg v. Willis, 45 A. 229, 71 Vt. 313.

Wis. Lee v. Hammond, 90 N. W. 1073, 114 Wis. 550.

[75] **U. S.** (D. C. Cal.) United States v. Hammond, 226 F. 849; (C. C. A. N. Y.) Gilson v. United States, 258 F. 588, 169 C. C. A. 528, certiorari denied 40 S. Ct. 119, 251 U. S. 555, 64 L. Ed. 412.

Ark. Missouri Pac. R. Co. v. Block, 218 S. W. 682, 142 Ark. 127, certiorari denied 40 S. Ct. 586, 253 U. S. 493, 64 L. Ed. 1029; Rogers v. Robertson, 218 S. W. 206, 142 Ark. 210; St. Louis Southwestern Ry. Co. v. Wyman, 178 S. W. 423, 119 Ark. 530; Bain v. Ft. Smith Light & Traction Co., 172 S. W. 843, 116 Ark. 125, L. R. A. 1915D, 1021; Rittenhouse v. Bell, 153 S. W. 1111, 106 Ark. 315.

Colo. Meek v. Smith, 149 P. 627, 59 Colo. 461; Willard v. Williams, 50 P. 207, 10 Colo. App. 140.

D. C. District of Columbia v. Duryee, 29 App. D. C. 327, 10 Ann. Cas. 675.

Iowa. King v. Chicago, R. I. & P. Ry. Co., 172 N. W. 268, 185 Iowa, 1227.

Mass. Chestnut v. Sawyer, 126 N. E. 273, 235 Mass. 46; Sullivan v. Sheehan, 173 Mass. 361, 53 N. E. 902; Mc-

Kee v. Tourtellotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; Hopcraft v. Kittredge, 162 Mass. 1, 37 N. E. 768.

Mich. Geary v. People, 22 Mich. 220.

Minn. Finance Co. of Pennsylvania v. Old Pittsburgh Coal Co., 65 Minn. 442, 68 N. W. 70.

Nev. Weck v. Reno Traction Co., 149 P. 65, 38 Nev. 285.

N. J. Addis v. Rushmore, 65 A. 1036, 74 N. J. Law, 649; Smith v. Atlantic City R. Co., 65 A. 1000, 74 N. J. Law, 452.

N. M. Probst v. Trustees of Board of Domestic Missions, 3 N. M. (Johns.) 237, 5 P. 702.

N. Y. Jones v. Gould, 103 N. E. 720, 209 N. Y. 419, reversing judgment 136 N. Y. S. 600, 152 App. Div. 881; Ellis v. People, 21 How. Prac. 356.

N. D. Russell v. Olson, 133 N. W. 1030, 22 N. D. 410, 37 L. R. A. (N. S.) 1217, Ann. Cas. 1914B, 1069; Pease v. Magill, 115 N. W. 260, 17 N. D. 166.

Okl. Higgins v. Street, 92 P. 153, 19 Okl. 45, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086.

Pa. Sgier v. Philadelphia & R. Ry. Co., 103 A. 730, 260 Pa. 343.

R. I. Ralph v. Taylor, 82 A. 279, 33 R. I. 503, reargument denied 82 A. 495.

S. C. Township Com'rs of St. Andrews Parish v. Charleston Min. & Mfg. Co., 57 S. E. 201, 76 S. C. 382; Pearson v. Spartanburg County, 29 S. E. 193, 51 S. C. 480.

S. D. Wood v. Dodge, 120 N. W. 774, 23 S. D. 95.

Wis. Robinson v. Dow, 145 N. W. 652, 155 Wis. 605.

In Pennsylvania, it is held that, while the statute requires the reasons for a general exception to a charge to be given, it does not demand minute particularization. Sikorski v. Philadelphia & R. Ry. Co., 103 A. 618, 260 Pa. 243.

Illustrations of objections or exceptions held too general and indefinite to be available on appeal. A general exception to one sentence in a charge of ten paragraphs to a jury. Brooks v. Dutcher, 24 Neb. 300, 38 N. W. 780. An exception "to so much of" a long and elaborate charge "as requires the evidence should show there was an intention to deceive." Phœnix Assur. Co. v. Lucker (C. C. A. S. C.) 77 F. 243, 23 C. C. A. 139. An objection to instructions as having been given on a certain theory, and that "some of them fall far short of stating the law, even upon that theory, fully and correctly." Baltimore & O. S. W. Ry. Co. v. Spaulding, 52 N. E. 410, 21 Ind. App. 323. An exception "to all of the charges and to the special request asked by defendant for the reason that they are liable to mislead the jury, and for the reason that the jury in its verdict would pass upon these questions." Alt v. Chicago & N. W. Ry. Co., 5 S. D. 20, 57 N. W. 1126. An objection that a charge fails to submit the real issue. Thomas v. Parker, 69 Ga. 283. An exception "to the definition of ordinary care, and also in regard to the admissions," in the charge of the court in an action for negligence. Elmborg v. St. Paul City Ry. Co., 51 Minn. 70, 52 N. W. 969. An exception that the court erred in not confining the jury in their finding to the special matters of negligence set out and relied on by plaintiff, without showing how the court failed in that regard. Central R. R. v. Freeman, 75 Ga. 331. A general objection to each and all the instructions given, on a trial, that they are not law, or were misleading to the jury. Gum v. Murray, 6 Mont. 10, 9 P. 447. An exception that "the charge of the court, as a whole, is not a full and fair presentation of the law of the case." Chambers v. Walker, 80 Ga. 642, 6 S. E. 165. An exception, "in misdirecting the jury as to what would constitute the proximate cause of an injury in any given case." Tucker v. Charleston & W. C. Ry. Co., 28 S. E. 943, 51 S. C. 306. An exception that the court erred in omitting to correct any erroneous impressions made on the minds of the jury by the charge so widely at variance with defendant's requests as to be impossible of reconcilement therewith. Crosswell v. Connecticut Indemnity Ass'n, 29 S. E. 236, 51 S. C. 469. An exception, that "his honor erred in commenting upon the facts in connection

with the case in his charge." Hayes v. Sease, 29 S. E. 259, 51 S. C. 534. An exception to an instruction in that it charged, as the law applicable to the case, principles of law in regard to possession and boundaries which are correct in an action between grantor and grantee, but not where there is no dispute between them, and said issues are raised by a stranger who has no legal title to any of the land. Connor v. Johnson, 30 S. E. 833, 53 S. C. 90. Exceptions alleging error in giving or refusing certain numbered requests for instructions, or "in charging on the facts" or in not setting a verdict aside. Walters v. Laurens Cotton Mills, 31 S. E. 1, 53 S. C. 155. An objection that certain instructions given for plaintiff were on the wrong theory, and that defendants' which were refused should have been given. Ilgenfritz v. Missouri Pac. Ry. Co., 155 S. W. 854, 169 Mo. App. 652. An exception to the last half of a charge: "The jury will determine the amount of land actually taken and fenced in, and the statements made by the agents of the railroad company in the presence of the plaintiff are competent to prove what is actually taken." Bigelow v. West Wisconsin Ry. Co., 27 Wis. 478. Where, in an action for libel, the court charged that several parts of the publication were libelous per se, and some of the parts so pointed out were confessedly so, an exception "to the portions of the charge wherein it is stated that certain parts of the publication are libelous per se" is too broad, and therefore bad. Cunningham v. Underwood (C. C. A. Tenn.) 116 F. 803, 53 C. C. A. 99. Where, in a personal injury case, an instruction stated three distinct phases of the case relating to the measure of plaintiff's recovery, an exception that the charge "does not properly state the measure of plaintiff's damages or recovery, under the allegations of the complaint," is insufficient, for indefiniteness. McDonough v. Great Northern Ry. Co., 46 P. 334, 15 Wash. 244. Where, in an action for personal injuries, the court instructs the jury that plaintiff's expenses for medical treatment should be allowed, and a general exception is taken to such instruction as a whole, it being claimed on appeal that there was no evidence that he expended anything for such treatment, the exception will not be sustained, because not sufficiently specific at the time of taking. Hulehan v. Green Bay, W. & St. P. R. Co., 68 Wis. 520, 32 N. W. 529. In an action for malicious prosecution based on the institution of a suit for false representations as to the existence of a partnership between plaintiffs, an exception to an instruction as to probable cause "that if the defendant made false representations to his counsel, then he would not be protected, if counsel advised him that he had a good suit," held too general, since the false representations must have been as to material facts, and must have been considered and relied upon by counsel in giving advice as to the institution of the suit. Bonazzi v. Fortney, 110 A. 439, 94 Vt. 263.

Objections to instruction on maxim of "falsus in uno," etc. Where the court charged that, if the jury found that any witness had sworn falsely on any material fact in the case, his testimony might be disregarded unless corroborated by other reliable witnesses, a general exception is not sufficient to call the attention of the court to the fact that before the testimony could be rejected the jury must find that the witness had knowingly or willfully sworn falsely. Dallemand v. Janney, 51 Minn. 514, 53 N. W. 803.

Exceptions held sufficiently specific to raise particular questions. An exception to an instruction, on the ground that it assumes facts not proved in the case, need not point out specifically wherein it assumes such fact. Davis v. Strohm, 17 Iowa, 421. In an action to recover for the death of plaintiff's son, an exception to the portions of the general charge on the measure of damages as contrary to law is sufficiently specific to raise the question of the correctness of the charge on one element of damages, since all the elements together constitute the measure of damages, and, if one element was wrongly stated, the measure was a defective one. Wales v. Pacific Elec-

tric Motor Co., 62 P. 932, 130 Cal. 521. In an action for damages resulting from defendant's negligence, an exception to so much of the "charge as says that plaintiff is entitled to damages for the loss of services of his wife incurred during her sickness" alleged to have been caused by negligence, and a request to charge that plaintiff is not entitled to recover any such damages on the ground that he has failed to give any evidence showing what damages were sustained by reason of the loss of such services, fairly present the question of the sufficiency of plaintiff's evidence to entitle him to recover for the loss of the wife's services. Munk v. City of Watertown, 67 Hun, 261, 22 N. Y. S. 227. In an action for the negligent killing of a boy of tender years, an exception "to the language of the court with regard to the degree of care imposed on the boy" sufficiently points out the error in the charge stating the degree of care required of him. McDonald v. Metropolitan St. Ry. Co., 78 N. Y. S. 284, 75 App. Div. 559, rehearing denied 80 N. Y. S. 577, 80 App. Div. 233. Where a trial judge erroneously charged that a husband, in an action for injuries to his wife, might recover compensation for loss of his wife's assistance in the household duties, and, secondly, recompense for the hire of a woman to do certain work which the wife had done before her injury, an exception in the words of the charge is sufficient in the absence of a requirement by the trial court that the ground of exception be more specifically stated. Janson v. Goerke Co., 65 A. 856, 74 N. J. Law, 270. In action against railroad for damage to shipment, paragraph of written objections to charge which complained that in submitting issue of rough handling language placed higher duty on defendant than law required in not requiring finding of negligence sufficiently indicated to trial court vice in charge. Panhandle & S. F. Ry. Co. v. Wright Herndon Co. (Tex. Civ. App.) 195 S. W. 216. Where a trial judge erroneously submits to the jury the question whether defendant's negligent agent is a vice principal, or a fellow servant with plaintiff, an exception is sufficient which is taken to that paragraph of the charge treating most extensively of this subject, "because said instruction does not properly state the rule whereby it is to be determined whether an employé is a coemployé or fellow servant, said instruction going much further, as to the liability of an employer for acts of coemployés, than the law justifies," in connection with a further exception that, at the time of the alleged injury, plaintiff was a coemployé with the man whose negligence caused the injury. What Cheer Coal Co. v. Johnson (C. C. A. Iowa) 56 Fed. 810, 6 C. C. A. 148. Where the court charged that plaintiff's evidence had two aspects: First, that the switchman had left the switch properly set, but that in some way not known it had been displaced; and, second, that there was a defect in the switch rail, so that the engine would be likely to take and did take the wrong track, and the court further charged that, if the switch by some inadvertence became set for the wrong track, it would be necessary to consider whether the absence of a switch lock was negligence; the plaintiff claiming that if it had been locked the accident would not have happened, and the defendant excepted, for that there was no evidence from which the jury could determine whether the switch was in the position it was by intent, inadvertence, or the intervention of trespassers, and for that there was no evidence that through some misadventure or the trespass of some one the switch, if properly set, was changed to the wrong track, it was held that the exception was sufficiently explicit, if the charge was bad in any of the particulars specified. Place v. Grand Trunk Ry. Co., 76 A. 1110, 83 Vt. 498.

Objections or exceptions held insufficient to raise particular questions. In an action for damages sustained by plaintiff in collision between his horse and buggy and defendant's motor truck, general objection to instruction that, if the driver of the truck failed to exercise or-

some jurisdictions, that the grounds of the objection be stated,[76]

dinary care. defendant was guilty of negligence, was not sufficient to call trial court's attention to objection that instruction might be construed as intimating that there was negligence as a matter of law. Bennett v. Snyder (Ark.) 227 S. W. 402. On an issue as to defendant's adverse possession, an instruction that adverse possession is to be taken strictly, and that every presumption is in favor of possession subject to the title of the true owner, was not obnoxious to a general objection, but the defect should have been pointed out by specific objections. Fox v. Spears, 93 S. W. 560, 78 Ark. 71. The instruction that it was defendant's duty, in constructing its road, to use ordinary care to provide proper openings or culverts for escape of all waters to cause the water to overflow the crossing its roadbed by means of natural drains and depressions so as not lands of upper proprietors, which by such care could have been guarded against; and if defendant failed to provide such openings, and by reason thereof plaintiff's lands were overflowed, and his crops injured, defendant was negligent, and verdict should be for plaintiff—considered as a whole, shows an intent to charge that, if defendant failed to use ordinary care to provide sufficient openings for escape of the water, and plaintiff's lands were overflowed and his crop injured, he could recover, so that specific objection, pointing out the failure to do so by proper words, was necessary. Ames Shovel & Tool Co. v. Anderson, 118 S. W. 1013, 90 Ark. 231. A general objection to an instruction defining the measure of damages, in an action for personal injuries, does not reach the objection that the court erred in including as an element of damage pecuniary loss, in the absence of evidence of such damage. Ft. Smith Light & Traction Co. v. Carr, 93 S. W. 990, 78 Ark. 279. A general objection to an instruction, requiring that carriers "must be extremely careful" to avoid injuring passengers, was insufficient to call to the trial court's attention the contention that the words quoted were incorrect. Midland Valley R. Co. v. Hamilton, 104 S. W. 540, 84 Ark. 81. Where in slander plaintiff proved the use of the words alleged in the complaint, but some of the witnesses testified to the use of words substantially different, though amounting to the charge complained of, a general objection to an instruction, authorizing a verdict for plaintiff if defendant falsely uttered words which in their common acceptation amounted to the slander complained of, was not sufficient, but a specific objection calling attention to the failure to limit the application to substantially the words of the complaint was necessary. Townsley v. Yentsch, 135 S. W. 882, 98 Ark. 312. In action against city for injuries from fall on icy crosswalk, where court in the same instruction stated city's duty with relation to walks and crosswalks, an objection that the instructions did not completely instruct as to the respective duties of the city and the pedestrians on the matter of street crossings held not sufficiently specific to advise court that the city was contending that there is a difference between city's duty with respect to sidewalks and its duty with respect to street crossings. Blackmore v. City of Council Bluffs (Iowa) 176 N. W. 369.

[76] **U. S.** (C. C. A. Wash.) Pacific Telephone & Telegraph Co. v. Hoffman, 208 F. 221, 125 C. C. A. 421.

Ind. City of Aurora v. Cobb, 21 Ind. 492.

Iowa. Ludwig v. Blackshere, 71 N. W. 356, 102 Iowa, 366; Brantz v. Marcus, 73 Iowa, 64, 35 N. W. 115; Patterson v. Chicago, M. & St. P. Ry. Co., 70 Iowa, 593, 33 N. W. 228; Benson v. Lundy, 52 Iowa, 265, 3 N. W. 149; Miller v. Gardner, 49 Iowa, 234; Eyser v. Weissgerber, 2 Iowa, 463; Millard v. Singer, 2 G. Greene (Iowa) 144.

Mass. Emmons v. Alvord, 59 N. E. 126, 177 Mass. 466.

N. H. Emery v. Boston & M. R. R., 30 A. 367, 67 N. H. 434.

N. Y. Haas v. Brown, 47 N. Y. S. 606, 21 Misc. Rep. 434, affirming judg-

and ordinarily the particular part of the charge of which complaint is made should be set out or pointed out,[77] and it is held that such rule, being mainly established for the protection of the prevailing

ment (Civ. Ct. N. Y.) 46 N. Y. S. 540. 20 Misc. Rep. 672; Goldman v. Abrahams, 9 Daly, 223.

N. C. Joines v. Johnson, 45 S. E. 828, 133 N. C. 487; Hampton v. Norfolk & W. R. Co., 27 S. E. 96, 120 N. C. 534, 35 L. R. A. 808.

Ohio. Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; Pittsburgh, Ft. W. & C. Ry. v. Probst, 30 Ohio St. 104.

S. C. Tinsley v. Western Union Telegraph Co., 51 S. E. 913, 72 S. C. 350; Carter & Co. v. Kaufman, 45 S. E. 1017, 67 S. C. 456; Gallman v. Union Hardwood Mfg. Co., 43 S. E. 524, 65 S. C. 192.

See, also, post, § 526, note 62.

In Iowa, the grounds of objection need not be stated, where the exceptions are taken at the time of giving instructions. H. B. Hardenburg & Co. v. Roberts, 125 N. W. 818, 146 Iowa, 696.

In New York, it has been held that an exception to an instruction which points out the language complained of by repeating the identical words is sufficient without stating the reason why the charge is considered erroneous. Davenport v. Prentice, 110 N. Y. S. 1056, 126 App. Div. 451.

In Utah, it is provided by statute that no reason need be given for exceptions taken to instructions. Everts v. Worrell, 197 P. 1043.

[77] **U. S.** (C. C. A. Iowa) Chicago Great Western Ry. Co. v. McDonough, 161 F. 657, 88 C. C. A. 517; (C. C. A. Ky.) Hindman v. First Nat. Bank, 112 F. 931, 50 C. C. A. 623, 57 L. R. A. 108.

Ala. Birmingham Ry., Light & Power Co. v. Cockrum, 60 So. 304, 179 Ala. 372.

Conn. State v. Tripp, 81 A. 247, 84 Conn. 640.

D. C. Traver v. Smolik, 43 App. D. C. 150.

Ga. Fordham v. State, 37 S. E. 391, 112 Ga. 228.

Iowa. Willis v. Schertz, 175 N. W. 321, 188 Iowa, 712.

Me. Field v. Lang, 36 A. 984, 89 Me. 454; Atkins v. Field, 36 A. 375, 89 Me. 281, 56 Am. St. Rep. 424.

Minn. Nelson v. Chicago, M. & St. P. Ry. Co., 165 N. W. 866, 139 Minn. 52.

N. J. Smith v. Atlantic City R. Co., 65 A. 1000, 74 N. J. Law, 452.

N. Y. Rheinfeldt v. Dahlman, 43 N. Y. S. 281, 19 Misc. Rep. 162.

Ohio. Adams v. State, 29 Ohio St. 412.

Or. Reimers v. Pierson, 113 P. 436, 58 Or. 86.

Vt. In re Healy's Will, 109 A. 19, 94 Vt. 128.

Objections to oral charge. Exception merely describing subject treated by court in an oral charge is bad, and hence exception merely designating beginning parts of oral charge excepted to is insufficient. Ex parte Cowart, 77 So. 349, 201 Ala. 55, reversing judgment Cowart v. State, 75 So. 711, 16 Ala. App. 119.

An exception to a charge is sufficiently specific, when it distinctly points out the particular parts to which it is directed. Scott v. Astoria R. Co., 72 P. 594, 43 Or. 26, 62 L. R. A. 543, 99 Am. St. Rep. 710.

Illustrations of sufficient exceptions. An exception "to that part of your honor's charge in which you submit to the jury whether the direction of [the foreman] to put his ladder upon the track relieved plaintiff from contributory negligence" is sufficiently definite to cover whatever the court said in submitting the question referred to to the jury. Date v. New York Glucose Co., 93 N. Y. S. 249, 104 App. Div. 207. An exception to instructions between certain numbers given, and to each of them, is sufficiently specific, when the objection is made at the time the instructions are given. Mann v. Sioux City & P. R. Co., 46 Iowa, 637. An exception that "the plaintiff moved for

party and being in furtherance of justice, cannot be abrogated by the practice of any trial court.[78]

One of the purposes of such rule being to give the court an opportunity, if convinced of error in its charge, to correct it,[79] the test of the sufficiency of an exception is whether it fairly directs the attention of the court to the claimed error.[80] An objection to a charge should be as definite as an assignment of error to it is required to be.[81]

§ 520. Specific applications of rule

Under this rule a general exception to an entire charge and to each and every part thereof cannot be sustained,[82] unless the whole

instructions Nos. 1, 2, and 3, which were given, to which defendant excepted, and still excepts," is sufficient. Poston v. Smith's Ex'r, 8 Bush (Ky.) 589.

[78] Eldred v. Oconto County, 33 Wis. 133.

[79] Birmingham Ry., Light & Power Co. v. Jackson, 73 So. 627, 198 Ala. 378; Schneider v. Winkler, 70 A. 731, 74 N. J. Law, 71.

[80] In re Chisholm's Will, 108 A. 393, 93 Vt. 453; Jenks v. State, 17 Wis. 665.

[81] Cleburne St. Ry. Co. v. Barnes (Tex. Civ. App.) 168 S. W. 991.

[82] **U. S.** Holder v. U. S., 150 U. S. 91, 14 S. Ct. 10, 37 L. Ed. 1010; Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961; Block v. Darling, 140 U. S. 234, 11 S. Ct. 832, 35 L. Ed. 476; Burton v. West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215; Washington & G. R. Co. v. Varnell, 98 U. S. 479, 25 L. Ed. 233; Stimpson v. Westchester R. Co., 4 How. 380, 11 L. Ed. 1020; (C. C. A. Ill.) Cleveland, C., C. & St. L. Ry. Co. v. Zider, 61 F. 908, 10 C. C. A. 151; (C. C. A. N. Y.) Park Bros. & Co. v. Bushnell, 60 F. 583, 9 C. C. A. 138; (C. C. A. Va.) Thom v. Pittard, 62 F. 232, 10 C. C. A. 352.

Ala. Stevenson v. Moody, 83 Ala. 418, 3 So. 695; South & North Alabama R. Co. v. McLendon, 63 Ala. 266.

Ark. Lambeth v. Ponder, 33 Ark. 707.

Cal. Bernstein v. Downs, 112 Cal. 197, 44 P. 557; Cavallaro v. Texas & P. R. Co., 110 Cal. 348, 42 P. 918, 52 Am. St. Rep. 94; Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 P. 929; Moore v. Moore, 4 Cal. Unrep. 190, 34 P. 90; Gillaspie v. Hagans, 90 Cal. 90, 27 P. 34; Cockrill v. Hall, 76 Cal. 192, 18 P. 318; Dixon v. Allen, 69 Cal. 527, 11 P. 179; Brown v. Kentfield, 50 Cal. 129; Sill v. Reese, 47 Cal. 294; Shea v. Petrero & B. V. R. Co., 44 Cal. 414; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Colo. Holman v. Boston Land & Security Co., 8 Colo. App. 282, 45 P. 519; Jacobs v. Mitchell, 2 Colo. App. 456, 31 P. 235; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 P. 21; Edwards v. Smith, 16 Colo. 529, 27 P. 809; Wray v. Carpenter, 16 Colo. 271, 27 P. 248, 25 Am. St. Rep. 265; McFeters v. Pierson, 15 Colo. 201, 24 P. 1076, 22 Am. St. Rep. 388; Keith v. Wells, 14 Colo. 321, 23 P. 991; Wooton v. Seigel, 5 Colo. 424; Coon v. Rigden, 4 Colo. 275.

Dak. McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667.

Ga. Rogers v. Rogers, 74 Ga. 598; Rogers v. Tillman, 72 Ga. 479; Saulsbury v. Wimberly, 60 Ga. 78; Harris v. Harris, 53 Ga. 678; Smith v. Atwood, 14 Ga. 402.

Idaho. Black v. City of Lewiston, 2 Idaho (Hasb.) 276, 13 P. 80.

Ill. Razor v. Razor, 142 Ill. 375, 31 N. E. 678; Mather Electric Co. v. Matthews, 47 Ill. App. 557; Cincin-

charge is erroneous, or is erroneous in its general scope or mean-

nati, L. & C. R. Co. v. Ducharme, 4 Ill. App. 178.

Ind. Baker v. McGinniss, 22 Ind. 257; City of Aurora v. Cobb, 21 Ind. 492; Hawk v. Crago, 12 Ind. 369; Branham v. State, 11 Ind. 553; State v. Bartlett, 9 Ind. 569.

Iowa. Leach v. Hill, 97 Iowa, 81, 66 N. W. 69; Byford v. Girton, 90 Iowa, 661, 57 N. W. 588; Reeves v. Harrington, 85 Iowa, 741, 52 N. W. 517; Patterson v. Chicago, M. & St. P. Ry. Co., 70 Iowa, 593, 33 N. W. 228; Stevens v. Taylor, 58 Iowa, 664, 12 N. W. 625; Benson v. Lundy, 52 Iowa, 265, 3 N. W. 149; Pitman v. Molsberry, 49 Iowa, 339; King v. Lyman, 46 Iowa, 703; Moore v. Gilbert, 46 Iowa, 508; Davenport Gaslight & Coke Co. v. City of Davenport, 13 Iowa, 229; Abbott v. Striblen, 6 Iowa, 191.

Kan. Fleming v. L. D. Latham & Co., 48 Kan. 773, 30 P. 166; Ryan v. Madden, 46 Kan. 245, 26 P. 679; Young v. Youngman, 45 Kan. 65, 25 P. 209; Haak v. Struve, 38 Kan. 326, 16 P. 686; State v. Wilgus, 32 Kan. 126, 4 P. 218; Fullenwider v. Ewing, 25 Kan. 69; City of Atchison v. King, 9 Kan. 550.

Me. State v. Pike. 65 Me. 111.

Mass. Chenery v. Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; Hunting v. Downer, 151 Mass. 275, 23 N. E. 832; Rock v. Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401; Curry v. Porter, 125 Mass. 94.

Mich. McAllister v. Engle, 52 Mich. 56, 17 N. W. 694; Pray v. Cadwell, 50 Mich. 222, 15 N. W. 92; Geary v. People, 22 Mich. 220.

Minn. Steffenson v. Chicago, M. & St. P. Ry. Co., 51 Minn. 531, 53 N. W. 800; Cole v. Curtis, 16 Minn. 182 (Gil. 161); Foster v. Berkey, 8 Minn. 351 (Gil. 310).

Mont. McKinstry v. Clark, 4 Mont. 370, 1 P. 759.

Neb. City of Omaha v. McGavock, 47 Neb. 313, 66 N. W. 415; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928; First Nat. Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568; Walker v. Turner, 27 Neb. 103, 42 N. W. 918; Brooks v. Dutcher, 24 Neb. 300, 38 N. W. 780; Hotel Ass'n of Omaha v. Walters, 23 Neb. 280, 36 N. W. 561; Brooks v. Dutcher, 22 Neb. 644, 36 N. W. 128.

N. H. Reynolds v. Boston & M. R. Co., 43 N. H. 580.

N. J. Oliver v. Phelps, 21 N. J. Law, 597; Potts v. Clarke, 20 N. J. Law, 536.

N. Y. Mann v. City of Brooklyn, 63 Hun. 627, 17 N. Y. S. 643; People v. McKenna, 58 Hun, 609, 12 N. Y. S. 493; Newlin v. Lyon, 49 N. Y. 661; Requa v. City of Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Oldfield v. New York & H. R. Co., 14 N. Y. 310; Caldwell v. Murphy, 11 N. Y. 416; Jones v. Osgood, 6 N. Y. 233; Robinson v. New York & E. R. Co., 27 Barb. 512; McBurney v. Cutler, 18 Barb. 203; Carland v. Day, 4 E. D. Smith, 251; Simpson v. Downing. 23 Wend. 316.

N. C. Kendrick v. Dellinger, 117 N. C. 491, 23 S. E. 438; Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 147, 20 S. E. 367; Shober v. Wheeler, 113 N. C. 370, 18 S. E. 328; Davis v. Duval, 112 N. C. 833, 17 S. E. 528; Hemphill v. Morrison, 112 N. C. 756, 17 S. E. 535; Ward v. Albemarle & R. R. Co., 112 N. C. 168, 16 S. E. 921; Hinson v. Powell, 109 N. C. 534, 14 S. E. 301; Bottoms v. Seaboard & R. R. Co., 109 N. C. 72, 13 S. E. 738; Bost v. Bost, 87 N. C. 477.

Ohio. Consolidated Coal & Mining Co. v. Clay's Adm'r, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; Everett v. Sumner, 32 Ohio St. 562; Western Ins. Co. v. Tobin, 32 Ohio St. 77; Pittsburg, Ft. W. & C. Ry. v. Probst, 30 Ohio St. 104; Marietta & C. R. Co. v. Strader, 29 Ohio St. 448; Butchers' Melting Ass'n v. Commercial Bank, 2 Disn. 46, 13 Ohio Dec. 29; Weber v. Wiggins, 11 Ohio Cir. Ct. R. 18, 1 O. C. D. 84.

S. C. Davis v. Elmore, 40 S. C. 533, 19 S. E. 204; Dobson v. Cothran, 34 S. C. 518, 13 S. E. 679; Norton v. Livingston, 14 S. C. 177.

Vt. Goodwin v. Perkins, 39 Vt. 598.

Wash. Carroll v. Washington Water Power Co., 105 P. 1026, 56 Wash. 467; Cunningham v. Seattle

ing,[83] and a general exception to instructions, several in number and separate and distinct, given at the request of the other party, is insufficient,[84] and each instruction should be objected to separately by number.[85]

All defects of form must be met by a specific objection,[86] and a general objection to an instruction is not sufficient to point out an ambiguity therein,[87] nor to call the attention of the court to its inconsistency with other instructions given [88] nor to a misstatement of fact therein,[89] nor to the fact that a word used therein should be defined,[90] nor to the point that an instruction is confusing or misleading,[91] nor to the objection that an instruction erroneously assumed as a fact a matter in dispute,[92] nor to the fact that an in-

Electric Ry. & Power Co., 3 Wash. 471, 28 P. 745.

Wis. Luedtke v. Jeffery, 89 Wis. 136, 61 N. W. 292; Smith v. Coleman, 77 Wis. 343, 46 N. W. 664; Meno v. Hoeffel, 46 Wis. 282, 1 N. W. 31; Sabine v. Fisher, 37 Wis. 376; Strachan v. Muxlow, 31 Wis. 207; Tomlinson v. Wallace, 16 Wis. 224.

General exception combined with special exception. An exception to the charge, and to each and every part thereof, and to the whole thereof, and also to a particular, specified portion of such charge, is inoperative except as to the part specifically described. Yates v. Bachley, 33 Wis. 185.

[83] Hentig v. Kansas Loan & Trust Co., 28 Kan. 617; Wheeler v. Joy, 15 Kan. 389.

[84] Bard v. Elston, 31 Kan. 274, 1 P. 565.

[85] State v. Bartlett, 9 Ind. 569; Woods v. Berry, 7 Mont. 195, 14 P. 758; McKinstry v. Clark, 4 Mont. 370, 1 P. 759.

Oral instructions. Where the jury is instructed orally in accordance with the statute, the various portions of the charge being given unnumbered, such portions must be particularized by number before valid exceptions may be taken thereto. Strong v. Ross, 75 N. E. 291, 36 Ind. App. 174.

[86] **Ark.** Dierks Lumber & Coal Co. v. Coffman Bros., 132 S. W. 654, 96 Ark. 505; Ft. Smith & W. Ry. Co. v. Messek, 131 S. W. 686, 96 Ark. 243, rehearing denied, 131 S. W. 966, 96 Ark. 243; St. Louis, I. M. & S. Ry. Co. v. Walker, 125 S. W. 135, 93 Ark. 457; Hamburg Bank v. George & Butler, 123 S. W. 654, 92 Ark. 472; Arkansas Midland R. Co. v. Rambo, 117 S. W. 784, 90 Ark. 108; Sloan v. Little Rock Ry. & Electric Co., 117 S. W. 551, 89 Ark. 574; McElvaney v. Smith, 88 S. W. 981, 76 Ark. 468, 6 Ann. Cas. 458; St. Louis, I. M. & S. Ry. Co. v. Norton, 73 S. W. 1095, 71 Ark. 314; Williams v. State, 50 S. W. 517, 66 Ark. 264.

N. Y. Saugerties Bank v. Mack, 54 N. Y. S. 950, 35 App. Div. 398.

[87] **Ark.** New Coronado Coal Co. v. Jasper, 222 S. W. 22, 144 Ark. 58; Huckaby v. St. Louis, I. M. & S. Ry. Co., 177 S. W. 923, 119 Ark. 179; Garretson-Greeson Lumber Co. v. Goza, 172 S. W. 825, 116 Ark. 277; St. Louis, I. M. & S. Ry. Co. v. Prince, 142 S. W. 499, 101 Ark. 315; St. Louis, I. M. & S. Ry. Co. v. Dunn & Stewart, 127 S. W. 464, 94 Ark. 407; Aluminum Co. of North America v. Ramsey, 117 S. W. 568, 89 Ark. 522.

[88] Matthews v. Clough, 49 A. 637, 70 N. H. 600.

[89] Walker v. Collins (C. C. A. Kan.) 59 Fed. 70, 8 C. C. A. 1.

[90] Mt. Nebo Anthracite Coal Co. v. Williamson, 84 S. W. 779, 73 Ark. 530; St. Louis, I. M. & S. Ry. Co. v. Barnett, 45 S. W. 550, 65 Ark. 255; Kirby v. Lower, 124 S. W. 34, 139 Mo. App. 677.

[91] C. C. Emerson & Co. v. Stevens Grocer Co., 151 S. W. 1003, 105 Ark. 575; Gilroy v. Loftus, 48 N. Y. S. 532, 22 Misc. Rep. 105.

[92] St. Louis S. W. Ry. Co. v. McLaughlin, 196 S. W. 460, 129 Ark. 377.

struction correctly stating the law is not applicable to the evidence,[93] nor to the use of a particular word or phrase not inappropriate to express the idea intended to be conveyed,[94] nor to any particular omission not amounting to a misdirection,[95] and an objection to the failure to number instructions must be taken on that specific ground.[96]

An objection merely to the giving of an instruction only goes to the substance thereof,[97] and is not sufficient to raise the point on appeal that it was not reduced to writing,[98] or that it was given after the jury had partly considered the case.[99]

Objections merely that a charge is argumentative,[1] or not sufficiently specific,[2] or that a charge is abstract,[3] or misleading,[4] are too general, unless there is reason for supposing that the jury has actually and prejudicially been misled,[5] and so is an objection to an entire charge on the ground that it contains a misstatement of the testimony,[6] or that an instruction intimates the opinion of the court upon the facts in the case.[7]

[93] Quetermous v. Hatfield, 54 Ark. 16, 14 S. W. 1096; Graham v. State, 53 S. E. 816, 125 Ga. 48; Central of Georgia Ry. Co. v. Bond, 36 S. E. 299, 111 Ga. 13.

[94] Bocquin v. Theurer, 202 S. W. 845, 133 Ark. 448; Commonwealth v. Tolman, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, 14 Am. St. Rep. 414; Evans v. St. Paul & S. C. R. Co., 30 Minn. 489, 16 N. W. 271.

[95] Armour v. Pecker, 123 Mass. 143; Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51).

[96] Herzog v. Campbell, 47 Neb. 370, 66 N. W. 424; Smith v. State, 4 Neb. 277.

[97] Omaha & F. Land & Trust Co. v. Hansen, 32 Neb. 449, 49 N. W. 456.

[98] Giddings v. McCumber, 51 Ill. App. 373; Gaynor v. Pease Furnace Co., 51 Ill. App. 292.

Exceptions to all of instructions and to each of them. Where the court was requested by defendant to charge the jury in writing, but, disregarding the request, gave with certain written instructions verbal explanations thereof and verbal instructions, and no objection was made at the time, but after the bailiff had been sworn to take charge of the jury, and before the jury retired, defendant's attorney stated that he excepted to the instructions, and, when asked to specify which instructions he excepted to stated that he excepted to them all, and that all included each, it was held that the exception was sufficiently specific to raise the question of the giving of the verbal instructions in disregard of defendant's request. Sutherland v. Venard, 34 Ind. 390.

[99] City of Topeka v. Heitman, 47 Kan. 739, 28 P. 1096.

[1] Goldstein v. Smiley, 48 N. E. 203, 168 Ill. 438, affirming judgment 68 Ill. App. 49; Owen v. Brown, 41 A. 1025, 70 Vt. 521.

[2] Chinn v. Ferro-Concrete Const. Co., 132 N. Y. S. 850, 148 App. Div. 368.

[3] Holman v. Herscher (Tex.) 16 S. W. 984.

[4] Smith v. Birmingham Ry., Light & Power Co., 41 So. 307, 147 Ala. 702; Hunt v. Atlantic Coast Lumber Corporation, 85 S. E. 229, 101 S. C. 64.

[5] Holm v. Sandberg, 32 Minn. 427, 21 N. W. 416.

[6] Keystone Lumber & Salt Mfg. Co. v. Dole, 43 Mich. 370, 5 N. W. 412.

[7] Carpenter v. American Acc. Co., 46 S. C. 541, 24 S. E. 500; Greene v. Duncan, 37 S. C. 239, 15 S. E. 956.

§ 521. Application of rule in criminal cases

The above rule with respect to the necessity that exceptions to instructions be specific and definitely point out the error complained of, although having some relaxation in criminal cases, where it is apparent that the charge given is not applicable and tends to mislead the jury,[8] is generally observed in criminal prosecutions.[9]

[8] Dodge v. People, 4 Neb. 220.

[9] **Ala.** Hardin v. State, 63 Ala. 38; Jacobson v. State, 55 Ala. 151; Irvin v. State, 50 Ala. 181; Cohen v. State, 50 Ala. 108.

Ark. Burgess v. State, 158 S. W. 774, 108 Ark. 508; Jackson v. State, 126 S. W. 843, 94 Ark. 169; Bell v. State, 125 S. W. 1020, 93 Ark. 600; Burnett v. State, 96 S. W. 1007, 80 Ark. 225.

Fla. Carter v. State, 20 Fla. 754.

Ga. Webb v. State, 69 S. E. 601, 8 Ga. App. 430; Wiley v. State, 59 S. E. 438, 3 Ga. App. 120; Wilson v. State, 69 Ga. 224; Wood v. State, 68 Ga. 296.

Mass. Commonwealth v. Meserve, 154 Mass. 64, 27 N. E. 997.

N. C. State v. Herren, 94 S. E. 698, 175 N. C. 754; State v. Downs, 118 N. C. 1242, 24 S. E. 531.

Ohio. Adams v. State, 25 Ohio St. 584.

Tex. Walker v. State, 151 S. W. 822, 68 Tex. Cr. R. 346; Barrett v. State (Cr. App.) 69 S. W. 144; Thompson v. State, 32 Tex. Cr. R. 265, 22 S. W. 979; Goodson v. Same (Cr. App.) 22 S. W. 20; Cordway v. Same, 25 Tex. App. 405, 8 S. W. 670; Williams v. State, 22 Tex. App. 497, 4 S. W. 64.

Utah. People v. Hart, 10 Utah, 204, 37 P. 330.

Illustrations of exceptions held too general. An objection that a charge "was not a correct statement of the law in reference to the matters dealt with." Reed v. State, 168 S. W. 541, 74 Tex. Cr. R. 242. An objection to the charge of the court because it is insufficient. Simons v. State (Tex. Cr. App.) 34 S. W. 619. An exception to the entire charge of the court, on the ground that it is "on some material points contrary to law, and failed to charge the law applicable to the facts, and was calculated to mislead the jury." Wood v. State, 68 Ga. 296. A general exception "to all those things and specifically to the whole charge on the ground that it did not fairly present the facts in the case." State v. Wagner (R. I.) 86 A. 147. An exception that the court erred in defining "malice," without pointing out wherein the error lies. People v. Thiede, 11 Utah, 241, 39 P. 837. An exception that the court erred in charging as it did on the issue of provocation by mere words, when on the testimony there was no such issue in the case, and thereby misleading the jury. State v. Crosby, 70 S. E. 440, 88 S. C. 98. An exception to the trial court's definition of a "'reasonable doubt,' setting forth that it failed to define what constitutes a reasonable doubt in a sufficiently clear and distinct manner." State v. Davenport, 38 S. C. 348, 17 S. E. 37. An exception to each and every clause of the court's charge, because it is upon the weight of the evidence, without specifying in what way it is upon the weight of the evidence, or what charge is on the weight of the evidence. McDougal v. State (Tex. Cr. App.) 103 S. W. 847. Where a bill of exceptions is reserved to a charge as an entirety, "because it did not instruct the jury fully on the law governing his case on the facts proved," the exception is too general to be considered by this court. Quintana v. State, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730. Where defendant thinks an instruction liable to be misconstrued, an exception by his counsel that it is "calculated to do their client an injury" is too general. State v. Tibbs, 48 La. Ann. 1278, 20 So. 735. Where a charge consists of several sentences, a general exception "to the latter portion of said charge" will not be considered on appeal. Stroud v. State, 55 Ala. 77. An exception "to so much of the charge as commences with the words 'if the jury believe,' on the fourth line from the bottom of the

Thus an exception to a charge "as given," [10] or to the action of the court in giving "said instructions and each of them," is too general.[11] So an exception to a charge involving a number of points that it is contrary to law,[12] or an exception that on the whole charge the court presented the case in a manner to prejudice the defendant, is too general,[13] and a general exception to the charge is insufficient to raise the point that a part of the charge requires the jury to consider outside matters not proven at the trial.[14]

preceding page." Stroud v. State, 55 Ala. 77. A general objection to an instruction as a whole was insufficient to raise an objection to a clause that the jury was not at liberty to "doubt as jurors if they believed as men." Thomas v. State, 86 S. W. 404, 74 Ark. 431. An exception to the contents of a written charge is insufficient to present a question as to an oral statement made in connection with the charge. Peelle v. State, 68 N. E. 682, 161 Ind. 378. An objection that the court's charge was not sufficiently clear in reference to the weight to be given dying statements does not specify plainly the alleged error, in that it fails to set out in what respect the charge was not clear or accurate. Boynton v. State, 41 S. E. 995, 115 Ga. 587. In a prosecution for homicide, an objection to the giving of certain instructions, made solely on the ground that they did not entirely cover all the facts of the case under the law, and as not being complete and sufficient under the law, was insufficient, where on such objection being made, the trial court requested counsel to state which questions, if any, were not covered by the instructions given, to which counsel made no reply. State v. West, 100 S. W. 478, 202 Mo. 128. The charge which the court gave on the law relating to good character being in substance correct, the exception to the same, presenting the objection that it "was general, and not specific as to the law of good character, and did not give to the jury the law in relation thereto," was itself defective, in that it failed to point out in what respect the charge was incomplete, or what it required to render it sufficiently full and specific. Barber v. State, 37 S. E. 885, 112 Ga. 584.

Illustrations of exceptions held sufficiently specific. An exception, taken at the time of the delivery of the charge of the court, "to all the remarks of the court in reference to the impeachment of" a witness named, and "to that part of the charge in regard to the evidence of" such witness. Brown v. United States, 17 S. Ct. 33, 164 U. S. 221, 41 L. Ed. 410. An exception to "that part of the charge in stating the effect of good character," made to a paragraph which treats only of the proper effect of evidence of good character. Edgington v. United States, 17 S. Ct. 72, 164 U. S. 361, 41 L. Ed. 467. The following objection: "Comes now the defendants and object to all of the instructions in this case by the court and except to the same, and especially except to the court in not instructing on all the law in the case and not instructing on the different degrees of larceny"—is sufficient to call the court's attention to its failure to embrace in the instructions, in the event the jury should find defendants not guilty of burglary, the subject of larceny from a dwelling house. State v. Nicholas, 121 S. W. 12, 222 Mo. 425.

[10] State v. Moore, 26 S. E. 697, 120 N. C. 570; State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Frizell, 111 N. C. 722, 16 S. E. 409.

[11] Gardner v. United States (C. C. A. Mo.) 230 F. 575, 144 C. C. A. 629.

[12] Smith v. State, 67 Ga. 769; State v. Orfanakis, 159 P. 674, 22 N. M. 107.

[13] State v. Varner, 115 N. C. 744, 20 S. E. 518.

[14] Shelp v. United States (C. C. A. Alaska) 81 F. 694, 26 C. C. A. 570.

§ 522. Exceptions to instructions correct in part

Unless the errors of the court in charging the jury are manifestly grave or of a fundamental character,[15] the rule is, both in civil [16] and in criminal cases,[17] that a general exception to a charge

[15] Walker v. Windsor Nat. Bank (C. C. A. N. H.) 56 F. 76, 5 C. C. A. 421; Robinson v. State (Ark.) 231 S. W. 2.

[16] **U. S.** Norfolk & W. R. Co. v. Earnest, 33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; Newport News & M. V. Co. v. Pace, 158 U. S. 36, 15 S. Ct. 743, 39 L. Ed. 887; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624; (C. C. A. Alaska) Lindblom v. Fallett, 145 F. 805, 76 C. C. A. 369; (C. C. A. Ark.) St. Louis, I. M. & S. Ry. Co. v. Spencer, 71 F. 93, 18 C. C. A. 114; (C. C. A. Colo.) New Dunderberg Min. Co. v. Old, 97 F. 150, 38 C. C. A. 89; Price v. Pankhurst, 53 Fed. 312, 3 C. C. A. 551; (C. C. A. Ill.) Vider v. O'Brien, 62 Fed. 326, 10 C. C. A. 385; Masonic Ben. Ass'n of Central Illinois v. Lyman, 60 F. 498, 9 C. C. A. 104; (C. C. A. Ind. T.) Gulf, C. & S. F. Ry. Co v. Johnson, 54 F. 474, 4 C. C. A. 447; McClellan v. Pyeatt, 50 Fed. 686, 1 C. C. A. 613; (C. C. A. La.) Kansas City Southern Ry. Co. v. Prunty, 133 F. 13, 66 C. C. A. 163; (C. C. A. Neb.) Union Pac. R. Co. v Thomas, 152 F. 365, 81 C. C. A. 491; Western Assur. Co. of Toronto v. Polk, 104 F. 649, 44 C. C. A. 104; (C. C. A. Ohio) Pennsylvania Co. v. Whitney, 169 F. 572, 95 C. C. A. 70; (C. C. A. Vt.) Giddings v. Freedley, 128 F. 355, 63 C. C. A. 85, 65 L. R. A. 327, affirming judgment Friedly v. Giddings (C. C.) 119 F. 438.

Ala. Gilley v. Denman, 64 So. 97, 185 Ala. 561; Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357; Shirley v. Ezell, 60 So. 905, 180 Ala. 352; Sulser v. Sayre, 58 So. 758, 4 Ala. App. 452; Postal Tel. Cable Co. v. Hulsey, 31 So. 527, 132 Ala. 444; Postal Tel. Cable Co. v. Hulsey, 22 So. 854, 115 Ala. 193; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 So. 46; Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145; Bell v. Kendall, 93 Ala. 489, 8 So. 492; Nelson v. Warren, 93 Ala. 408, 8 So. 413; Kirby v. State, 89 Ala. 63, 8 So. 110; Adams v. State, 87 Ala. 89, 6 So. 270; Kilpatrick v. Pickens County, 66 Ala. 422; City of Birmingham v. Rumsey, 63 Ala. 352; Chapman v. Holding, 60 Ala. 522.

Ark. Kansas City Southern Ry. Co. v. Belknap, 98 S. W. 366, 80 Ark. 587; Walnut Ridge Mercantile Co. v. Cohn, 96 S. W. 413, 79 Ark. 338; Young v. Stevenson, 86 S. W. 1000, 75 Ark. 181; Dunnington v. Frick Co., 60 Ark. 250, 30 S. W. 212; Oxley Stave Co. v. Staggs, 59 Ark. 370, 27 S. W. 241; Atkins v. Swope, 38 Ark. 528; Murphy v. Lemay, 32 Ark. 223; Crisman v. McDonald, 28 Ark. 8.

Colo. Adams Exp. Co. v. Aldridge, 77 P. 6, 20 Colo. App. 74; Schollay v. Moffitt-West Drug Co., 67 P. 182, 17 Colo. App. 126; Kansas Pac. Ry. Co. v. Ward, 4 Colo. 30.

D. C. Chapman v. Capital Traction Co., 37 App. D. C. 479; McDermott v. Severe, 25 App. D. C. 276, judgment affirmed 26 S. Ct. 709, 202 U. S. 600, 50 L. Ed. 1162; Birmingham v. Pettit, 21 D. C. 209; Mackey v. Baltimore & P. R. Co., 19 D. C. 282.

Fla. Post v. Bird, 28 Fla. 1, 9 So. 888; Baker v. Chatfield, 23 Fla. 540, 2 So. 822; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19; Burroughs v. State, 17 Fla. 643; John D. C. v. State, 16 Fla. 554.

Ga. Higdon v. Williamson, 78 S. E. 767, 140 Ga. 187; Boswell v. Gillen, 62 S. E. 187, 131 Ga. 310; Foote v. Kelley, 55 S. E. 1045, 126 Ga. 799; Collins v. Spence, 84 Ga. 503, 11 S. E. 502; Verdery v. Savannah, F. & W. Ry. Co., 82 Ga. 675, 9 S. E. 1133; Grace v. Martin, 83 Ga. 245, 9 S. E. 841; Blackman v. State, 78 Ga. 592, 3 S. E. 418; Fisher v. State, 73 Ga. 595; Weaver v. Nixon, 69 Ga. 699; Hambric v. State, 68 Ga. 836; Fuller v. City of Atlanta, 66 Ga. 80; Bruns-

[17] See note 17 on page 957.

or to a part thereof containing more than one proposition is of no

wick & A. R. R. v. Toomer, 61 Ga. 253; Reedy v. Brunner, 60 Ga. 107; Thompson v. Feagin, 60 Ga. 82.

Ill. Hayward v. Catton, 1 Ill. App. 577.

Ind. Cathcart v. Brewer (App.) 123 N. E. 358; Hablich v. University Park Bldg. Co., 97 N. E. 539, 177 Ind. 193; Inland Steel Co. v. Smith, 80 N. E. 538, 168 Ind. 245, affirming judgment 75 N. E. 852, 39 Ind. App. 636; Jones v. Peters, 62 N. E. 1019, 28 Ind. App. 383; State v. Ray, 45 N. E. 693, 140 Ind. 500; Moore v. Orr, 10 Ind. App. 89, 37 N. E. 554; Buchart v. Ell, 9 Ind. App. 353, 36 N. E. 762; State v. Gregory, 132 Ind. 387, 31 N. E. 952; Elliott v. Woodward, 18 Ind. 183; Garrigus v. Burnett, 9 Ind. 528; Jolly v. Terre Haute Drawbridge Co., 9 Ind. 417.

Iowa. Rowen v. Sommers, 101 Iowa, 734, 66 N. W. 897; Hallenbeck v. Garst, 96 Iowa, 509, 65 N. W. 417; Ruter v. Foy, 46 Iowa, 132; Brown v. Scott County, 36 Iowa, 140; Mershon v. National Ins. Co., 34 Iowa, 87; McCaleb v. Smith, 24 Iowa, 591.

Kan. Standard Life & Accident Ins. Co. v. Davis, 53 P. 856, 59 Kan. 521; Carter v. Carter, 50 P. 948, 6 Kan. App. 923; Crosby v. Wilson, 53 Kan. 565, 36 P. 985; Myer v. Moon, 45 Kan. 580, 26 P. 40; Sumner v. Blair, 9 Kan. 521.

Me. State v. Flaherty, 5 A. 563; Webber v. Dunn, 71 Me. 331; Crosby v. Maine Central R. Co., 69 Me. 418; Harriman v. Sanger, 67 Me. 442; Macintosh v. Bartlett, 67 Me. 130.

Mass. Bartow v. Parsons Pulp & Paper Co., 94 N. E. 312, 208 Mass. 232.

Mich. Prescott v. Patterson, 49 Mich. 622, 14 N. W. 571; Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239, 1 N. W. 1035; Tupper v. Kilduff, 26 Mich. 394; Danielson v. Dyckman, 26 Mich. 169.

Minn. Main v. Oien, 47 Minn. 89, 49 N. W. 523; Russell v. St. Paul, M. & M. Ry. Co., 33 Minn. 210, 22 N. W. 379; Rheiner v. Stillwater St. Ry. & Transp. Co., 31 Minn. 193, 17 N. W. 279; Ferson v. Wilcox, 19 Minn. 449 (Gil. 388); Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51).

Mont. Simonton v. Kelly, 1 Mont. 363.

Neb. Mattern v. McCarty, 102 N. W. 468, 73 Neb. 228; Runquist v. Anderson, 90 N. W. 760, 64 Neb. 755; Axthelm v. Chicago, R. I. & P. R. Co., 89 N. W. 313, 2 Neb. (Unof.) 444; Green v. Tierney, 87 N. W. 331, 62 Neb. 561; Pease Piano Co. v. Camerson, 76 N. W. 1053, 56 Neb. 561; Bennett v. McDonald, 72 N. W. 268, 52 Neb. 278; Adams-Smith Co. v. Hayward, 71 N. W. 949, 52 Neb. 79; Home Fire Ins. Co. v. Phelphs, 71 N. W. 303, 51 Neb. 623; Union Pac. Ry. Co. v. Montgomery, 68 N. W. 619, 49 Neb. 429; Blue Valley Lumber Co. v. Smith, 48 Neb. 293, 67 N. W. 159; Redman v. Voss, 46 Neb. 512, 64 N. W. 1094; Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. 740.

N. J. Thibodeau v. Hamley, 112 A. 320.

N. M. Hagin v. Collins, 110 P. 840, 15 N. M. 621.

N. Y. Brozek v. Steinway Ry. Co. of Long Island City, 55 N. E. 395, 161 N. Y. 63, affirming judgment 48 N. Y. S. 345, 23 App. Div. 623, and 48 N. Y. S. 1101, 23 App. Div. 626; Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861, affirming (Sup. 1889) 5 N. Y. S. 895, 53 Hun, 629; Burdick v. Freeman, 120 N. Y. 420, 24 N. E. 949; Ensign v. Hooker, 6 App. Div. 425, 39 N. Y. S. 543; Gundlin v. Hamburg-American Packet Co. (Com. Pl. N. Y.) 8 Misc. Rep. 291, 28 N. Y. S. 572; Wallace v. Williams, 59 Hun, 628, 14 N. Y. S. 180; Abenheim v. Samuel, 49 Hun, 607, 1 N. Y. S. 868; Stone v. Western Transp. Co., 38 N. Y. 240; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Barker v. Savage, 31 N. Y. Super. Ct. 288; City of Detroit Water Com'rs v. Burr, 35 N. Y. Super. Ct. 522.

N. C. Buchanan v. Cranberry Furnace Co., 101 S. E. 518, 178 N. C. 643; Quelch v. Futch, 94 S. E. 713, 175 N. C. 694.

Ohio. City of Toledo v. Radbone, 23 Ohio Cir. Ct. R. 268.

Okl. Denson v. Fowler, 155 P.

avail, if any of such propositions is correct. Under this rule a general exception to a long paragraph of a charge containing nu-

1184, 56 Okl. 670; Johnson v. Johnson, 143 P. 670, 43 Okl. 582; Glaser v. Glaser, 74 P. 944, 13 Okl. 389.

Or. Hahn v. Mackay, 126 P. 991, 63 Or. 100, modifying opinion on rehearing 126 P. 12, 63 Or. 100; McAlister v. Long, 54 P. 194, 33 Or. 368; Langford v. Jones, 18 Or. 307, 22 P. 1064.

Utah. Rampton v. Cole, 172 P. 477, 52 Utah, 36; Smith v. Columbus Buggy Co., 123 P. 580, 40 Utah, 580; Grow v. Utah Light & Ry. Co., 106 P. 514, 37 Utah, 41; Ryan v. Curlew Irrigation & Reservoir Co., 104 P. 218, 36 Utah, 382; Pennington v. Redman Van & Storage Co., 97 P. 115, 34 Utah, 223; Farnsworth v. Union Pac. Coal Co., 89 P. 74, 32 Utah, 112; Whipple v. Preece, 67 P. 1072, 24 Utah, 364; Beaman v. Martha Washington Min. Co., 63 P. 631, 23 Utah. 139; Wilson v. Sioux Consol. Min. Co., 52 P. 626, 16 Utah, 392; Lowe v. Salt Lake City, 13 Utah, 91, 44 P. 1050, 57 Am. St. Rep. 708; Nelson v. Brixen, 7 Utah, 454, 27 P. 578.

Vt. Barnard v. Leonard, 100 A. 876, 91 Vt. 369; Usher v. Severance, 80 A. 741, 86 Vt. 523; Needham v. Boston & M. R. Co., 74 A. 226, 82 Vt. 518; Cutler v. Skeels, 37 A. 228, 69 Vt. 154; Jones v. Ellis' Estate, 35 A. 488, 68 Vt. 544; Morrill v. Palmer, 68 Vt. 1, 33 A. 829, 33 L. R. A. 411; Dickerman v. Quincy Mut. Fire Ins. Co., 67 Vt. 609, 32 A. 489; Rowell v. Fuller's Estate, 59 Vt. 688, 10 A. 853.

Wash. Rush v. Spokane Falls & N. Ry. Co., 63 P. 500, 23 Wash. 501; Maling v. Crummey, 5 Wash. 222, 31 P. 600; Meeker v. Gardella, 1 Wash. 139, 23 P. 837.

Wis. Elwell v. Bosshard, 138 N. W. 46, 151 Wis. 46; Kersten v. Weichman, 114 N. W. 499, 135 Wis. 1; Richardson v. Babcock, 96 N. W. 554, 119 Wis. 141; Tebo v. City of Augusta, 90 Wis. 405, 63 N. W. 1045; Green v. Hanson, 89 Wis. 597, 62 N. W. 408; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Butler v. Carns, 37 Wis. 61; Hamlin v. Haight, 32 Wis. 237; Wood v. Aldrich, 25 Wis. 695; Thrasher v. Tyack, 15 Wis. 256; Milwaukee & C. R. Co. v. Hunter, 11 Wis. 160, 78 Am. Dec. 699.

Exceptions held insufficient within rule. In action against waterworks company for wrongfully cutting off plaintiff's water service, exception to instruction entitling plaintiff to damages for "humiliation, embarrassment, annoyance, and inconvenience," even though bad in so far as instruction applied to damages for humiliation or embarrassment, will not be sustained where not restricted to that portion of instruction. Birmingham Waterworks Co. v. Justice, 86 So. 389, 204 Ala. 547. Where, the jury having been instructed that if the whole of defendant's personal property was not transferred to the trustee, or if he practiced any fraud upon his creditors by which they were induced to enter into the agreement, then such agreement was void from the very beginning, an exception to the whole instruction was too indefinite to avail defendant on appeal; the second part of such instruction being correct. Musgat v. Wybro, 33 Wis. 515.

Effect of statement that party excepts to each instruction. A general exception noted at the end of a charge containing a number of instructions which embody separate and distinct propositions, though it states that the party excepts to each instruction, is not sufficiently specific to challenge the correctness of any particular instruction, and raises no question for review where any of the propositions contained in the charge are correct. Holloway v. Dunham, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165, affirming judgment Dunham v. Halloway, 41 P. 140, 3 Okl. 244.

[17] **Ala.** Addington v. State, 74 So. 846, 16 Ala. App. 10; Kirk v. State, 65 So. 195, 10 Ala. App. 216; Kirkwood v. State, 62 So. 1011, 8 Ala. App. 108, certiorari denied 63 So. 990, 184 Ala. 9; Dunn v. State, 62 So. 379, 8 Ala. App. 382; Sanders v. State, 61 So. 336, 181 Ala. 35; McGhee v. State, 59 So. 573, 178 Ala. 4; Powell

merous statements of fact will not raise the point that a particu-

v. State, 59 So. 328, 5 Ala. App. 150; Maxwell v. State, 57 So. 505, 3 Ala. App. 169; Johnson v. State, 57 So. 389, 3 Ala. App. 98; Treadwell v. State, 53 So. 290, 168 Ala. 96; Sims v. State, 41 So. 413, 146 Ala. 109; Ragsdale v. State, 32 So. 674, 134 Ala. 24; Bonner v. State, 107 Ala. 97, 18 So. 226; Dick v. State, 87 Ala. 61, 6 So. 395; Woods v. State, 76 Ala. 35, 52 Am. Rep. 315; Farley v. State, 72 Ala. 170; Dickey v. State, 68 Ala. 508; Gray v. State, 63 Ala. 66; Murphy v. State, 54 Ala. 178.

Ark. Martin v. State, 107 S. W. 380, 85 Ark. 130; Johnson v. State, 104 S. W. 929, 84 Ark. 95; Darden v. State, 84 S. W. 507, 73 Ark. 315, dismissed 26 S. Ct. 758, 200 U. S. 615, 50 L. Ed. 621.

Colo. Wilson v. People, 3 Colo. 325.

D. C. Sullivan v. District of Columbia, 20 App. D. C. 29.

Fla. Gillyard v. State, 61 So. 641, 65 Fla. 322; Bass v. State, 50 So. 531, 58 Fla. 1; Thomas v. State, 36 So. 161, 47 Fla. 99; Wood v. State, 31 Fla. 221, 12 So. 539; Smith v. State, 29 Fla. 408, 10 So. 894; Pinson v. State, 28 Fla. 735, 9 So. 706; Heron v. State, 22 Fla. 86; Willingham v. State, 21 Fla. 761.

Ga. Thomas v. State, 84 Ga. 613, 10 S. E. 1016; Brassell v. State, 64 Ga. 318.

La. State v. Anderson, 45 So. 267, 120 La. 331.

Neb. Goff v. State, 131 N. W. 213, 89 Neb. 287.

N. J. Engle v. State, 50 N. J. Law (21 Vroom) 272, 13 A. 604.

N. M. Territory v. Alarid, 106 P. 371, 15 N. M. 165; Beall v. Territory, 1 N. M. 507.

N. Y. People v. Guidici, 100 N. Y. 503, 3 N. E. 493.

N. C. State v. Bowman, 67 S. E. 1058, 152 N. C. 817; State v. Hall, 44 S. E. 553, 132 N. C. 1094.

Okl. Huff v. Territory, 85 P. 241, 15 Okl. 376.

Utah. State v. Riley, 126 P. 294, 41 Utah, 225.

Vt. State v. Shaw, 94 A. 434, 89 Vt. 121, L. R. A. 1915F, 1087; State v. Ryder, 68 A. 652, 80 Vt. 422.

Wis. Hayes v. State, 87 N. W. 1076, 112 Wis. 304; Jenks v. State, 17 Wis. 665.

Illustrations of exceptions held too general. Where, at the conclusion of the charge, accused "severally and separately excepted to each distinct part of the court's general oral charge, and especially to the charge on the weight of the evidence, and especially to the charge of setting forth the punishment of manslaughter in the first degree," it was held that such exception was a mere general exception to the charge as a whole, and was unavailing unless the charge was entirely erroneous. Untreiner v. State, 41 So. 285, 146 Ala. 26. Where, after the court had made remarks to the jury on their returning into court, including the statement that if they could not reconcile the testimony they must adopt the most plausible theory of the evidence, and they had again retired, defendant's counsel merely called attention to the fact that the court had left out the question of reasonable doubt, whereupon the court recalled the jury and repeated what he had said, and his charge in full, and added that the state must satisfy them beyond a reasonable doubt, defendant's general exception then taken cannot be treated as made to the use of the word "plausible." State v. Dewey, 51 S. E. 937, 139 N. C. 556.

Instruction on reasonable doubt. An instruction as to reasonable doubt, which, after defining such doubt as an actual doubt which a juror is conscious of after reviewing in his mind the entire case, giving consideration to all the testimony, and one which he believes would cause a reasonable man in any matter of like importance to hesitate to act, denies the notion that any mere possibility is sufficient ground for such a doubt, and adds that, in the performance of jury service, jurors should decide controversies as they would any important question in their own affairs, is good as against a general exception. Holt v. United States, 31 S. Ct. 2, 218 U. S. 245, 54

lar statement is erroneous,[18] and an objection to a long excerpt from the charge that it is not a clear statement of the law and is confusing, and does not state the principles of law applicable to the case, so that the jury can understand them, is insufficient where some of the parts of the excerpt are not subject to any of such objections.[19] So a general exception to the whole of a portion of a charge, a part of which is not open to objection on any view of the case, cannot be sustained on the theory that the balance of the charge is not within the issues,[20] and an objection that an instruction is not warranted by the evidence is not well taken, where it is pertinent to one phase of the evidence.[21]

Where, however, although only one part of an instruction is improper, the two parts are so inseparable that the whole charge is rendered bad by the error in the one part, a general exception to such instruction will be sufficient,[22] and the above rule is not applicable, where the instruction to which a general exception is taken authorizes the wrong application of that portion of it which is correct.[23] So, where an instruction, covering one general subject, if considered as a whole, fails to correctly reflect the law "applicable to the case," an exception to such an instruction is sufficient, although there may be phrases, or even sentences, in the instruction that are unobjectionable,[24] and it has been held that, where the instructions are not numbered nor divided into distinct propositions, an exception to any part of them which is erroneous may be reserved by excepting to all collectively.[25]

L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment (C. C. Wash.) United States v. Holt, 168 F. 141.

Instructions held not to contain two distinct propositions within rule. An instruction on a trial for murder, that murder in the first degree was the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson or certain other crimes named; that premeditation meant intent before the act; that premeditated design to kill meant intent to kill; that premeditation need not be for any particular length of time, but must be sufficient to enable the slayer to form a distinct intent to kill. Stokes v. State, 44 So. 759, 54 Fla. 109.

[18] Philip Schneider Brewing Co. v. American Ice-Mach. Co. (C. C. A. Colo.) 77 F. 138, 23 C. C. A. 89; Morse v. Gilman, 18 Wis. 373.

[19] Reeves v. H. C. Allgood & Co., 67 S. E. 82, 133 Ga. 835.

[20] Metropolitan Redwood Lumber Co. v. Davis (C. C. A. Cal.) 205 F. 486, 123 C. C. A. 554.

[21] James v. Hamil, 78 S. E. 721, 140 Ga. 168.

[22] Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264; Eddy v. Howard, 23 Iowa, 175; Haun v. Rio Grande W. Ry. Co., 62 P. 908, 22 Utah, 346.

[23] Melcher v. Beeler, 110 P. 181, 48 Colo. 233, 139 Am. St. Rep. 273.

[24] Everts v. Worrell (Utah) 197 P. 1043.

[25] Hersleb v. Moss, 28 Ind. 354.

§ 523. Exception to each and every part of a charge

The rule in most jurisdictions is that an exception taken indiscriminately to every paragraph of a charge, or to each clause separately, will be treated the same as if one general exception had been taken to the whole charge, and is not effective unless the whole charge is bad,[26] and an exception to every instruction adverse to the exceptant and every part thereof, and the instructions as a whole, is insufficient to bring to the attention of the court any separate paragraph, and will not avail unless the whole charge is erroneous.[27]

In some jurisdictions, however, an exception to "each and every" charge of the court is held to entitle the party so excepting to present his objections to any one of the charges.[28] In one jurisdiction the appellate court will not refuse to review such an exception at the close of a written charge duly paragraphed and numbered, if allowed in that form by the trial court,[29] although in this jurisdiction, as elsewhere, it is considered the better practice to minutely specify objections at the trial, and where the instructions are oral and in the nature of a general charge, such an exception is not sufficient.[30]

§ 524. Exception directed against several instructions designated by certain numbers

In some jurisdictions an exception to the giving of instructions designated by certain numbers "and to the giving of each of said instructions" is held to be a separate and specific exception to

[26] **Ala.** Savage v. Milum, 54 So. 180, 170 Ala. 115.

Mich. Goodsell v. Seeley, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183; People v. Bristol, 23 Mich. 118.

Okl. Duroderigo v. Culwell, 152 P. 605, 52 Okl. 6; Remund v. McCool, 150 P. 1055, 50 Okl. 69; Eisminger v. Beman, 124 P. 289, 32 Okl. 818.

Utah. Scoville v. Salt Lake City, 11 Utah, 60, 39 P. 481.

Wis. Nisbet v. Gill, 38 Wis. 657.

Illustrations of exceptions insufficient within rule. Where an instruction stated the rule of damages in other respects correctly, and added that interest might be allowed from the date of the injury, an exception "to said instruction, and to each and every part thereof," is not sufficiently specific to raise the question whether the time for which interest might be allowed was correctly stated. Dean v. Chicago & N. W. Ry. Co., 43 Wis. 305.

In Oklahoma, in an early case the court vigorously condemned such an exception holding it to amount merely to a general exception, although feeling itself bound under the statute to consider it. Buck v. Territory, 98 P. 1017, 1 Okl. Cr. 517. See Dunham v. Holloway, 3 Okl. 244, 41 P. 140.

[27] Isnard v. Edgar Zinc Co., 106 P. 1003, 81 Kan. 765.

[28] Ellis v. Leonard, 78 N. W. 246, 107 Iowa, 487; Eikenberry v. Edwards, 67 Iowa, 14, 24 N. W. 570; Hawes v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 315, 20 N. W. 717.

[29] Ritchey v. People, 47 P. 272, 23 Colo. 314, Id., 47 P. 384, 23 Colo. 314. See Beals v. Cone, 62 P. 948, 27 Colo. 473, 83 Am. St. Rep. 92.

[30] Miller v. People, 46 P. 111, 23 Colo. 95.

each of said paragraphs of the charge and to be sufficient,[31] and in one jurisdiction an exception to the giving of instructions requested by a party and designated by certain numbers is held to be a specific exception to each instruction.[32]

§ 525. Exceptions to refusals to instruct

The general rule that exceptions to the giving of instructions should be specific applies also to the refusal of requests to charge,[33]

[31] Phœnix Ins. Co. v. Moog, 81 Ala. 335, 1 So. 108; Geary v. Parker, 47 S. W. 238, 53 S. W. 567, 65 Ark. 521; Rice v. Williams, 71 P. 483, 18 Colo. App. 330; City of Omaha v. Richards, 68 N. W. 528, 49 Neb. 244, overruling Brooks v. Dutcher, 36 N. W. 128, 22 Neb. 644, and Walker v. Turner, 42 N. W. 918, 27 Neb. 103.

Exception to requests. In Minnesota, it has been held, disapproving, so far as inconsistent, the cases of Steffenson v. Chicago, M. & St. P. R. Co., 53 N. W. 800, 51 Minn. 531, and Rosquist v. D. M. Gilmore Furniture Co., 52 N. W. 385, 50 Minn. 192, that where several separate and distinct "requests," each containing but a single proposition of law, are given, an exception "to each and all of them" is sufficient. Van Doren v. Wright, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22.

[32] Coley v. City of Statesville, 28 S. E. 482, 121 N. C. 301; Witsell v. West Asheville & S. S. Ry. Co., 27 S. E. 125, 120 N. C. 557.

[33] **U. S.** Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. Ed. 510; Burton v. West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215; Connecticut Mut. Life Ins. Co. v. Union Trust Co. of New York, 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708; (C. C. A. Ill.) Cleveland, C., C. & St. L. Ry. Co. v. Zider, 61 Fed. 908, 10 C. C. A. 151; (C. C. A. Va.) Anderson v. Avis, 62 Fed. 227, 10 C. C. A. 347.

Ill. Razor v. Razor, 142 Ill. 375, 31 N. E. 678.

Ind. Baker v. McGinniss, 22 Ind. 257; State v. Bartlett, 9 Ind. 569; Jolly v. Terre Haute Drawbridge Co., 9 Ind. 417.

Kan. Fleming v. L. D. Latham & Co., 48 Kan. 773, 30 P. 166; Bailey v. Dodge, 28 Kan. 72.

Mass. Murphy v. McNulty, 145 Mass. 464, 14 N. E. 532.

Neb. City of Omaha v. McGavock, 47 Neb. 313, 66 N. W. 415; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928.

N. Y. People v. Katz, 103 N. E. 305, 209 N. Y. 311, Ann. Cas. 1915A, 501, affirming judgment 139 N. Y. S. 137, 154 App. Div. 44; Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; Rehberg v. City of New York, 99 N. Y. 652, 2 N. E. 11; Yale v. Curtiss, 71 Hun, 436, 24 N. Y. S. 981.

S. C. Jones v. Swearingen, 42 S. C. 58, 19 S. E. 947.

Vt. Goodwin v. Perkins, 39 Vt. 598.

Illustrations of exceptions to refusals to charge held too general. An exception to refusals to charge, which states that the "court refused to give any of the foregoing requests and the counsel for defendant in due time and form excepted to each refusal." Pound v. Port Huron & S. W. Ry. Co., 19 N. W. 570, 54 Mich. 13. The objection to refusal of a request to instruct the jury to return a verdict for defendant, because plaintiff's evidence is insufficient to sustain a verdict, is too general, if it does not point out wherein the evidence is insufficient. Cleburne St. Ry. Co. v. Barnes (Tex. Civ. App.) 168 S. W. 991. Where defendant made four requests to charge, three of which the court modified and gave, and the fourth refused, to which defendant excepted in these words: "Defendant now excepts to each and every part of the charge, and also to the refusal of the court to give the requests of defendant, as requested," it was held that the exception failed to point out which of the charges given was claimed to be erroneous, and

and the court may properly disallow an exception to its refusal to give a large number of instructions as requested, and require every error in omitting to cover requested instructions to be specifically pointed out.[34] Where, of a number of requests to charge, some are given and others are refused or modified, a general exception to the refusal of instructions asked, not calling the attention of the court to the particular omission or modification complained of,[35] or an exception to the refusals to charge as requested in so far as the court did refuse, and to each of the refusals to charge,[36]

was therefore bad. Shull v. Raymond, 23 Minn. 66. Where, in the charge to the jury, the court gave almost verbatim four out of plaintiff's nine requests to charge, and all of defendant's seven, and the exception taken was that plaintiff "excepts to the refusal of the court to give plaintiff's fourth, sixth, seventh, eighth, and ninth requests, and to the modification of the first and second of plaintiff's requests as given. Plaintiff also excepts to the giving of each of defendant's requests," the exception was held not sufficiently specific. Rosquist v. D. M. Gilmore Furniture Co., 50 Minn. 192, 52 N. W. 385. An exception at the close of the charge to the court's "refusal to charge in the language stated," and to his "modification of the respective requests as stated," is too general to be considered. Heath v. Glens Falls, S. H. & Ft. E. St. R. Co., 90 Hun, 560, 36 N. Y. S. 22. A mere general exception to the failure of the court to give nine separate propositions, requested before the argument and charge, and not afterwards called to the attention of the court, is too vague to require any action by an appellate court. Pittsburgh & W. Ry. Co. v. Thompson (C. C. A. Ohio) 82 F. 720, 27 C. C. A. 333.

Exceptions held sufficiently specific. Where a bill of exceptions recited that the defendants asked the trial court to give "each" of several charges set out, but that the court refused to give "either of said charges," and that to such refusal the defendants excepted, it was held that the exception brought up for revision each of the charges named. Lehman v. Bibb, 55 Ala. 411. Where, following certain instructions given by the court to the jury contained in a bill of exceptions are other instructions signed by counsel immediately preceded by a statement that they were asked by defendant and refused by the court, and containing after the instructions refused the statement, "to the giving of each of which instructions and the refusal to give those asked defendant at the time objected and excepted," such exception is properly taken, and is neither too general nor indefinite. Robb v. State, 52 Ind. 218. Where five distinct requests to charge, separately numbered, were submitted to the court, who ruled upon—denying or modifying—each separately, and counsel "excepted to said refusals and modifications of said instructions, as given," it was held that such exception was sufficiently specific, and would be understood as applying to the ruling on each proposition. Schurmeier v. Johnson, 10 Minn. 319 (Gil. 250).

[34] Herrick v. Waitt, 113 N. E. 205, 224 Mass. 415; Randall v. Peerless Motor Car Co., 99 N. E. 221, 212 Mass. 352; Luce v. Hassam, 58 A. 725, 76 Vt. 450.

[35] **Mich.** Edgell v. Francis, 86 Mich. 232, 48 N. W. 1095.

Minn. Delude v. St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Carroll v. Williston, 44 Minn. 287, 46 N. W. 352.

N. Y. Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990; Roe v. City of New York, 56 N. Y. Super. Ct. (24 Jones & S.) 298, 4 N. Y. S. 447; Smedis v. Brooklyn & R. B. R. Co., 88 N. Y. 13.

[36] Read v. Nicholas, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130.

is unavailing to present any question for review, and a general exception to a refusal to give a number of requests, except so far as they are included in the main charge to the jury,[37] or an exception to such parts of the charge of the court as are variant from the requests of the exceptant,[38] the variances not being pointed out, is too general. So, where a party requests numerous instructions, and the court gives a general charge purporting to cover the instructions asked, an objection to the refusal of the court to give the instructions, on the ground that they were proper and that they were not covered by the charge, is too general.[39] So an exception to the modification by the court in its general charge of a particular proposition submitted by one of the parties, without stating specifically the modification to which objection is made, is too indefinite,[40] and an exception taken to the ruling of the court in refusing to give an instruction asked will not embrace a ruling modifying the instruction,[41] and a general exception to the refusal to charge as requested, and "severally to each refusal to charge and to the charge," presents nothing for review.[42]

Where the court refuses to give a certain number of instructions, an exception to the failure to give a certain less number, not specifying which requests of the larger number are objected to, is not good,[43] and a general exception to the refusal of a number of requests to charge presents no question on appeal, if any one of such requests is improper.[44] An exception, however, to the refusal

[37] Walker v. Windsor Nat. Bank (C. C. A. N. H.) 56 F. 76, 5 C. C. A. 421; Lane v. Minnesota State Agricultural Soc., 69 N. W. 463, 67 Minn. 65; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Welcome v. Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913.

[38] Beaver v. Taylor, 93 U. S. 46, 23 L. Ed. 797; Chamberlain v. Pratt, 33 N. Y. 47.

[39] Boyd v. Oddous, 97 Cal. 510, 32 P. 569.

[40] Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708; Washington Ry. & Electric Co. v. Washington Terminal Co., 44 App. D. C. 470; Thompson v. Security Trust & Life Ins. Co., 41 S. E. 464, 63 S. C. 290.

[41] Chicago City Ry. Co. v. Mumford, 97 Ill. 560; State v. Robinson, 12 Wash. 491, 41 P. 884.

[42] Dodge v. Alger, 53 N. Y. Super. Ct. (21 Jones & S.) 107.

[43] Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.

[44] **U. S.** Union Pac. Ry. Co. v. Callaghan, 161 U. S. 91, 16 S. Ct. 493, 40 L. Ed. 628; Thiede v. Territory of Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237; Newport News & M. V. Co. v. Pace, 158 U. S. 36, 15 S. Ct. 743, 39 L. Ed. 887; Bogk v. Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631; Union Ins. Co. v. Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497; Moulor v. American Life Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447; Beaver v. Taylor, 93 U. S. 46, 23 L. Ed. 797; (C. C. A. Colo.) Morgan v. United States, 169 F. 242, 94 C. C. A. 518; (C. C. A. Ill.) Illinois Car & Equipment Co. v. Linstroth Wagon Co., 112 F. 737, 50 C. C. A. 504; Linehan Ry. Transfer Co. v. Morris, 87 F. 127, 30 C. C. A. 575; (C. C. A. Ind. T.) Waples-Platter Co. v. Turner, 83 F 64, 27 C. C. A. 439; (C. C. A. Mich.)

to give a number of instructions having certain designated numbers, has been held to be sufficient,[45] and it has been held that the

Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co., 131 F. 215, 65 C. C. A. 201; (C. C. A. N. Y.) Erie R. Co. v. Littell, 128 F. 546, 63 C. C. A. 44; (C. C. A. Or.) Otis Elevator Co. v. Luck, 202 F. 452, 120 C. C. A. 558; (C. C. A. S. D.) New England Furniture & Carpet Co. v. Catholicon Co., 79 F. 294, 24 C. C. A. 595.

Ala. Tombigbee Valley R. Co. v. Morris, 65 So. 207, 10 Ala. App. 322; Johnson v. State, 37 So. 456, 141 Ala. 37; Pearson v. Adams, 29 So. 977, 129 Ala. 157; Milliken v. Maund, 110 Ala. 332, 20 So. 310; Alston v. State, 109 Ala. 51, 20 So. 81; Nelson v. Warren, 93 Ala. 408, 8 So. 413; Goley v. State, 87 Ala. 57, 6 So. 287; Adams v. State, 87 Ala. 89, 6 So. 270; Black v. Pratt Coal & Coke Co., 85 Ala. 504, 5 So. 89; Bedwell v. Bedwell, 77 Ala. 587; Stovall v. Fowler, 72 Ala. 77; Williams v. State, 68 Ala. 551; Kilpatrick v. Pickens County, 66 Ala. 422; McGehee v. State, 52 Ala. 224.

Fla. Lee v. State, 67 So. 883, 69 Fla. 255, Ann. Cas. 1917D, 236; Telfair v. State, 50 So. 573, 58 Fla. 110; Ewert v. State, 37 So. 334, 48 Fla. 36; Griffin v. State, 37 So. 209, 48 Fla. 42; King v. State, 31 So. 254, 43 Fla. 211.

Ind. Cotner v. State, 89 N. E. 847, 173 Ind. 168; Rastetter v. Reynolds, 66 N. E. 612, 160 Ind. 133; Kluse v. Sparks, 10 Ind. App. 444, 37 N. E. 1047; Garrigus v. Burnett, 9 Ind. 528.

Ind. T. Hall v. Needles, 38 S. W. 671, 1 Ind. T. 146.

Kan. Murray v. Board of Com'rs of Woodson County, 48 P. 554, 58 Kan. 1; Hayes v. Farwell, 45 P. 910, 4 Kan. App. 387; Sumner v. Blair, 9 Kan. 521.

Minn. McNamara v. Pengilly, 64 Minn. 543, 67 N. W. 661; Webb v. Fisher, 57 Minn. 441, 59 N. W. 537; Ferson v. Wilcox, 19 Minn. 449 (Gil. 388).

Neb. City of South Omaha v. Powell, 70 N. W. 391, 50 Neb. 798.

N. J. Gardner v. State, 55 N. J. Law (26 Vroom) 17, 26 A. 30.

N. Y. Barker v. Cunard S. S. Co., 51 N. E. 1089, 157 N. Y. 693, affirming judgment 36 N. Y. S. 256, 91 Hun, 495; Patton v. Royal Baking Powder Co., 114 N. Y. 1, 20 N. E. 621; Barker v. Cunard S. S. Co., 91 Hun, 495, 36 N. Y. S. 256; Willetts v. Sun Mut. Ins. Co., 45 N. Y. 45, 6 Am. Rep. 31; Magee v. Badger, 34 N. Y. 247, 90 Am. Dec. 691; affirming 30 Barb. 246; Myers v. Dixon, 45 How. Prac. 48, 35 N. Y. Super. Ct. (3 Jones & S.) 390.

Ohio. Hills v. Ludwig, 46 Ohio St. 373, 24 N. E. 596; Shaffer v. Cincinnati, H. & D. R. R. Co., 14 Ohio Cir. Ct. R. 488, 8 O. C. D. 66; Voelckel v. Banner Brewing Co., 9 Ohio Cir. Ct. R. 318.

Or. Salomon v. Cress, 22 Or. 177, 29 P. 439; Murray v. Murray, 6 Or. 17.

Utah. Marks v. Tomkins, 7 Utah, 421, 27 P. 6.

Vt. White v. Lumiere North American Co., 64 A. 1121, 79 Vt. 206, 6 L. R. A. (N. S.) 807.

W. Va. Ocheltree v. McClung, 7 W. Va. 232.

Wis. Elwell v. Bosshard, 138 N. W. 46, 151 Wis. 46; Haueter v. Marty, 137 N. W. 761, 150 Wis. 490; Racine Basket Mfg. Co. v. Konst, 51 Wis. 156, 7 N. W. 254; Harrison v. Crocker, 39 Wis. 68; Hamlin v. Haight, 32 Wis. 237.

Illustrations of insufficient exceptions within rule. Where the bill of exceptions recites that the defendant asked the court to give "the following charges," which the court refused to do, and that the defendant separately and severally excepted to the refusal of the court to give each of said charges, and then sets out a number of charges, it will be assumed that the charges were requested as a whole, and hence refusal to give them is not error, if any one of them is erroneous. Town of Vernon v. Edgeworth, 42 So. 749, 148 Ala. 490.

[45] Bell v. Washington Cedar Shingle Co., 8 Wash. 27, 35 P. 405.

Contra, Holman v. Herscher (Tex.) 16 S. W. 984.

rulings of the court on prayers for instructions presented at the same time and forming a series of consecutive propositions is a single act, and that one exception will embrace the whole.[46]

In some jurisdictions it is not necessary to take an exception to the reason given by the court for refusing an instruction.[47] An exception to the refusal to give a requested instruction is sufficient to raise the question of the propriety of that portion of the general charge which affirms the contrary of such request.[48] Where instructions are asked as an entirety, but the refusals to give them are several, and the exceptions are also several, consideration thereof will not be refused on appeal because of the absence of an exception to the refusal to give them as an entirety.[49]

§ 526. Limitations of rule

A general exception to the whole charge will raise the question whether as an entirety it is not manifestly wrong and injurious to the exceptant,[50] and such an exception may be sufficient, where the charge consists of a single proposition, or where the whole scope of the charge asserts and explains a single question or principle,[51] or where the whole charge proceeds on a false theory and there is no reason to suppose that the error is inadvertent.[52] Thus an exception "to the court's measure of damages" as stated in the charge is sufficiently specific, where the error, if any, is fundamental in giving a rule of damages inapplicable to the case, and which affects the entire charge relating to that subject.[53] As stated in one jurisdiction, the rule is that to challenge the correctness of a charge because of its inapplicability to the facts, or because it does not state the law with sufficient fullness, the respects in which it is deficient must be specified,[54] but that in order to challenge the correctness of a legal proposition involved in a charge it is sufficient to point out the particular part objected to, and to say that it is not a legal charge.[55] A general objection to an in-

[46] McCosker v. Banks, 35 A. 935, 84 Md. 292.

[47] Maxwell v. Massachusetts Title Ins. Co., 92 N. E. 42, 206 Mass. 197; Chessman v. Hale, 79 P. 254, 31 Mont. 577, 68 L. R. A. 410, 3 Ann. Cas. 1038.

[48] Connecticut Mut. Life Ins. Co. v. Hillmon, 23 S. Ct. 294, 188 U. S. 208, 47 L. Ed. 446, reversing judgment (C. C. A. Kan.) 107 F. 834, 46 C. C. A. 668.

[49] Pennsylvania Co. v. Ebaugh, 144 Ind. 687, 43 N. E. 936.

[50] See Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51).

[51] Nickum v. Gaston, 24 Or. 380, 33 P. 671, 35 P. 31. See Robinson v. New York & E. R. Co., 27 Barb. (N. Y.) 512.

[52] Snyder v. Viola Mining & Smelting Co., 3 Idaho (Hasb.) 28, 26 P. 127.

[53] Hindman v. First Nat. Bank (C. C. A. Ky.) 112 F. 931, 50 C. C. A. 623, 57 L. R. A. 108; Denver & R. G. R. Co. v. Young, 70 P. 688, 30 Colo. 349.

[54] State v. Weston, 31 So. 383, 107 La. 45.

[55] State v. Weston, 31 So. 383, 107 La. 45.

struction is sufficient to raise the point that it invades the province of the jury,[56] and it has been held that a more liberal rule with respect to giving effect to a general exception will be applied in the case of an oral charge than where the instructions are written.[57] The rule that exceptions to instructions should be precise and pointed, so as not to require the court to search for errors through long passages does not apply, when it is necessary or useful to cite an entire passage in order to form a just view of the error complained of,[58] and an exception to a court's charge which is merely a quotation therefrom is not fatally defective for that reason, if it sets forth a distinct proposition and is definite and specific as to the error therein.[59]

Exceptions to a charge are sufficiently explicit if they fairly direct the attention of the court to that part of the charge considered objectionable.[60] Where instructions in writing are separately paragraphed and numbered, an exception to the giving of one of such instructions designated by its number is sufficient.[61] In some

[56] Union Seed & Fertilizer Co. v. St. Louis, I. M. & S. Ry. Co., 181 S. W. 898, 121 Ark. 585.

[57] Lichty v. Tannatt, 11 Wash. 37, 39 P. 260.

[58] Hicks v. United States, 150 U. S. 442, 14 S. Ct. 144, 37 L. Ed. 1137.

[59] Norris v. Clinkscales, 37 S. E. 821, 59 S. C. 232.

[60] Rogers v. Mahoney, 62 Cal. 611.

Exceptions held sufficient. An exception "to so much of the charge as relates to smooth, level, and slippery ice not being a defect under the conditions named" sufficiently indicates the statement of legal propositions to which objection is made. Adams v. Town of Chicopee, 147 Mass. 440, 18 N. E. 231.

Illustrations of insufficient exceptions. An exception to the charge "commencing with the words, * * * and from there to the end," is bad, where such portion of the charge contains distinct propositions. Calkins v. Seabury-Calkins Consol. Min. Co., 5 S. D. 299, 58 N. W. 797. On trial for malicious trespass, where the court in its charge has defined "malicious trespass" as the entering on another's property with a malicious intent to do injury, an exception to "that part of the charge defining trespass as the entering on land of another with malicious intent" is not sufficiently definite and specific to entitle defendant to a review of the charge. People v. Upton, 55 Hun, 612, 9 N. Y. S. 684. An exception to the charges as given on the request of plaintiff, and particularly his requests numbered 1, 2, 3, 5, 6, 7, and "to the refusal to charge as requested by the defendant and each and every one of the same, and particularly his requests numbered 2, 3, 5, etc.," where several of the plaintiff's requests referred to were in fact modified essentially, if not even favorable to defendant, and one at least of defendant's requests referred to was in fact given in substance in his general charge, will not be considered. Such an exception, in pointing at everything, specifies nothing, and is about equivalent to a general objection to the judge's charging at all. Danielson v. Dyckman, 26 Mich. 169. An exception to the charge "so far as it is inconsistent with the rulings requested" was too indefinite. Letchworth v. Boston & M. R. R., 108 N. E. 500, 220 Mass. 560.

[61] Big Hatchet Consol. Min. Co. v. Colvin, 75 P. 605, 19 Colo. App. 405;

jurisdictions a party excepting to a particular instruction need not state the reasons why it is bad,[62] and in some jurisdictions a general exception, although insufficient as to instructions given by the court of its own motion, is sufficient as to instructions given at the request of the other party.[63] That an exception is ambiguous as to which portion of the charge it refers furnishes no ground for reversal.[64]

F. Effect of Failure to Object or Except

§ 527. General rule

The general rule is that errors in instructions, other than those of a fundamental character,[65] are waived by the failure to object to them at the trial of the cause;[66] such instructions becoming,

McClellan v. Hein, 77 N. W. 120, 56 Neb. 600.

Oral charge. Where an instruction is given orally, and the division thereof into paragraphs in the abstract was subsequently and arbitrarily made by counsel, a general objection to a paragraph of the instruction, referring to it as "Instruction No. 7," is insufficient. Edwards v. People, 59 P. 56, 26 Colo. 539.

[62] Denver & R. G. R. Co. v. Young, 70 P. 688, 30 Colo. 349; Bradbury v. Alden, 57 P. 490, 13 Colo. App. 208; Farnsworth v. Union Pac. Coal Co., 89 P. 74, 32 Utah, 112; Sexton v. School Dist. No. 34 of Spokane County, 9 Wash. 5, 36 P. 1052. See, also, ante, § 519, note 76.

In Iowa, the grounds for exceptions to instructions need not be stated, where the exceptions are taken at the time the instructions are given. Johnson v. Chicago, R. I. & P. R. Co., 51 Iowa, 25, 50 N. W. 543; Williams v. Barrett, 52 Iowa, 637, 3 N. W. 690; Hawes v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 315, 20 N. W. 717.

[63] Waldteufel v. Pacific Vineyard Co., 92 P. 747, 6 Cal. App. 624; Miller v. Fireman's Fund Ins. Co. of San Francisco, 92 P. 332, 6 Cal. App. 395; Williams v. Casebeer, 58 P. 380, 126 Cal. 77; Robinson v. Western Pac. R. Co., 48 Cal. 409.

[64] McGinley v. United States Life Ins. Co., 77 N. Y. 495; Schmalz v. Hauseman, 7 N. Y. Civ. Proc. R. 414.

[65] Jeffries' Ex'r v. Ferree, 193 S. W. 646, 175 Ky. 18; Gowdey v. Robbins, 3 App. Div. 353, 38 N. Y. S. 280; Cooper & Jones v. Hall (Tex. Civ. App.) 168 S. W. 465; Beazley v. Denson, 40 Tex. 416; Stude v. Saunders, 2 Posey, Unrep. Cas. (Tex.) 122.

[66] **U. S.** Reagan v. Aiken, 138 U. S. 109, 11 Sup. Ct. 283, 34 L. Ed. 892; (C. C. A. Mich.) Standard Oil Co. v. Sutherland, 247 F. 309, 159 C. C. A. 403; (C. C. N. Y.) Emerson v. Hogg, Fed. Cas. No. 4,440, 2 Blatchf. 1, 1 Fish. Pat. Rep. 77; (C. C. A. Pa.) Barnes & Tucker Coal Co. v. Vozar, 227 F. 25, 141 C. C. A. 579.

Ark. Evins v. St. Louis & S. F. R. Co., 147 S. W. 452, 104 Ark. 79; St. Louis, I. M. & S. Ry. Co. v. Lamb, 128 S. W. 1030, 95 Ark. 209.

Cal. Los Angeles County v. Reyes, 32 P. 233, 3 Cal. Unrep. Cas. 77; Wilkinson v. Parrott, 32 Cal. 102.

Colo. Brewster v. Crossland, 2 Colo. App. 446, 31 P. 236.

Ind. Parker v. Clayton, 51 Ind. 126.

Iowa. Joyner v. Interurban Ry. Co., 154 N. W. 936, 172 Iowa, 727; Eldridge v. Stewart, 97 Iowa, 689, 66 N. W. 891; Hall v. Town of Manson, 90 Iowa, 585, 58 N. W. 881; Fritz v. Kansas City, C. B. & St. J. Ry. Co., 61 Iowa, 323, 16 N. W. 144; Kirk v. Woodbury County, 55 Iowa, 190, 7 N. W. 498; Talty v. Lusk, 4 Iowa, 469.

Kan. Kansas Farmers' Fire Ins.

in the absence of any objection or exception taken to them, and in the absence of any request for contrary instructions, the law of the case,[67] and in many cases the failure of a party to ask an in-

Co. v. Hawley, 46 Kan. 746, 27 P. 176; State v. Probasco, 46 Kan. 310, 26 P. 749; City of Wyandotte v. Noble, 8 Kan. 444.

Minn. Bork v. Keller Mfg. Co., 148 N. W. 113, 126 Minn. 203; Town of Wells v. Sullivan, 147 N. W. 244, 125 Minn. 353.

Mo. Carlton v. Monroe, 115 S. W. 1057, 135 Mo. App. 172.

Neb. Holloway v. Schooley, 27 Neb. 553, 43 N. W. 346; Chicago, B. & Q. R. Co. v. Starner, 26 Neb. 630, 42 N. W. 706; Schroeder v. Rinehard, 25 Neb. 75, 40 N. W. 593.

N. Y. Schaff v. Miles (Com. Pl.) 10 Misc. Rep. 395, 31 N. Y. S. 134.

N. C. White v. Clark, 82 N. C. 6.

Okl. Carter v. Missouri Mining & Lumber Co., 41 P. 356, 6 Okl. 11.

Or. Hurst v. Burnside, 12 Or. 520, 8 P. 888.

Wash. State v. Bringgold, 82 P. 132, 40 Wash. 12, 5 Ann. Cas. 716; Johnson v. Tacoma Cedar Lumber Co., 3 Wash. 722, 29 P. 451.

Wis. Thomas v. Paul, 87 Wis. 607, 58 N. W. 1031; Firmeis v. State, 61 Wis. 140, 20 N. W. 663; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468.

Illustrations of waivers by reason of failure to object or except. Where, at the close of the charge, plaintiff's counsel only requested a modification of the instructions on the burden of proof, and on this being allowed defendant's counsel asked if he was through, whereupon plaintiff's counsel said "I have nothing more to say," he thereby waived any objection to an instruction on the degree of care required of defendant. Cucciarre v. New York Cent. & H. R. R. Co. (C. C. A. Ill.) 163 F. 38, 90 C. C. A. 220. Where, on the trial in an action by a shipper against a carrier for the burning of the goods in transit, both parties proceeded on the theory that if the fire originated from the act of the shipper's agent in handling a lantern such act was negligence, and no objection was made to the use of the word "negligence" in the instructions, given at plaintiff's request, that defendant was liable if it had not proved the loss was by reason of the alleged neglect of the plaintiff, and that it had the burden of proving its defense that the fire was caused by the negligence of plaintiff's agent, objection on that account was waived. St. Louis, I. M. & S. R. Co. v. Pape, 140 S. W. 265, 100 Ark. 269. If the charge states a certain condition of affairs as being contended for by a party, when there is no evidence to support the contention, it is the duty of counsel to call the court's attention thereto. Jeffress v. Norfolk-Southern R. Co., 73 S. E. 1013, 158 N. C. 215. In an action against connecting carriers for injury to cattle the failure of defendants to except to the refusal to give a request to apportion the damages was a waiver of an objection to the general charge on the same point. Quanah, A. & P. Ry. Co. v. Galloway (Tex. Civ. App.) 165 S. W. 546. A party who presents requests for rulings, saying that he proposes to except if they are not given, and then agrees that the judge may charge the jury, reserving the right to except if the requests are not covered by the charge, waives the right to except if, after the charge is given, he makes no objection to the omission to cover the rulings requested. Boutelle v. Dean, 148 Mass. 89, 18 N. E. 681. When, during the argument of the last counsel for the defendant, the judge announced that he intended to submit to the jury issues different from those originally agreed upon by counsel, and the new issues were examined and commented on to the jury by defendant's counsel, and no exceptions were taken, any objection to such change must be considered to have been waived. Phifer v. Alexander, 97 N. C. 335, 2 S. E. 530.

[67] **Iowa.** Almon v. Chicago & N. W. Ry. Co., 144 N. W. 997, 163 Iowa, 449.

N. Y. Smith v. Appleton, 140 N.

struction on a particular subject, or to except to the refusal of the court to give such instruction, operates as a waiver of any objection to the omission to give it.[68]

§ 528. Limitations of rule

The mere failure to object to a general charge does not amount to an approval of it, so as to estop a party from requesting instructions and excepting to their refusal,[69] and where the charge of the court is susceptible of a construction unfavorable to a party, but it is so ambiguous as to mislead him into omitting to except thereto, supposing that no such construction was intended, his failure to except will not operate against him on appeal.[70]

§ 529. Specific applications of rule

The above rule applies to the giving of contradictory instructions,[71] to a misstatement of the contentions of counsel,[72] to misstatements of the evidence,[73] to the giving of abstract instructions,[74] to a charge on the weight of the evidence,[75] to the assumption of disputed facts,[76] to the modification of an instruction or of a request to charge,[77] or to the failure to indorse a charge asked as "given."[78] The objection that the charge of the court was given orally, instead of in writing, will not be considered by the appellate court, where it was not made in the trial court.[79]

Y. S. 565, 155 App. Div. 520; Grimm v. Wandell, 140 N. Y. S. 391; Schweinburg v. Altman, 130 N. Y. S. 37, 145 App. Div. 377; Gillan v. O'Larry, 108 N. Y. S. 1024, 124 App. Div. 498.

S. D. Lallier v. Pacific Elevator Co., 127 N. W. 558, 25 S. D. 572.

[68] Marks v. Jacobs, 76 Ind. 216; Davis v. Keen, 55 S. E. 359, 142 N. C. 496.

[69] Rabinowitz v. Smith Co. (Tex. Civ. App.) 190 S. W. 197.

[70] Gougar v. Morse (C. C. Mass.) 66 F. 702.

[71] Williams v. Southern Pac. R. Co., 110 Cal. 457, 42 P. 974.

[72] State v. Blackwell, 78 S. E. 316, 162 N. C. 672.

[73] Corcoran v. Lehigh & Franklin Coal Co., 37 Ill. App. 577, reversed 138 Ill. 390, 28 N. E. 759; Naumann v. Brewers' Ice Co., 53 N. Y. Super. Ct. 121; Krepps v. Carlisle, 157 Pa. 358, 27 A. 741, 33 Wkly. Notes Cas. 192.

[74] Stoner v. Devilbiss, 70 Md. 144, 16 A. 440.

[75] Martin v. State, 83 S. W. 390, 47 Tex. Cr. R. 29, affirmed 26 S. Ct. 338, 200 U. S. 316, 50 L. Ed. 497.

[76] Ryan v. Conroy, 85 Hun, 544, 33 N. Y. S. 330.

[77] Torkelson v. Minneapolis & St. L. R. Co., 134 N. W. 307, 117 Minn. 73; Greene v. Duncan, 37 S. C. 239, 15 S. E. 956; State v. Huffman, 73 S. E. 292, 69 W. Va. 770.

[78] Tyree v. Parham's Ex'r, 66 Ala. 424.

[79] **U. S.** (C. C. A. Okl.) Williams v. United States, 158 F. 30, 88 C. C. A. 296, reversing 87 P. 647, 17 Okl. 28.

Colo. Doyle v. Nesting, 88 P. 862, 37 Colo. 522.

Fla. West v. Blackshear, 20 Fla. 457.

Ind. Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 79 Am. Dec. 430; Taber v. Hutson, 5 Ind. 322, 61 Am. Dec. 96.

Neb. Gibson v. Sullivan, 18 Neb. 558, 26 N. W. 368.

N. D. Boss v. Northern Pac. R.

Where instructions are presented to the court at the close of the evidence, and either party waives objections to any request of the opposite party, which the court thereupon gives, the party so waiving objection may not afterwards reserve an exception to the giving of such request without leave of court first obtained.[80] By confining an objection to an instruction to a particular part thereof, or to a specific ground, a party waives all other objections,[81] and if an exception to a part of an instruction is stated to be upon a ground which cannot be sustained, it will not be extended, so as to serve as an exception upon a different ground, which might have been sustained.[82]

Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

S. D. Frye v. Ferguson, 6 S. D. 392, 61 N. W. 161.

Wash. Collins v. Terminal Transfer Co., 168 P. 174, 98 Wash. 597; Taylor v. Kidd, 129 P. 406, 72 Wash. 18.

Waiver of request for written instructions. Where a judge, instead of giving his instructions in writing, as requested, directed his oral instructions to be taken down by a stenographer, it was that failure to object to this mode of preserving the evidence of the charge was no waiver of the request. Shafer v. Stinson, 76 Ind. 374.

[80] Oddie v. Mendenhall, 86 N. W. 881, 84 Minn. 58.

[81] Stein v. Ashby, 30 Ala. 363; St. Louis, I. M. & S. Ry. Co. v. Richardson, 112 S. W. 212, 87 Ark. 101; Price v. Burlington, C. R. & M. R. Co., 42 Iowa, 16; Coddington v. Brooklyn Crosstown R. Co., 102 N. Y. 66, 5 N. E. 797; Edmunds v. Black, 15 Wash. 73, 45 P. 639.

[82] Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468.

CHAPTER XXXVIII

CONSTRUCTION AND OPERATION

A. General Rules of Construction

§ 530. In general.
531. Construction with reference to pleadings and evidence.
532. Construction against party asking instruction.

B. Construction and Effect of Charge as a Whole

533. General rule.
534. Further discussion of rule—Cure of deficiencies and objectionable matters, not amounting to a positive misstatement of the law, by other instructions.
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536. Objection that instructions invade province of jury.

C. Conflicting Instructions and Cure of Positive Error in Instructions by Giving Other Instructions

537. General rule.
538. Limitations of rule.
539. Cure of erroneous instruction by its withdrawal.

A. General Rules of Construction

§ 530. In general

In interpreting an instruction which may be susceptible of more than one construction, a hypercritical one should not be given to it,[1] but it must be given a reasonable construction,[2] and that mean-

[1] Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624; Addington v. State, 74 So. 846, 16 Ala. App. 10; Galpin v. Wilson, 40 Iowa, 90; St. Louis & S. F. R. Co. v. Ault, 58 So. 102, 101 Miss. 341.

[2] Coffman v. State, 165 S. W. 939, 73 Tex. Cr. R. 295; Graham v. State, 163 S. W. 726, 73 Tex. Cr. R. 28; Christian v. State, 161 S. W. 101, 71 Tex. Cr. R. 566.

Instructions on reasonable doubt. Where, on trial under an indictment for murder in the first degree, the court charged that: "Defendant is presumed to be innocent of the offense charged. Before you can convict him, the state must overcome that presumption by proving him guilty beyond a reasonable doubt. If you have a reasonable doubt of defendant's guilt, you must acquit him,"—the use of the words "of the offense charged" does not limit the requirement of proof of guilt beyond a reasonable doubt to murder in the first degree, but applies to all offenses of which defendant could be convicted under such indictment. State v. Smith, 65 S. W. 270, 164 Mo. 567. An instruction that, if certain testimony be true, defendant "is not guilty, and you should say so; or, if you have a reasonable doubt about it, you should say so,"—is equivalent to a statement that, if the jury have a reasonable doubt, they should acquit. People v. Pichette, 69 N. W. 739, 111 Mich. 461. An instruction that the jury cannot convict unless all the

ing should be adopted which the trial court and the jury, in the exercise of common sense, evidently intended it to have.[3] Words employed in an instruction must be taken in the ordinary and popular acceptation,[4] and in the sense in which they would be understood by men of ordinary intelligence,[5] and it will be presumed that an instruction was understood by the jury in the way it would naturally impress the mind.[6]

Particular instructions, or particular sentences used in instructions, must be considered, in determining their correctness, in connection with the other instructions or with the context.[7] The subsequent language of an instruction controls that previously used.[8]

It is error in a criminal case to tell the jury that they are not bound by any particular instruction or part of an instruction giv-

material averments of the information are established beyond a reasonable doubt, does not by implication authorize a conviction without presumption or proof of defendant's sanity. Schwartz v. State, 91 N. W. 190, 65 Neb. 196.

"Ought not to convict." An instruction using the words, "ought not to convict," has the same meaning and effect as if the jury had been told "not to convict." State v. Nelson, 52 P. 868, 59 Kan. 776.

Effect of attempt to escape. An instruction in a homicide case that an attempt by defendant to escape is a circumstance which may be considered, in connection with all other evidence, as bearing on his guilt, but is insufficient itself to determine his guilt, is not subject to the objection that it is an instruction that the slightest evidence in addition to the attempt to escape will authorize a conviction. State v. Haworth, 68 P. 155, 24 Utah, 398.

Effect of instruction referring to certain enumerated facts. An instruction, "If you find" certain enumerated facts, "then you might find him guilty," does not limit the jury to the facts stated therein, but states facts which they must find in order to convict, and these facts, if found, are to be considered in connection with other facts which were either admitted or not disputed. Commonwealth v. Light, 45 A. 933, 195 Pa. 220.

[3] Green v. Lewis, 13 Ill. 642; Orange Lumber Co. v. Ellis, 150 S. W. 582, 105 Tex. 363; Bank of Huntington v. Napier, 41 W. Va. 481, 23 S. E. 800.

[4] Yazoo & M. V. R. Co. v. Williams, 39 So. 489, 87 Miss. 344; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

[5] Kingan & Co. v. King, 100 N. E. 1044, 179 Ind. 285; Harris v. Harris, 100 S. E. 125, 178 N. C. 7.

Instruction that jury must be governed solely by the evidence. The charge of the court must be construed with reference to the evidence before the jury, and to the presumption that the jurors are possessed of ordinary intelligence, and will so understand and apply it, where they are charged that they must be governed solely by the evidence in determining all questions submitted to them. Southern Pac. Co. v. Hall (C. C. A. Cal.) 100 F. 760, 41 C. C. A. 50.

[6] Massachusetts Mut. Life Ins. Co. v. Robinson, 98 Ill. 324.

[7] City of Wyandotte v. White, 13 Kan. 191; Welch v. Ware, 32 Mich. 77; Kahn v. Minthorn, 144 N. W. 859, 178 Mich. 312; Commonwealth v. Washington, 51 A. 759, 202 Pa. 148.

[8] Freedman v. Metropolitan St. Ry. Co., 85 N. Y. S. 986, 89 App. Div. 486.

en; the jury being absolutely bound by the instruction on reasonable doubt.[9]

§ 531. Construction with reference to pleadings and evidence

In determining whether instructions are misleading or erroneous, their language must be construed with reference to the pleadings[10] and the evidence,[11] and in the light of the issues raised

[9] Hobbs v. State, 132 P. 822, 9 Okl. Cr. 598.

[10] Windham v. Hydrick, 72 So. 403, 197 Ala. 125; Smith v. Carr, 16 Conn. 450; Winfield v. Truitt, 70 So. 775, 71 Fla. 38; City of Chicago v. McDonough, 112 Ill. 85, 1 N. E. 337; M. E. Smith & Co. v. Kimble, 162 N. W. 162, 38 S. D. 511.

Effect of withdrawal of count of declaration. Where one count of the declaration was withdrawn in the presence of the jury, and no evidence was introduced relating thereto, all references in the instructions to the pleadings are to be understood as referring to the pleadings as they were at the time of the trial. Judgment, 101 Ill. App. 527, affirmed. Slack v. Harris, 65 N. E. 669, 200 Ill. 96.

Request not referring to pleadings. The correctness of a prayer, which does not refer to the pleadings, and is not affected by any other prayer referring to the pleadings, must be determined with reference to the evidence without consideration of the pleadings. Richardson v. Anderson, 72 A. 485, 109 Md. 641, 25 L. R. A. (N. S.) 393, 130 Am. St. Rep. 543.

[11] **U. S.** (C. C. A. Alaska) Hall v. McKinnon, 193 F. 572, 113 C. C. A. 440; (C. C. Mass.) Willis v. Carpenter, Fed. Cas. No. 17,770.

Ala. Higdon v. Fields, 60 So. 594, 6 Ala. App. 281; Central of Georgia Ry. Co. v. Chicago Varnish Co., 53 So. 832, 169 Ala. 287; Meighan v. Birmingham Terminal Co., 51 So. 775, 165 Ala. 591; Miller v. Jones' Adm'r, 29 Ala. 174; Kirkland v. Oates, 25 Ala. 465; Waters v. Spencer, 22 Ala. 460; Berry v. Hardman, 12 Ala. 604.

Ga. Adams v. Governor, 22 Ga. 417; King v. State, 21 Ga. 220.

Ind. Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Iowa. Yeager v. Chicago, R. I. & P. Ry. Co., 123 N. W. 974, 148 Iowa, 231; Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co., 119 N. W. 532, 141 Iowa, 121.

Me. Casco Bank v. Keene, 53 Me. 103; Lyman v. Redman, 23 Me. 289; Blake v. Irish, 21 Me. 450.

Mich. Sword v. Keith, 31 Mich. 247; People v. Scott, 6 Mich. 287.

Mo. Esstman v. United Rys. Co. of St. Louis, 216 S. W. 526.

Mont. Surman v. Cruse, 187 P. 890, 57 Mont. 253.

N. H. Hooksett v. Amoskeag Mfg. Co., 44 N. H. 105; Gerrish v. New Market Mfg. Co., 30 N. H. 478.

N. C. Penn v. Standard Life Ins. Co., 76 S. E. 262, 160 N. C. 399, 42 L. R. A. (N. S.) 597, dismissing petition for rehearing Same v. Standard Life & Accidental Ins. Co., 73 S. E. 99, 158 N. C. 29, 42 L. R. A. (N. S.) 593.

Ohio. Maumee Valley Rys. & Light Co. v. Hanaway, 7 Ohio App. 99.

Okl. Missouri, K. & T. Ry. Co. v. Taylor, 170 P. 1148.

Tenn. Hale v. Darter, 10 Humph. 92.

Tex. Thompson v. Shannon, 9 Tex. 536; Davis v. Loftin, 6 Tex. 489; Peck v. State, 9 Tex. App. 70.

Va. Williams Printing Co. v. Saunders, 73 S. E. 472, 113 Va. 156, Ann. Cas. 1913E, 693.

Wash. Wheeler v. Hotel Stevens Co., 127 P. 840, 71 Wash. 142, Ann. Cas. 1914C, 576; Harkins v. Seattle Electric Co., 101 P. 836, 53 Wash. 184.

Instructions incorrect as abstract propositions. Instructions, which, standing alone, would seem to assert that a promise to pay for improvements made on a farm of another by one in possession, for his own benefit, would be valid, though the improvements should be of no value or benefit to the owner, are not erroneous, though incorrect as abstract propositions, in a case where

thereby.[12] Thus, an expression used in an instruction, or a special issue submitted, although in itself susceptible of two meanings, is not misleading when, as applied to the evidence, only one meaning can be given to it.[13]

§ 532. Construction against party asking instruction

When a charge given on request is ambiguous, that construction will be adopted which is least favorable to the party making the request.[14]

B. Construction and Effect of Charge as a Whole

§ 533. General rule

In determining the sufficiency of a particular instruction, or part of a charge, it is not to be considered apart from its context, or the rest of the charge.[15] Both in civil[16] and in criminal cases[17]

the improvements referred to are shown by the evidence to be of a permanent character, which would add to the value of the premises, and did actually increase their price on a subsequent sale, and where the promise referred to would naturally be understood to mean a promise made at or before the time the improvements were made. Sword v. Keith, 31 Mich. 247. Instructions are to be interpreted in the light of the evidence, and an instruction that a jury might consider other fires caused by the engines of a railroad company, as bearing on the question of negligence in causing the one complained of, without limiting the inquiry as to time, is not erroneous when the evidence before the jury is within the proper limits. New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264.

[12] **Ala.** Empire Life Ins. Co. v. Gee, 55 So. 166, 171 Ala. 435.

Iowa. Hart v. Cedar Rapids & M. C. Ry. Co., 80 N. W. 662, 109 Iowa, 631.

Mich. Botsford v. Kleinhans, 29 Mich. 332.

Tex. East Line & R. R. Ry. Co. v. Smith, 65 Tex. 167; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

Va. Richmond Granite Co. v. Bailey, 24 S. E. 232, 92 Va. 554.

Wis. Neumann v. City of La Crosse, 68 N. W. 654, 94 Wis. 103.

[13] National Bank of Asheville v. Fidelity & Casualty Co. of New York (C. C. A. N. C.) 89 F. 819, 32 C. C. A. 355.

[14] Carter v. Chambers, 79 Ala. 223.

[15] **U. S.** (C. C. A. Iowa) Chicago Great Western Ry. Co. v. McDonough, 161 F. 657, 88 C. C. A. 517.

Cal. De Witt v. Floriston Pulp & Paper Co., 96 P. 397, 7 Cal. App. 774.

Colo. In re Hayes' Estate, 135 P. 449, 55 Colo. 340, Ann. Cas. 1914C, 531; Bailey v. Carlton, 95 P. 542, 43 Colo. 4.

Conn. Appeal of Wheeler, 100 A. 13, 91 Conn. 388.

Fla. Florala Sawmill Co. v. Smith, 46 So. 332, 55 Fla. 447; Stearns & Culver Lumber Co. v. Adams, 46 So. 156, 55 Fla. 394.

Idaho. Barrow v. B. R. Lewis Lumber Co., 95 P. 682, 14 Idaho, 698.

Ill. Klofski v. Railroad Supply Co., 85 N. E. 274, 235 Ill. 146, affirming judgment Railroad Supply Co. v. Klofski, 138 Ill. App. 468; Helbig v. Citizens' Ins. Co., 84 N. E. 897, 234 Ill. 251, affirming judgment Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115; Atchison v. McKinnie, 84 N. E. 208, 233 Ill. 106; Brew v. Seymour, 133 Ill. App. 225; Varney v. Taylor, 133 Ill. App. 154; East St. Louis & S. Ry. Co. v. Zink, 133 Ill. App. 127, judg-

[16] See note 16 on page 975.

[17] See note 17 on page 979.

the instructions of the court must be read together as one con-

ment affirmed 82 N. E. 283, 229 Ill. 180; Chicago Consol. Traction Co. v. Mahoney, 131 Ill. App. 591, judgment affirmed 82 N. E. 868, 230 Ill. 562; Chicago, R. I. & P. Ry. Co. v. Turck, 131 Ill. App. 128.

Ind. Pittsburgh, C., C. & St. L. Ry. Co. v. Wood, 84 N. E. 1009, 45 Ind. App. 1.

Kan. Chicago, R. I. & P. Ry. Co. v. Brandon, 95 P. 573, 77 Kan. 612.

Mass. Plummer v. Boston Elevated Ry. Co., 84 N. E. 849, 198 Mass. 499; Whitney v. Wellesley & B. St. Ry. Co., 84 N. E. 95, 197 Mass. 495.

Mich. Anderson Carriage Co. v. Pungs, 117 N. W. 162, 153 Mich. 580; Croze v. St. Mary's Canal Mineral Land Co., 117 N. W. 81, 153 Mich. 363.

Minn. McCusky v. Kuhlman, 179 N. W. 1000.

Miss. Hitt v. Terry, 46 So. 829, 92 Miss. 671.

Mo. Young v. Lanznar, 112 S. W. 17, 133 Mo. App. 130; Batten v. Modern Woodmen of America, 111 S. W. 513, 131 Mo. App. 381.

Neb. Sheibley v. Fales, 116 N. W. 1035, 81 Neb. 795; Morrow v. Barnes, 116 N. W. 657, 81 Neb. 688; Maxson v. J. I. Case Threshing Mach. Co., 116 N. W. 281, 81 Neb. 546, 16 L. R. A. (N. S.) 963.

N. D. Buchanan v. Minneapolis Threshing Mach. Co., 116 N. W. 335, 17 N. D. 343.

S. C. Columbia, N. & L. R. Co. v. Laurens Cotton Mills, 61 S. E. 1089, 82 S. C. 24, rehearing denied 62 S. E. 1119, 82 S. C. 24; Cannon v. Dean, 61 S. E. 1012, 80 S. C. 557.

Tex. Galveston, H. & N. Ry. Co. v. Cochran (Civ. App.) 109 S. W. 261.

Wash. Jensen v. Schlenz, 154 P. 159, 89 Wash. 268; Davis v. City of Wenatchee, 149 P. 337, 86 Wash. 13.

16 U. S. Seaboard Air Line Ry. v. Padgett, 35 S. Ct. 481, 236 U. S. 668, 59 L. Ed. 777, affirming judgment Padgett v. Seaboard Air Line Ry., 83 S. E. 633, 99 S. C. 364; (C. C. A. Ark.) Kansas City Southern Ry. Co. v. Clinton, 224 F. 896, 140 C. C. A. 340; Trulock v. Willey, 187 F. 956, 112 C. C. A. 1; (C. C. A. Cal.) Southern Pac. Co. v. Ward, 208 F. 385, 125 C. C. A. 601; (C. C. A. Colo.) City of Denver v. Porter, 126 F. 288, 61 C. C. A. 168; (C. C. A. Pa.) Pittsburgh Rys. Co. v. Givens, 211 F. 885, 128 C. C. A. 263; Pressed Steel Car Co. v. Nist, 176 F. 919, 100 C. C. A. 273; (C. C. A. Tenn.) Memphis St. Ry. Co. v. Pierce, 257 F. 659, 168 C. C. A. 609; (C. C. A. Tex.) Texas & P. Ry. Co. v. Wineland, 102 F. 673, 42 C. C. A. 588.

Ala. Anders v. Wallace, 82 So. 644, 17 Ala. App. 154; Thrasher v. Neely, 72 So. 115, 196 Ala. 576; Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211; Western Union Telegraph Co. v. Holland, 66 So. 926, 11 Ala. App. 510; Fowlkes v. Lewis, 65 So. 724, 10 Ala. App. 543; Birmingham Ry., Light & Power Co. v. Mayo, 61 So. 289, 181 Ala. 525; Louisville & N. R. Co. v. Bogue, 58 So. 392, 177 Ala. 349; Central of Georgia Ry. Co. v. Knight, 57 So. 253, 3 Ala. App. 436; Alabama Consol. Coal & Iron Co. v. Cowden, 56 So. 984, 175 Ala. 108; Birmingham Southern Ry. Co. v. Craig, 55 So. 950, 1 Ala. App. 329; Alabama Consol. Coal & Iron Co. v. Heald, 53 So. 162, 168 Ala. 626; Birmingham Ry., Light & Power Co. v. King, 42 So. 612, 149 Ala. 504; Reiter-Conley Mfg. Co. v. Hamlin, 40 So. 280, 144 Ala. 192.

Ariz. Phœnix Ry. Co. of Arizona v. Beals, 181 P. 379, 20 Ariz. 386.

Ark. St. Louis Southwestern Ry. Co. v. Wyman, 178 S. W. 423, 119 Ark. 530; Dunman v. Raney, 176 S. W. 339, 118 Ark. 337; St. Louis, I. M. & S. Ry. Co. v. Brown, 140 S. W. 279, 100 Ark. 107; Arkansas Lumber Co. v. Wallace, 139 S. W. 534, 99 Ark. 537; Western Union Telegraph Co. v. Gillis, 133 S. W. 833, 97 Ark. 226; St. Louis, I. M. & S. Ry. Co. v. Lamb, 128 S. W. 1030, 95 Ark. 209; Lowe v. Hart, 125 S. W. 1030, 93 Ark. 548; Southern Anthracite Coal Co. v. Bowen, 124 S. W. 1048, 93 Ark. 140; Rock Island Plow Co. v. Rankin Bros. & Winn, 115 S. W. 943, 89 Ark. 24; St. Louis, I. M. & S. Ry. Co. v. Puckett, 114 S. W. 224, 88 Ark. 204; Taylor v. McClintock, 112 S. W. 405, 87 Ark. 243.

Cal. Freiburg v. Israel (App.) 187 P. 130; Baillargeon v. Myers, 182 P.

nected whole, to ascertain whether they correctly declare the law.

37; Taylor v. Pacific Electric Ry. Co., 158 P. 119, 172 Cal. 638; Fountain v. Connecticut Fire Ins. Co. of Hartford (App.) 117 P. 630; Peters v. Southern Pac. Co., 116 P. 400, 160 Cal. 48; Parkin v. Grayson-Owen Co., 106 P. 210. 157 Cal. 41.

Colo. National Fuel Co. v. Maccia, 139 P. 22, 25 Colo. App. 441; In re Burnham's Will, 134 P. 254, 24 Colo. App. 131; First National Bank of Ouray v. Shank, 128 P. 56, 53 Colo. 446; Starrett v. Ruth, 119 P. 690, 51 Colo. 583; Denver City Tramway Co. v. Brumley, 116 P. 1051, 51 Colo. 251; Keefer v. Amicone, 100 P. 594, 45 Colo. 110; Denver City Tramway Co. v. Martin, 98 P. 836, 44 Colo. 324; Blackman v. Edsall, 68 P. 790, 17 Colo. App. 429.

Conn. Anthony v. Connecticut Co., 92 A. 672, 88 Conn. 700; Bernier v. Woodstock Agr. Society, 92 A. 160, 88 Conn. 558; Brodie v. Connecticut Co., 87 A. 798, 87 Conn. 363.

Del. Spahn v. People's Ry. Co., 92 A. 727, 3 Boyce, 302.

Fla. Key v. Moore. 82 So. 810, 78 Fla. 205; Gracy v. Atlantic Coast Line R. Co., 42 So. 903, 53 Fla. 350; Seaboard Air Line Ry. v. Scarborough, 42 So. 706, 52 Fla. 425; Jacksonville Electric Co. v. Sloan, 42 So. 516, 52 Fla. 257.

Ga. Brooks v. Goodin, 99 S. E. 540, 23 Ga. App. 800; City of Atlanta v. Williams, 84 S. E. 139, 15 Ga. App. 654; Lyon v. Cedartown Lumber Co., 79 S. E. 236, 13 Ga. App. 450.

Idaho. Lyons v. Lambrix, 190 P. 356; Cady v. Keller, 154 P. 629, 28 Idaho, 368.

Ill. McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476, affirming judgment 212 Ill. App. 664; Zeman v. North American Union, 105 N. E. 22, 263 Ill. 304, affirming judgment 181 Ill. App. 551; Wilkinson v. Service, 94 N. E. 50, 249 Ill. 146, Ann. Cas. 1912A, 41; Dady v. Condit, 70 N. E. 1088, 209 Ill. 488, affirming judgment 104 Ill. App. 507; Baker v. Baker, 67 N. E. 410, 202 Ill. 595; McCormick v. Decker, 204 Ill. App. 554; Gillette v. Chicago, M. & St. P. Ry. Co., 193 Ill. App. 304; Olcese v. Val Blatz Brewing Co., 144 Ill. App. 597; Chicago City Ry. Co. v. Hyndshaw, 116 Ill. App. 367; Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8; Mobile & O. R. Co. v. Vallowe, 115 Ill. App. 621, judgment affirmed 73 N. E. 416, 214 Ill. 124; United States Brewing Co. v. Stoltenberg, 113 Ill. App. 435, judgment affirmed 71 N. E. 1081, 211 Ill. 531; Grayville Waterworks v. Burdick, 109 Ill. App. 520; Thompson v. Koperlski, 109 Ill. App. 466; Witte Hardware Co. v. Air Line Transfer Co., 109 Ill. App. 428; Chicago Screw Co. v. Weiss, 107 Ill. App. 39, judgment affirmed 68 N. E. 54, 203 Ill. 536.

Ind. Laws v. Hammon, W. & E. C. Ry. Co. (App.) 128 N. E. 52; Indianapolis Traction & Terminal Co. v. Thornburg (App.) 125 N. E. 57; Naparala v. Chicago, S. B. & N. I. Ry. Co., 115 N. E. 694, 64 Ind. App. 169; American Maize Products Co. v. Widiger, 114 N. E. 457, 186 Ind. 227; Merchants' Nat. Bank of Massillon, Ohio, v. Nees, 110 N. E. 73, 62 Ind. App. 290; rehearing denied 112 N. E. 904, 62 Ind. App. 290; Terre Haute, I. & E. Traction Co. v. Frischman, 107 N. E. 296, 57 Ind. App. 452; Chicago & E. R. Co. v. Dinius, 103 N. E. 652, 180 Ind. 596; Southern Ry. Co. v. Friedley, 100 N. E. 481, 52 Ind. App. 192; Terre Haute, I. & E. Traction Co. v. Maberry, 100 N. E. 401, 52 Ind. App. 114; Reddick v. Young, 98 N. E. 813, 177 Ind. 632; Steele v. Spanhurst, 98 N. E. 733, 50 Ind. App. 564; Cleveland, C., C. & St. L. Ry. Co. v. Clark, 97 N. E. 822, 51 Ind. App. 392; I. F. Force Handle Co. v. Hisey, 96 N. E. 643, 52 Ind. App. 235; Metropolitan Life Ins. Co. v. Johnson, 94 N. E. 785, 49 Ind. App. 233; Snow v. Indianapolis & E. Ry. Co., 93 N. E. 1089, 47 Ind. App. 189; Indiana Union Traction Co. v. Myers, 93 N. E. 888, 47 Ind. App. 646; City of Logansport v. Smith, 93 N. E. 883, 47 Ind. App. 64; Indiana Union Traction Co. v. Schwinge, 93 N. E. 35, 46 Ind. App. 525; Bicknese v. Brandl, 91 N. E. 41, 46 Ind. App. 269; Cleveland, C., C. & St. L. Ry. Co. v. Heineman, 90 N. E. 899, 46 Ind. App. 388; Indiana Natural Gas & Oil Co. v. Wihelm, 86 N. E. 86, 44 Ind. App. 100; Sterling v.

The omissions or inaccuracies of one instruction may be cured by

Frick, 86 N. E. 65, 171 Ind. 710, judgment affirmed on rehearing 87 N. E. 237, 171 Ind. 710; Allyn v. Burns, 76 N. E. 636, 37 Ind. App. 223; Robinson v. Shanks, 20 N. E. 713, 118 Ind. 125; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Fischer v. Bell, 91 Ind. 243; Babb v. Babb, 89 Ind. 281; Branstetter v. Dorrough, 81 Ind. 527.

Ind. T. Swofford Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co., 37 S. W. 103, 1 Ind. T. 314.

Iowa. Fletcher v. Ketcham, 176 N. W. 245, 188 Iowa, 340; Fuller v. Illinois Cent. R. Co., 173 N. W. 137, 186 Iowa, 686; In re Workman's Estate, 156 N. W. 438, 174 Iowa, 222; Crawford v. McElhinney, 154 N. W. 310, 171 Iowa, 606, Ann. Cas. 1917E, 221; Doran v. Waterloo, C. F. & N. Ry. Co., 147 N. W. 1100; Stotts v. Fairfield, 145 N. W. 61, 163 Iowa, 726; Moore v. Pearson, 141 N. W. 1048, 160 Iowa, 449; Mitchell v. Des Moines City Ry. Co., 141 N. W. 43, 161 Iowa, 100; Lauer v. Banning, 131 N. W. 783, 152 Iowa, 99; McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689; Brusseau v. Lower Brick Co., 110 N. W. 577, 133 Iowa, 245.

Kan. Zuspann v. Roy, 170 P. 387, 102 Kan. 188; Murphy v. Ludowici Gas & Oil Co., 150 P. 581, 96 Kan. 321; John V. Farwell Co. v. Thomas, 56 P. 151, 8 Kan. App. 614.

Ky. Borderland Coal Co. v. Miller, 201 S. W. 299, 179 Ky. 769; Wiltshire's Adm'x v. Kister, 160 S. W. 743, 156 Ky. 168; White v. Jouett, 144 S. W. 55, 147 Ky. 197; Paducah Commission Co. v. Boswell, 83 S. W. 144, 26 Ky. Law Rep. 1062; Kentucky Nat. Bank v. O'Neal, 11 Ky. Law Rep. (abstract) 763.

Me. Nielson v. International Textbook Co., 75 A. 330, 106 Me. 104, 20 Ann. Cas. 591.

Md. Gosman Ginger Ale Co. of Baltimore City v. Keystone Bottle Mfg. Co., 106 A. 747, 134 Md. 360; Hochschild v. Cecil, 101 A. 700, 131 Md. 70.

Mass. Savageau v. Boston & M. R. R., 96 N. E. 67, 210 Mass. 164; Lockwood v. Boston Elevated Ry. Co., 86 N. E. 934, 200 Mass. 537, 22 L. R. A. (N. S.) 488.

Mich. Interstate Const. Co. v. United States Fidelity & Guaranty Co., 174 N. W. 173, 207 Mich. 265; Jacobs v. Hagenback-Wallace Shows, 164 N. W. 548, 198 Mich. 73, L. R. A. 1918A, 504; In re Rockett's Estate, 158 N. W. 12, 191 Mich. 499; Wegner v. Herkimer, 133 N. W. 623, 167 Mich. 587; Custard v. Hodges, 119 N. W. 583, 155 Mich. 361; Smalley v. Detroit & M. Ry. Co., 91 N. W. 1027, 131 Mich. 560; Manistee Nat. Bank v. Seymour, 31 N. W. 140, 64 Mich. 59; Kuney v. Dutcher, 22 N. W. 806, 56 Mich. 308; Souvais v. Leavitt, 15 N. W. 37, 50 Mich. 108; Russell v. Phelps, 4 N. W. 1, 42 Mich. 377; Wheeler & Wilson Mfg. Co. v. Walker, 1 N. W. 1035, 41 Mich. 239; Lake Superior Iron Co. v. Erickson, 39 Mich. 492, 33 Am. Rep. 423; Eggleston v. Boardman, 37 Mich. 14; Greenlee v. Lowing, 35 Mich. 63.

Miss. Cumberland Telephone & Telegraph Co. v. Jackson, 48 So. 614, 95 Miss. 79.

Mo. Hulse v. St. Joseph Ry. Co., 214 S. W. 150; Rappaport v. Roberts (App.) 203 S. W. 676; Wiley v. Wiley (App.) 182 S. W. 107; Barrett v. Delano, 174 S. W. 181, 187 Mo. App. 501; Tawney v. United Rys. Co. of St. Louis, 172 S. W. 8, 262 Mo. 602; Andrew v. Linebaugh, 169 S. W. 135, 260 Mo. 623; Pendegrass v. St. Louis & S. F. R. Co., 162 S. W. 712, 179 Mo. App. 517; Patterson v. Evans, 162 S. W. 179, 254 Mo. 293; Wilson v. United Rys. Co. of St. Louis, 152 S. W. 426, 169 Mo. App. 405; Dutcher v. Wabash R. Co., 145 S. W. 63, 241 Mo. 137; Michael v. Kansas City Western Ry. Co., 143 S. W. 67, 161 Mo. App. 53; Vanderbeck v. Wabash Ry. Co., 133 S. W. 1178, 154 Mo. App. 321; Hales v. Raines, 130 S. W. 425, 146 Mo. App. 232; Turner v. Snyder, 123 S. W. 1050, 139 Mo. App. 656; McKinstry v. St. Louis Transit Co., 82 S. W. 1108, 108 Mo. App. 12; Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106; Feary v. O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440; Kitchen

v. Cape Girardeau & S. L. R. Co., 59 Mo. 514; Ritchey v. Huntley, 73 Mo. App. 258; Roos v. Clark, 14 Mo. App. 594, memorandum.

Mont. Surman v. Cruse, 187 P. 890, 57 Mont. 253; Pure Oil Co. v. Chicago, M. & St. P. Ry. Co., 185 P. 150, 56 Mont. 266; Brockway v. Blair, 165 P. 455, 53 Mont. 531; Michalsky v. Centennial Brewing Co., 134 P. 307, 48 Mont. 1; Frederick v. Hale, 112 P. 70, 42 Mont. 153.

Neb. Travis v. Omaha & Council Bluffs St. Ry. Co., 152 N. W. 395, 98 Neb. 200; Dore v. Omaha & C. B. St. R. Co., 149 N. W. 792, 97 Neb. 250; Hans v. American Transfer Co., 134 N. W. 943, 90 Neb. 834; Bailey v. Kling, 130 N. W. 439, 88 Neb. 699; Christensen v. Tate, 128 N. W. 622, 87 Neb. 848; Smith v. Lorang, 127 N. W. 873, 87 Neb. 537; Sheridan Coal Co. v. C. W. Hull Co., 127 N. W. 218, 87 Neb. 117, 138 Am. St. Rep. 435; Morris v. Miller, 119 N. W. 458, 83 Neb. 218, 20 L. R. A. (N. S.) 907, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047; Zelenka v. Union Stockyards Co., 118 N. W. 103, 82 Neb. 511; Sloan v. Fist, 89 N. W. 760, 2 Neb. (Unof.) 664; Chicago, B. & Q. R. Co. v. Oyster, 78 N. W. 359, 58 Neb. 1.

N. J. Shoeffler v. Phillipsburg Horse Car R. Co., 100 A. 199, 90 N. J. Law, 235; Veader v. Veader, 99 A. 309, 89 N. J. Law, 727; Kargman v. Carlo, 90 A. 292, 85 N. J. Law, 632.

N. M. Victor American Fuel Co. v. Melkusch, 173 P. 198, 24 N. M. 47.

N. Y. Dunn v. Ruppert, 151 N. Y. S. 662, 166 App. Div. 390; Booth v. Litchfield, 114 N. Y. S. 1009, 62 Misc. Rep. 279; Scutt v. Woolsey, 47 N. Y. S. 320, 20 App. Div. 541.

N. C. Woody v. Carolina Spruce Co., 101 S. E. 258, 178 N. C. 591; Harris v. Harris, 100 S. E. 125, 178 N. C. 7; McCurry v. Purgason, 87 S. E. 244, 170 N. C. 463, Ann. Cas. 1918A, 907; Montgomery v. Carolina & N. W. Ry. Co., 85 S. E. 139, 169 N. C. 249; Padgett v. McKoy, 83 S. E. 756, 167 N. C. 504, 508; Reynolds v. Palmer, 83 S. E. 755, 167 N. C. 454; Bain v. Lamb, 83 S. E. 466, 167 N. C. 304; Wheeler v. Cole, 80 S. E. 241, 164 N. C. 378; Penn v. Standard Life Ins. Co., 76 S. E. 262, 160 N. C. 399, 42 L. R. A. (N. S.) 597, dismissing petition for rehearing Penn v. Standard Life & Accidental Ins. Co., 73 S. E. 99, 158 N. C. 29, 42 L. R. A. (N. S.) 593; Jeffress v. Norfolk-Southern R. Co., 73 S. E. 1013, 158 N. C. 215; Kornegay v. Atlantic Coast Line R. Co., 70 S. E. 731, 154 N. C. 389; Haines v. Smith, 62 S. E. 1081, 149 N. C. 279; Everett v. Spencer, 30 S. E. 334, 122 N. C. 1010.

N. D. Buchanan v. Occident Elevator Co., 157 N. W. 122, 33 N. D. 346; McGregor v. Great Northern Ry. Co., 154 N. W. 261, 31 N. D. 471, Ann. Cas. 1917E, 141.

Ohio. Western Ohio Ry. Co. v. Fairburn, 124 N. E. 131, 99 Ohio St. 141.

Okl. Allison v. Bryan, 151 P. 610, 50 Okl. 677; Missouri, O. & G. Ry. Co. v. Collins, 150 P. 142, 47 Okl. 761.

Or. Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 86 Or. 329; Hudson v. Brown Lumber Co., 154 P. 533, 80 Or. 506; Macchi v. Portland Ry., Light & Power Co., 148 P. 72, 76 Or. 215; Powder Valley State Bank v. Hudelson, 144 P. 494, 74 Or. 191; Astoria Southern Ry. Co. v. Pacific Surety Co., 137 P. 857, 68 Or. 569; Wadhams & Co. v. Inman, Poulsen & Co., 63 P. 11, 38 Or. 143.

Pa. McDyer v. Eastern Pennsylvania Rys. Co., 76 A. 841, 227 Pa. 641; Stokes v. Ralpho Tp., 40 A. 958, 187 Pa. 333; Menhennet v. Davis, 71 Pa. Super. Ct. 260; Renn v. Tallman, 25 Pa. Super. Ct. 503; Brown v. Montgomery, 21 Pa. Super. Ct. 262; Schondorf v. Griffith, 13 Pa. Super. Ct. 580.

S. C. Hair v. Winnsboro Bank, 88 S. E. 26, 103 S. C. 343; Black v. State Co., 83 S. E. 1088, 99 S. C. 432; Singletary v. Seaboard Air Line Ry. Receivers, 71 S. E. 57, 88 S. C. 565; Willoughby v. North Eastern R. Co., 29 S. E. 629, 52 S. C. 166.

S. D. Duprel v. Collins, 146 N. W. 593, 33 S. D. 365.

Tex. Shipley v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 199 S. W. 661; Magnolia Motor Sales Corp. v. Chaffee (Civ. App.) 192 S. W. 562; Atchison, T. & S. F. Ry. Co. v. Stevens (Civ. App.) 192 S. W. 304; Texas Co. v. Earles (Civ. App.) 164 S. W. 28; St. Louis, B. & M. Ry. Co. v.

Jenkins (Civ. App.) 163 S. W. 621; Ft. Worth & D. C. Ry. Co. v. Taylor (Civ. App.) 162 S. W. 967; Atchison, T. & S. F. Ry. Co. v. Bryant (Civ. App.) 162 S. W. 400; Vickrey v. Dockray (Civ. App.) 158 S. W. 1160; Carl v. Wolcott (Civ. App.) 156 S. W. 334; Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 155 S. W. 678; Freeman v. Kennerly (Civ. App.) 151 S. W. 580; Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co. (Civ. App.) 149 S. W. 1083; Raywood Rice Canal & Milling Co. v. Erp, 146 S. W. 155, 105 Tex. 161, reversing judgment (Civ. App.) Erp v. Raywood Canal & Milling Co., 130 S. W. 897; Marrett v. Herrington (Civ. App.) 145 S. W. 254; Concho, S. S. & L. V. Ry. Co. v. Sanders (Civ. App.) 144 S. W. 693; Stark v. Coe (Civ. App.) 134 S. W. 373; El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922; Gulf, C. & S. F. Ry. Co. v. Shults, 129 S. W. 845, 61 Tex. Civ. App. 93; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160, 61 Tex. Civ. App. 80; Feigelson v. Brown (Civ. App.) 126 S. W. 17; Posener v. Harvey (Civ. App.) 125 S. W. 356; Houston & T. C. R. Co. v. Haberlin, 125 S. W. 107, 58 Tex. Civ. App. 375; San Antonio Traction Co. v. Higdon, 123 S. W. 732, 58 Tex. Civ. App. 83; St. Louis Southwestern Ry. Co. of Texas v. Taylor, 123 S. W. 714, 58 Tex. Civ. App. 139; Franks v. Harkness (Civ. App.) 117 S. W. 913; International & G. N. Ry. Co. v. Alleman, 115 S. W. 73, 52 Tex. Civ. App. 565; Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787; Texas & P. Ry. Co. v. Cotts (Civ. App.) 95 S. W. 602; Texas Cent. Ry. Co. v. Miller (Civ. App.) 88 S. W. 499; Missouri, K. & T. Ry. Co. of Texas v. Criswell (Civ. App.) 88 S. W. 373.

Utah. Hunt v. P. J. Moran, Inc., 150 P. 953, 46 Utah, 388; Utah Ass'n of Creditmen v. Boyle Furniture Co., 136 P. 572, 43 Utah, 523.

Vt. Reed v. Wilmington Savings Bank, 93 A. 265, 89 Vt. 6.

Va. Southern Ry. Co. v. Grubbs, 80 S. E. 749, 115 Va. 876; Peek v. City of Hampton, 80 S. E. 593, 115 Va. 855; Virginia Portland Cement Co. v. Luck's Adm'r, 49 S. E. 577, 103 Va. 427.

Wash. Travis v. Schnebley, 156 P. 400, 90 Wash. 463; Howard v. Washington Water Power Co., 134 P. 927, 75 Wash. 255, 52 L. R. A. (N. S.) 578; Independent Asphalt Paving Co. v. Hein, 131 P. 471, 73 Wash. 127; McIlwaine v. Tacoma Ry. & Power Co., 129 P. 1093, 72 Wash. 184; Morran v. Chicago, M. & P. S. Ry. Co., 126 P. 73, 70 Wash. 114; Myhra v. Chicago, M. & P. S. Ry. Co., 112 P. 939, 62 Wash. 1; Gray v. Washington Water Power Co., 71 P. 206, 30 Wash. 665; Bell v. City of Spokane, 71 P. 31, 30 Wash. 508.

W. Va. Howes v. Baltimore & O. R. Co., 87 S. E. 456, 77 W. Va. 362.

Wyo. Wood v. Wood, 164 P. 844, 25 Wyo. 26.

[17] **U. S.** (C. C. A. La.) Le More v. United States, 253 F. 887, 165 C. C. A. 367, certiorari denied 39 S. Ct. 184, 248 U. S. 586, 63 L. Ed. 434.

Fla. Gadsden v. State, 82 So. 50, 77 Fla. 627.

Ill. People v. Laures, 124 N. E. 585, 289 Ill. 490; People v. Foster, 123 N. E. 534, 288 Ill. 371.

Mich. People v. Sharac, 176 N. W. 431, 209 Mich. 249.

Mo. State v. Reppley, 213 S. W. 477, 278 Mo. 333.

Mont. State v. Smith, 190 P. 107, 57 Mont. 563; Same v. Dunn, 190 P. 121, 57 Mont. 591.

Neb. Francis v. State, 175 N. W. 675, 104 Neb. 5; Parker v. State, 175 N. W. 677, 104 Neb. 12; Mauzy v. State, 174 N. W. 325, 103 Neb. 775; Kirk v. State, 172 N. W. 527, 103 Neb. 484.

N. J. State v. Tachin, 108 A. 318, 93 N. J. Law, 485, affirming judgment 106 A. 145, 92 N. J. Law, 269.

Okl. Gunter v. State, 184 P. 797, 16 Okl. Cr. 476; Mathews v. State, 184 P. 468, 16 Okl. Cr. 466; Wilson v. State (Cr. App.) 183 P. 613; Davis v. State, 182 P. 909, 16 Okl. Cr. 377; January v. State, 181 P. 514, 16 Okl. Cr. 166.

Or. State v. Butler, 186 P. 55, 96 Or. 219.

S. C. Sandel v. State, 104 S. E. 567, 13 A. L. R. 1268.

Tex. Anderson v. State, 217 S. W. 390, 86 Tex. Cr. R. 207; Johnson v. State, 216 S. W. 192, 86 Tex. Cr. R.

the contents of the other instructions, or some of them,[18] and if,

276; Zimmerman v. State, 215 S. W. 101, 85 Tex. Cr. R. 630.

Wash. State v. Sowders, 186 P. 260, 109 Wash. 10.

Wyo. Loy v. State, 185 P. 796, 26 Wyo. 381.

Illustrations of instructions held proper when considered as a whole. In a prosecution for murder, resulting in conviction of manslaughter, instruction that in case of doubt as to whether defendant was guilty of murder or manslaughter, the jury should give him the benefit of the doubt, and find him guilty of something they were certain he was guilty of beyond a reasonable doubt, was not erroneous as requiring the jury to find guilt of some crime, murder, or manslaughter, in view of the following instruction that, if the state failed to convince of guilt beyond a reasonable doubt of any offense charged, the jury should acquit. State v. Brown, 101 S. E. 847, 113 S. C. 513. In trial for grand larceny, instruction that it was not necessary for state to prove that all of property was taken, or that it was taken by defendant, which, taken with other parts of charge, was to be construed as meaning that it was not necessary to prove that defendant took property with his own hands, and that to convict it was only necessary to show that all or any part of property was taken, was not erroneous. State v. Dodds. 160 N. W. 578, 41 N. D. 326. In prosecution for receiving stolen goods, instruction failing to embody in the definition of the crime the element of knowledge, at the time of receiving the goods, that they were stolen goods, but not informing the jury that, if they found the enumerated elements to exist, they could convict, was not error, where another instruction clearly indicated that such knowledge was an essential element; and if accused desired a more specific instruction on the subject, he should have tendered it and requested the court to give it. Partlow v. State (Ind.) 128 N. E. 436.

[18] **Ark.** Russ v. Strickland, 220 S. W. 451, 144 Ark. 642; St. Louis Southwestern Ry. Co. v. Graham, 102 S. W. 700, 83 Ark. 61, 119 Am. St. Rep. 112.

Cal. Hamlin v. Pacific Electric Ry. Co., 89 P. 1109, 150 Cal. 776.

Fla. Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265; Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400.

Ga. Bishop v. Georgia Nat. Bank, 78 S. E. 947, 13 Ga. App. 38; City of Macon v. Daley, 58 S. E. 540, 2 Ga. App. 355; Spence v. Morrow, 58 S. E. 356, 128 Ga. 722.

Idaho. Whitney v. Cleveland, 91 P. 176, 13 Idaho, 558.

Ill. Peoria & P. Terminal Ry. v. Schantz, 80 N. E. 1041, 226 Ill. 506, affirming judgment 130 Ill. App. 141; American Car & Foundry Co. v. Hill, 80 N. E. 784, 226 Ill. 227, affirming judgment 128 Ill. App. 176; McConnell v. Chicago Rys. Co., 199 Ill. App. 490; Illinois Steel Co. v. Ziemkowski, 123 Ill. App. 285, judgment affirmed 77 N. E. 190, 220 Ill. 324, 4 L. R. A. (N. S.) 1161; City of Gibson v. Murray, 120 Ill. App. 296, judgment affirmed 75 N. E. 319, 216 Ill. 589.

Ind. Lake Erie & W. R. Co. v. Howarth (App.) 124 N. E. 687, rehearing denied 127 N. E. 804; City of Bloomington v. Woodworth, 81 N. E. 611, 40 Ind. App. 373.

Iowa. Breiner v. Nugent, 111 N. W. 446, 136 Iowa, 322.

Mass. Doe v. Boston & W. St. Ry. Co., 80 N. E. 814, 195 Mass. 168.

Mo. McKinney v. Martin-Holloran-Klaus Laundry Co., 200 S. W. 114, 198 Mo. App. 386; Bell v. Central Electric Ry. Co., 103 S. W. 144, 125 Mo. App. 660; Sipple v. Laclede Gaslight Co., 102 S. W. 608, 125 Mo. App. 81; St. Louis, I. M. & S. Ry. Co. v. Stewart, 100 S. W. 583, 201 Mo. 491.

Neb. Coffey v. Omaha & C. B. St. Ry. Co., 112 N. W. 589, 79 Neb. 286; Vanderveer v. Moran, 112 N. W. 581, 79 Neb. 431; Lincoln Traction Co. v. Brookover, 111 N. W. 357, 77 Neb. 221, reversing judgment on rehearing 109 N. W. 168, 77 Neb. 217.

N. Y. Butler v. Gazette Co., 104 N. Y. S. 637, 119 App. Div. 767.

when the instructions of the court are considered as a whole, they correctly state the law and are not inconsistent or misleading, the fact that a particular instruction or isolated paragraph may be objectionable, as inaccurate or misleading, will not constitute ground for reversal.[19]

Okl. Hawkins v. State, 186 P. 490, 16 Okl. Cr. 382.

Or. Ridings v. Marion County, 91 P. 22, 50 Or. 30.

S. C. Keys v. Winnsboro Granite Co., 56 S. E. 949, 76 S. C. 284.

Tex. Thayer v. Clark, 104 S. W. 196, 47 Tex. Civ. App. 61.

Utah. Rogers v. Rio Grande Western Ry. Co., 90 P. 1075, 32 Utah, 367, 125 Am. St. Rep. 876.

Va. Virginia-Carolina Chemical Co. v. Knight, 56 S. E. 725, 106 Va. 674.

Wash. Buckley v. Massachusetts Bonding & Insurance Co., 192 P. 924.

Wis. Pelton v. Spider Lake Sawmill & Lumber Co., 112 N. W. 29, 132 Wis. 219, 122 Am. St. Rep. 963.

Charges on contributory negligence. Where the court correctly charged on contributory negligence and declared that all the instructions must be taken as a whole, an instruction omitting all reference to contributory negligence was not erroneous on that ground. Coors v. Brock, 125 P. 599, 22 Colo. App. 470. In passing on the question whether an instruction, in an action for injuries to a street car passenger, was erroneous for failing to charge on contributory negligence, it was proper to consider other instructions in reference to her negligence, and which covered the law on the subject. Louisville & S. I. Traction Co. v. Worrell, 86 N. E. 78, 44 Ind. App. 480. Where, in an action for injuries to a pedestrian on a bridge over a street, caused by a cinder thrown into his eye by an engine on the street, the court charged that pedestrians had a right to cross on the bridge, but that in crossing they must act as a person of ordinary prudence, with knowledge and experience of such pedestrians, a charge that a pedestrian must not blindly and heedlessly rush in a place where danger is likely to be apprehended, and that if plaintiff met this requirement, he was not guilty of contributory negligence, but if he fell short thereof, he was guilty of negligence, was not erroneous on the issue of contributory negligence, for the entire charge, when taken together, required the pedestrian to exercise reasonable care. Coffer v. Erickson, 112 P. 643, 61 Wash. 559.

Error in using phrase "approximate cause." Error in using the expression "approximate cause" in instruction that if kindling of fire by defendant on its premises was the approximate cause of communicating sparks of fire resulting in the destruction of insured's property to find for plaintiffs was cured by general instruction, stating, among other things, that "proximate cause" is the principal cause and is an important matter in cases of this kind. Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

[19] **U. S.** Northern Pac. R. Co. v. Lynch, 19 S. Ct. 878, 173 U. S. 701, 43 L. Ed. 1185, affirming judgment (C. C. A. Mont.) 79 F. 268, 24 C. C. A. 570; Chicago & N. W. Ry. Co. v. Whitton, 80 U. S. (13 Wall.) 270, 20 L. Ed. 571; (C. C. A. Ark.) Guild v. Andrews, 137 F. 369, 70 C. C. A. 49; (C. C. A. Neb.) Kerr-Murray Mfg. Co. v. Hess, 98 F. 56, 38 C. C. A. 647; (C. C. A. N. J.) North Jersey St. Ry. Co. v. Purdy, 142 F. 955, 74 C. C. A. 125; Camden & S. Ry. Co. v. Burr, 91 F. 351, 33 C. C. A. 557; (C. C. A. Tex.) Texas & P. Ry. Co. v. Holliday, 83 F. 452, 27 C. C. A. 558, writ of error dismissed 18 S. Ct. 947, 42 L. Ed. 1217.

Ala. Ballenger v. Shumate, 65 So. 416, 10 Ala. App. 329; Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357; Western Union Telegraph Co. v. Snell, 56 So. 854, 3 Ala. App. 263; Decatur Car Wheel & Mfg. Co. v. Mehaffey, 29 So. 646, 128 Ala. 242; Southern

Ry. Co. v. Lynn, 29 So. 573, 128 Ala. 297; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Montgomery & E. Ry. Co. v. Stewart, 91 Ala. 421, 8 So. 708.

Ark. Kansas City Southern Ry. Co. v. Sparks, 222 S. W. 724, 144 Ark. 227; Redman v. Hudson, 186 S. W. 312, 124 Ark. 26; St. Louis, I. M. & S. Ry. Co. v. Hydrick, 160 S. W. 196, 109 Ark. 231; St. Louis, I. M. & S. Ry. Co. v. Plott, 157 S. W. 385, 108 Ark. 292; Standard Life & Accident Ins. Co. v. Schmaltz, 53 S. W. 49, 66 Ark. 588, 74 Am. St. Rep. 112; Burton v. Merrick, 21 Ark. 357.

Cal. Lawrence v. Goodwill (App.) 186 P. 781; Darrell v. Mutual Ben. Life Ins. Co. (App.) 186 P. 620; Randolph v. Hunt, 183 P. 358, 41 Cal. App. 739; Froeming v. Stockton Electric R. Co., 153 P. 712, 171 Cal. 401, Ann. Cas. 1918B, 408; Polkinghorn v. Riverside Portland Cement Co., 142 P. 140, 24 Cal. App. 615; Ingalls v. Monte Cristo Oil & Development Co., 139 P. 97, 23 Cal. App. 652; Moseley v. Los Angeles Packing Co., 134 P. 994, 166 Cal. 59; Rialto Const. Co. v. Reed, 118 P. 473, 17 Cal. App. 29; De Witt v. Floriston Pulp & Paper Co., 96 P. 397, 7 Cal. App. 774; Hayden v. Consolidated Mining & Dredging Co., 84 P. 422, 3 Cal. App. 136; In re Keithley's Estate, 66 P. 5, 134 Cal. 9; Thomas v. Gates, 58 P. 315, 126 Cal. 1; Gray v. Eschen, 57 P. 664, 125 Cal. 1; Brittan v. Oakland Bank of Savings, 57 P. 84, 124 Cal. 282, 71 Am. St. Rep. 58, affirming order 44 P. 339, 112 Cal. 1; Sandell v. Sherman, 107 Cal. 391, 40 P. 493; People v. McDowell, 64 Cal. 467, 3 P. 124.

Colo. Idaho Gold Coin Min. & Mill. Co. v. Colorado Iron Works Co., 111 P. 553, 49 Colo. 66; Grimes v. Greenblatt, 107 P. 1111, 47 Colo. 495, 19 Ann. Cas. 608; Stratton Cripple Creek Mining & Development Co. v. Ellison, 94 P. 303, 42 Colo. 498; Ingemarson v. Coffey, 92 P. 908, 41 Colo. 407; City of Colorado Springs v. May, 77 P. 1093, 20 Colo. App. 204; Denver Dry-Goods Co. v. Martine, 55 P. 743, 12 Colo. App. 299; Curr v. Hundley, 3 Colo. App. 54, 31 P. 939; Hurd v. Atkins, 1 Colo. App. 449, 29 P. 528; Simonton v. Rohm, 14 Colo. 51, 23 P. 86; Dozenback v. Raymer, 13 Colo. 451, 22 P. 787; Finerty v. Fritz, 6 Colo. 136.

Conn. Adams v. Pierce, 110 A. 50, 94 Conn. 613; Appeal of Wheeler, 100 A. 13, 91 Conn. 388; Reed v. Heyman, 68 A. 322, 80 Conn. 311; Benedict v. Everard, 46 A. 870, 73 Conn. 157.

D. C. Turner v. American Security & Trust Co., 29 App. D. C. 460; Georgetown & T. Ry. Co. v. Smith, 25 App. D. C. 259, 5 L. R. A. (N. S.) 274.

Fla. Burnett v. Soule, 83 So. 461, 78 Fla. 507; Bibb v. United Grocery Co., 74 So. 880, 73 Fla. 589; Florida East Coast Ry. Co. v. Knowles, 67 So. 122, 68 Fla. 400; Hartford Fire Ins. Co. v. Brown, 58 So. 838, 60 Fla. 83; Pensacola Electric Co. v. Bissett, 52 So. 367, 59 Fla. 360; Cross v. Aby, 45 So. 820, 55 Fla. 311; Atlantic Coast Line R. Co. v. Beazley, 45 So. 761, 54 Fla. 311; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12.

Ga. Bishop v. Calhoun Nat. Bank, 91 S. E. 1055, 19 Ga. App. 713; Rogers, Cassels & Fleming v. Bennett, 91 S. E. 917, 19 Ga. App. 520; Cordray v. James, 91 S. E. 239, 19 Ga. App. 156; Nessmith Lumber Co. v. Berrien County Bank, 90 S. E. 1039, 18 Ga. App. 788; Southern Ry. Co. v. Chitwood, 82 S. E. 135, 141 Ga. 769; Clark v. Clark, 81 S. E. 129, 141 Ga. 437; Kerr Glass Mfg. Co. v. Americus Grocery Co., 79 S. E. 381, 13 Ga. App. 512; Murdock v. Adamson, 77 S. E. 181, 12 Ga. App. 275; Atlantic Coast Line R. Co. v. Jones, 63 S. E. 834, 132 Ga. 189; Bush v. Fourcher, 59 S. E. 459, 3 Ga. App. 43; Western & A. R. Co. v. Tate, 59 S. E. 266, 129 Ga. 526; Teasley v. Bradley, 47 S. E. 925, 120 Ga. 373; Russell v. Brunswick Grocery Co., 47 S. E. 528, 120 Ga. 38; Farmers' & Merchants' Bank v. Riddle, 41 S. E. 580, 115 Ga. 400; City Council of Augusta v. Tharpe, 38 S. E. 389, 113 Ga. 152; Webb v. Wight & Weslosky Co., 37 S. E. 710, 112 Ga. 432.

Idaho. Kelly v. Lemhi Irrigation & Orchard Co., 168 P. 1076, 30 Idaho, 778; Taylor v. Lytle, 160 P. 942, 29 Idaho, 546; Quirk v. Sunderlin, 130 P. 374, 23 Idaho, 368; Just v. Idaho Canal & Improvement Co., 102 P. 381, 16 Idaho, 639, 133 Am. St. Rep.

140; Tarr v. Oregon Short Line R. Co., 93 P. 957, 14 Idaho, 192, 125 Am. St. Rep. 151.

Ill. Judy v. Judy, 104 N. E. 256, 261 Ill. 470; Greenburg v. S. D. Childs & Co., 89 N. E. 679, 242 Ill. 110; Van Cleef v. City of Chicago, 88 N. E. 815, 240 Ill. 318, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275; Chicago City Ry. Co. v. Hagenback, 81 N. E. 1014, 228 Ill. 290; Chicago City Ry. Co. v. Shreve, 80 N. E. 1049, 226 Ill. 530, affirming judgment 128 Ill. App. 462; Fitzgerald v. Benner, 76 N. E. 709, 219 Ill. 485, affirming judgment 120 Ill. App. 447; West Chicago St. R. Co. v. Schulz, 75 N. E. 495, 217 Ill. 322; Dueber Watch Case Mfg. Co. v. Young, 155 Ill. 226, 40 N. E. 582; Dacey v. People, 116 Ill. 555, 6 N. E. 165; Riggin v. Keck, 203 Ill. App. 87; Smiley v. Barnes, 196 Ill. App. 530; Hitz v. Illinois Cent. R. Co., 183 Ill. App. 558; Swancutt v. W. M. Trout Auto Livery Co., 176 Ill. App. 606; McMaster v. Spencer, 129 Ill. App. 131; Thomas v. Mosher, 128 Ill. App. 479; Chicago City Ry. Co. v. Shreve, 128 Ill. App. 462, judgment affirmed 80 N. E. 1049, 226 Ill. 530; Eldorado Coal & Coke Co. v. Swan, 128 Ill. App. 237, judgment affirmed 81 N. E. 691, 227 Ill. 586; People v. Cook County, 127 Ill. App. 401; Chicago, P. & St. L. Ry. Co. v. Reuter, 119 Ill. App. 232, affirmed 79 N. E. 166, 223 Ill. 387; Kessel v. Mayer, 118 Ill. App. 267; Chicago & E. I. R. Co. v. Crose, 113 Ill. App. 547; Illinois Life Ins. Co. v. Lindley, 110 Ill. App. 161; Grand Lodge, Brotherhood of Locomotive Firemen, v. Orrell, 109 Ill. App. 422; Junction Min. Co. v. Goodwin, 109 Ill. App. 144; City of Macon v. Holcomb, 109 Ill. App. 135; Pungs v. American Brake Beam Co., 102 Ill. App. 76, judgment affirmed 65 N. E. 645, 200 Ill. 306; Chicago & W. I. R. Co. v. Doan, 93 Ill. App. 247, affirmed 62 N. E. 826, 195 Ill. 168; Johnston v. Hirschberg, 85 Ill. App. 47, affirmed 57 N. E. 26, 185 Ill. 445; Gernand v. Heinly, 84 Ill. App. 321.

Ind. Olds v. Lochner, 57 Ind. App. 269, 106 N. E. 889; Evansville & T. H. R. Co. v. Hoffman, 105 N. E. 788, 56 Ind. App. 530; Walley v. Wiley, 104 N. E. 318, 59 Ind. App. 171; Joseph E. Lay Co. v. Mendenhall, 102 N. E. 974, 54 Ind. App. 342; Cohen v. Reichman, 102 N. E. 284, 55 Ind. App. 164; Indianapolis & M. Rapid Transit Co. v. Reeder, 100 N. E. 101, 51 Ind. App. 533; Ft. Wayne Iron & Steel Co. v. Parsell, 94 N. E. 770, 49 Ind. App. 565; Snow v. Indianapolis & E. Ry. Co., 93 N. E. 1089, 47 Ind. App. 189; American Sheet & Tin Plate Co. v. Bucy, 87 N. E. 1051, 43 Ind. App. 501; Brinkman v. Pacholke, 84 N. E. 762, 41 Ind. App. 662; Abney v. Indiana Union Traction Co., 83 N. E. 387, 41 Ind. App. 53; Indianapolis Traction & Terminal Co. v. Miller, 82 N. E. 113, 40 Ind. App. 403; Southern Indiana Ry. Co. v. Baker, 77 N. E. 64, 37 Ind. App. 405; Indianapolis St. Ry. Co. v. James, 74 N. E. 536, 35 Ind. App. 543; Nickey v. Dougan, 73 N. E. 288, 34 Ind. App. 601; Conrad v. Cleveland, C., C. & St. L. Ry. Co., 72 N. E. 489, 34 Ind. App. 133; Cleveland, C., C. & St. L. Ry. Co. v. C. & A. Potts & Co., 71 N. E. 685, 33 Ind. App. 564; Pittsburgh, C., C. & St. L. Ry. Co. v. Collins, 71 N. E. 661, 163 Ind. 569; City of Linton v. Smith, 68 N. E. 617, 31 Ind. App. 546; Southern Indiana Ry. Co. v. Harrell (App.) 66 N. E. 1016, judgment reversed 68 N. E. 262, 161 Ind. 689, 63 L. R. A. 460; Archibald v. Harvey, 54 N. E. 813, 23 Ind. App. 30; White v. Beem, 80 Ind. 239.

Iowa. Adami v. Fowler & Wilson Coal Co., 179 N. W. 422; Spillett v. Clear Lake Boating & Amusement Co., 155 N. W. 822; Rose v. City of Ft. Dodge, 155 N. W. 170, 180 Iowa, 331; Finnane v. City of Perry, 145 N. W. 494, 164 Iowa, 171; Reed v. Rex Fuel Co., 141 N. W. 1056, 160 Iowa, 510; Cooper v. City of Oelwein, 123 N. W. 955, 145 Iowa, 181; Clark v. Johnson County Telephone Co., 123 N. W. 327, 146 Iowa, 428; Hawkins v. Young, 114 N. W. 1041, 137 Iowa, 281; Montrose Sav. Bank v. Claussen, 114 N. W. 547, 137 Iowa, 73; Heath v. Hagan, 113 N. W. 342, 135 Iowa, 495; Templin v. Incorporated City of Boone, 102 N. W. 789, 127 Iowa, 91; Hart v. Cedar Rapids & M. C. Ry. Co., 80 N. W. 662, 109 Iowa,

631; Zimmerman v. Brannon, 72 N. W. 439, 103 Iowa, 144.

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Ky. W. M. Ritter Lumber Co. v. Jordan, 128 S. W. 590, 138 Ky. 522; Chesapeake & O. Ry. Co. v. Perkins, 105 S. W. 148, 127 Ky. 110, 31 Ky. Law Rep. 1350; City of Louisville v. McGill, 52 S. W. 1053, 21 Ky. Law Rep. 718; Johnson v. Peak, 50 S. W. 682, 20 Ky. Law Rep. 1937; Louisville & N. R. Co. v. Williams, 15 Ky. Law Rep. (abstract) 31; Kellar v. Edmondson, 14 Ky. Law Rep. (abstract) 894; Kentucky & I. Bridge Co. v. Cecil, 14 Ky. Law Rep. (abstract) 477; Lancaster v. Turpin, 8 Ky. Law Rep. (abstract) 430.

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Fischer v. Heitzeberg Packing & Provision Co., 77 Mo. App. 108; Keen v. Schweigler, 70 Mo. App. 409; Voegeli v. Pickel Marble & Granite Co., 56 Mo. App. 678; Heitzig v. Gruner, 13 Mo. App. 580, memorandum; Singer & Talcott Stone Co. v. Sinclair, 10 Mo. App. 593, memorandum.

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Nev. Cutler v. Pittsburg Silver Peak Gold Mining Co., 116 P. 418, 34 Nev. 45; Christensen v. Floriston Pulp & Paper Co., 92 P. 210, 29 Nev. 552.

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N. C. Kirkpatrick v. Crutchfield, 100 S. E. 602, 178 N. C. 348; McNeill v. Atlantic Coast Line R. Co., 83 S. E. 704, 167 N. C. 390; Bird v. Bell Lumber Co., 79 S. E. 448, 163 N. C. 162; In re Big Cold Water Creek Drainage Dist., 78 S. E. 14, 162 N. C. 127; Madison County Ry. Co. v. Gahagan, 76 S. E. 696, 161 N. C. 190; Aman v. Rowland Lumber Co., 75 S. E. 931, 160 N. C. 369; Wilson v. Atlantic Coast Line R. Co., 55 S. E. 257, 142 N. C. 333; Marcom v. Raleigh & A. Air Line R. Co., 35 S. E. 423, 126 N. C. 200; Crenshaw v. Johnson, 26 S. E. 810, 120 N. C. 270.

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Pa. McCormick v. Bickerton, 96 A. 1092, 251 Pa. 466; Swauger v. People's Natural Gas Co., 96 A. 712, 251 Pa. 287; Watson v. Monongahela River Consol. Coal & Coke Co., 93 A. 625, 247 Pa. 469; Powell v. S. Morgan

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101 Va. 432; Dingee v. Unrue's Adm'x, 35 S. E. 794, 98 Va. 247; Richmond Traction Co. v. Hildebrand, 34 S. E. 888, 98 Va. 22, 99 Va. 48; Kimball v. Borden, 34 S. E. 45, 97 Va. 477.

Wash. Pierce v. General Fire Assur. Co., 182 P. 588, 107 Wash. 700; Pierce v. Security Ins. Co., 182 P. 588, 107 Wash. 699; Pierce v. Globe & Rutgers Fire Ins. Co., 182 P. 586, 107 Wash. 501; State v. Emonds, 182 P. 584, 107 Wash. 688; McDorman v. Dunn, 172 P. 244, 101 Wash. 120; Munson v. Johnson, 142 P. 18, 80 Wash. 628; Gosky v. Seattle Taxicab & Transfer Co., 140 P. 342, 79 Wash. 425; Alaska S. S. Co. v. Pacific Coast Gypsum Co., 138 P. 875, 78 Wash. 247; Murphy v. Chicago, M. & St. P. Ry. Co., 120 P. 525, 66 Wash. 663; Sudden & Christenson v. Morse, 104 P. 645, 55 Wash. 372; St. John v. Cascade Lumber & Shingle Co., 101 P. 833, 53 Wash. 193; Hoseth v. Preston Mill Co., 96 P. 423, 49 Wash. 682; Portland & S. Ry. Co. v. Clarke County, 93 P. 1083, 48 Wash. 509; Barclay v. Puget Sound Lumber Co., 93 P. 430, 48 Wash. 241, 16 L. R. A. (N. S.) 140; Wikstrom v. Preston Mill Co., 93 P. 213, 48 Wash. 164; Starr v. Ætna Life Ins. Co., 87 P. 1119, 45 Wash. 128; Burns v. Woolery, 45 P. 894, 15 Wash. 134.

W. Va. Karr v. Baltimore & O. R. Co., 86 S. E. 43, 76 W. Va. 526; Roberts v. Baltimore & O. R. Co., 78 S. E. 357, 72 W. Va. 370; Lay v. Elk Ridge Coal & Coke Co., 61 S. E. 156, 64 W. Va. 288; Styles v. Chesapeake & O. Ry. Co., 59 S. E. 609, 62 W. Va. 650; Huffman v. Alderson's Adm'r, 9 W. Va. 616.

Wis. Gussart v. Greenleaf Stone Co., 114 N. W. 799, 134 Wis. 418; Morrison v. Superior Water, Light & Power Co., 114 N. W. 434, 134 Wis. 167; Kohl v. Bradley, Clark & Co., 110 N. W. 265, 130 Wis. 301; Kiekhoefer v. Hidershide, 89 N. W. 189, 113 Wis. 280; Kenyon v. City of Mondovi, 73 N. W. 314, 98 Wis. 50; Hinkley v. Town of Rosendale, 70 N. W. 158, 95 Wis. 271.

Illustrations of instructions held unobjectionable when considered as a whole. Where the charge as a whole instructed that plaintiff must make out his case by the greater weight of the evidence, the fact that the charge in some places also required that he prove his case by a clear preponderance of the evidence did not render it erroneous, as requiring too high a degree of proof. Mullaly v. Smyth, 79 S. E. 634, 96 S. C. 14. In an action on a note, instructions that, if the preponderance of the evidence showed that the note had not been paid, plaintiff could recover, and that, if it appeared in the same way that payment had been made, the verdict should be for defendant, were not improper as placing the burden on plaintiff to show nonpayment, and for failing to instruct what the jury should do if the evidence were evenly balanced, where other instructions stated that the burden was on defendant, and that plaintiff's possession of the note was prima facie evidence of nonpayment. McCauley v. Darrow, 91 P. 1059, 36 Mont. 13. Where the court in its charge fully defines to the jury the meaning of the contract, and fully and fairly explains to them the contentions of both parties, as embodied in their respective understanding of its contents, the omission to further instruct the jury specially that they must determine what the contract was, its exact terms, the consideration, and the respective obligations, liability, and undertakings of each of the parties thereunder, was immaterial. Schofield v. Little, 58 S. E. 666, 2 Ga. App. 286. In an action to set aside a contract and a transfer of property thereunder alleged to have been obtained from M., a person of unsound mind, by the undue influence of his niece, a charge that, if the donation was unjust or unreasonable, that fact was evidence to be considered on the issues of sanity and undue influence, but that it was not of itself a cause for revising what had been done, unless it was of such an extent as to convince the jury of the existence of undue influence or of unsound mind, was not objectionable as allowing the jury, if they thought the transaction unjust or unreasonable, to find from that fact alone, unsoundness of mind, or undue influence, or

both, where the jury were told in the same charge that one in disposing of his property had a right to disregard all natural ties and all moral obligations and that the right of disposal did not depend upon the condition that the gift be reasonable, and that the transaction in question was one that M. could lawfully enter into if he saw fit, etc., and that the sole question was whether the gift was really his. Curtice v. Dixon, 68 A. 587, 74 N. H. 386. An instruction in a personal injury action that plaintiff could recover reasonable compensation for his fright, shock, suffering, anxiety, nervous prostration, sickness caused by the accident, mental strain and mortification through being required to use crutches or other inconveniences; and, if plaintiff was permanently injured, such further compensation for pain, etc., as he might be required to endure thereafter, and compensation for his loss of capacity and prospects of life, was not improper as authorizing recovery for loss of time or for diminished earning capacity, where the court instructed that there being no evidence of the value of plaintiff's loss of time, nor as to how much he could earn before the injury, he could not recover for time lost nor for diminished earning capacity; it appearing from the smallness of the verdict that the jury was not misled. Buxton v. Ainsworth, 116 N. W. 1094, 153 Mich. 315. An instruction on exemplary damages for assault, that the jury "should" consider defendant's wealth, and that the damages "should" be proportionate to his ability to respond, is harmless error, where the jury were further instructed that they could not award exemplary damages, unless the acts in question were done maliciously, and that even then the matter of exemplary damages was in their discretion, and were told the reason for considering defendant's wealth. Thomas v. Williams, 121 N. W. 148, 139 Wis. 467. The giving of an instruction that the presumption that deceased was exercising due care exists in the absence of evidence to the contrary, and, until it is overthrown by a preponderance of the evidence, is harmless, where from the entire charge the jury might have understood that the presumption may counterbalance evidence of contributory negligence. Sorensen v. Selden-Breck Const. Co., 154 N. W. 222, 98 Neb. 689. An instruction that a husband might recover of his wife's estate for work done on her property, if it was done under an implied contract, is cured by a statement that by this was meant, if the work was done under an understanding between them, that he should be paid therefor, though the exact terms of their agreement could not be proved. Westra v. Westra's Estate, 101 Mich. 526, 60 N. W. 55. In an action by a wife for alienation of her husband's affections, where an instruction stated that defendant had no right to interfere, and by any chance cut off the possibility of future affection between plaintiff and her husband, the use of the expression "by any chance cut off," instead of the expression "cut off any chance," was cured by the rest of the instruction, which clearly indicated its meaning. Claxton v. Pool, 167 S. W. 623, 182 Mo. App. 13. An instruction, under a lease of agricultural lands which required the lessor to maintain the drainage of the lands, that the drainage should be maintained so that the lands would be in the ordinary condition of uplands or flat lands not needing drainage, was not error, where the court also instructed as to the lessee's duty to maintain ditches on the land and to cultivate his crops properly, and denied recovery if the jury found negligence by the lessee. Columbia Agricultural Co. v. Seid Pak Sing (C. C. A. Or.) 267 F. 1. Though an instruction in a libel case charging the jury as to the effect of the libelous publication did not clearly show that it was a jury question, whether the article complained of was false, the error was cured by another instruction expressly stating that truth was a defense. Arizona Pub. Co. v. Harris, 181 P. 373, 20 Ariz. 446. In an action against a livery stable keeper for injuries to one who had hired a team from him, due to the insufficiency of the harness, an instruction that "a livery stable keeper is freed from lia-

bility for an accident by showing that he exercised the usual skill, care, and diligence ordinarily exercised by livery stable keepers," though not entirely accurate, the care required of livery stable keepers being that "usually exercised by persons of ordinary prudence in the conduct of such livery stable business," was not ground for granting plaintiff a new trial, where the court both before and after giving such instruction charged as requested by plaintiff that it was defendant's duty to use reasonable care in the selection of a safe harness for plaintiff's use, and that reasonable care meant that degree of care exercised by an ordinarily careful and prudent person acting in similar relations, and where the instruction complained of began with the words "on the contrary," showing that the judge was merely pointing out that defendant was not a public but a private carrier. Deming v. Johnson, 69 A. 347, 80 Conn. 553. In an action for damages for the willful burning of a house, an instruction that the jury must be satisfied by the greater weight of the evidence is not erroneous for using the word "satisfied," if the whole charge places on the plaintiff only the burden of a showing by a preponderance of the evidence. Champion v. Daniel, 87 S. E. 214, 170 N. C. 331. In an action against a railroad for injuries to an employé through a defective car step, an instruction that if defendant, through its inspectors and repairers, exercised ordinary care to see that the equipment of the car was in reasonably safe condition, "and were not guilty of negligence," the verdict must be for defendant, was not misleading as adding, by the use of the words "and were not guilty of negligence," something to defendant's duty beyond the exercise of ordinary care; the court having clearly defined "negligence" as the failure to use ordinary care. El Paso & S. W. R. Co. v. O'Keefe, 110 S. W. 1002, 50 Tex. Civ. App. 579. In an action for injuries to a servant, defendant cannot complain of an instruction defining contributory negligence as "the want of ordinary care on the part of the person injured—that is to say, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances—which, concurring with the negligence of defendant, if any, proximately caused the injuries," where the court, in another part of the charge, directed the jury to find for defendant if they believed from the evidence that plaintiff was guilty of negligence which caused or contributed to his injuries. Galveston, H. & S. A. Ry. Co. v. Worth, 116 S. W. 365, 53 Tex. Cr. R. 351. An instruction using the term "due care" in connection with the exercise thereof by the person injured was not erroneous because it did not define the term, or state what measure of care the law required of the person injured, or that the care required of him must be continually exercised up to the time of his injury, where by taking the instruction in connection with other instructions given which fully defined negligence and contributory negligence and the character of the care required of the person injured the jury could not have been misled by the instruction complained of. Brinkman v. Pacholke, 84 N. E. 762, 41 Ind. App. 662. Where the court had previously charged that a person would not be liable unless his negligence was the proximate cause of the injury, an instruction that, if negligence of defendant's agent caused the injury, the principal would be liable, was not erroneous for failure to charge that such liability would occur only for injuries which were proximately caused by the agent's negligence. Rochester v. Bull, 58 S. E. 766, 78 S. C. 249. Where, in an action for repairs to an automobile, the question of defendant's ratification of the work was otherwise fully explained, an instruction, that if the charge was reasonable and authority for the repairs was given, or if authority was not given that the work was ratified by defendant, that he, after knowing it, agreed to it and accepted the property, then he would be liable, was not error. Bush v. Fourcher, 59 S. E. 459, 3 Ga. App. 43. Where, in an action for the death of a traveler struck by a train at a crossing, the evidence showed that

§ 534. Further discussion of rule—Cure of deficiencies and objectionable matters, not amounting to a positive misstatement of the law, by other instructions

Where an instruction states the law correctly so far as it goes, and is merely insufficient, ambiguous or uncertain, the defect may

the engineer could not see on account of the obstruction of the boiler, an instruction that if those in charge of the engine "negligently" failed to keep a lookout, etc., a recovery was authorized, was not erroneous because of the use of the word "negligently," when considered in connection with another instruction that those in charge of the train must use ordinary care in discovering whether decedent was ignorant of the approach of the train and was about to go on the track. Hummer's Ex'x v. Louisville & N. R. Co., 108 S. W. 885, 128 Ky. 486, 32 Ky. Law Rep. 1315. An instruction, in an action against a railroad company for the death of plaintiff's daughter, that, notwithstanding the parent may have been negligent, such fact did not relieve the company from using ordinary care to avoid injuring the child, and that the company was bound to use such care, and that if the child was in a position of danger it must be the greatest care, and that a failure to exercise such care, where it might reasonably be inferred that an injury would follow as a result of such failure, amounted to wanton and reckless conduct, though in somewhat stronger language than generally used in such connection, was not erroneous when construed in connection with instructions that precaution was a duty only so far as there was reason for apprehension, and that the exercise of ordinary care to prevent injury arose only after the company became aware of the child's danger. Anderson v. Great Northern Ry. Co., 99 P. 91, 15 Idaho, 513. Where the court charged that use of a highway by the public must have been adverse, continuous, uninterrupted, and under a claim of right for the necessary period in order to make it a public highway, another instruction that 20 years' user of a road by the public as a highway under claim of right creates a highway by prescription was not objectionable for failure to require that the use must have been continuous and uninterrupted. Road Dist. No. 1 v. Beebe, 83 N. E. 131, 231 Ill. 147. Instructions, in an action for injuries to a bicyclist in a collision with an automobile, that if defendant was on the left-hand side of the street when the collision occurred, he failed to perform a duty which he owed by statute to plaintiff, and should be found negligent, unless he was coming from an intersecting street, and had not had time to get to the right-hand side, and that when a collision occurs, the fact that a person is on the wrong side is prima facie evidence of negligence, are not open to the criticism that they stated that one may not lawfully drive upon the left-hand side of the road, where the court had previously instructed that the law did not require a person to drive on his right side, but did require him to turn to his right when meeting another, and since such instructions were expressly confined to the position of defendant at the time of the collision. Irwin v. Judge, 71 A. 572, 81 Conn. 492. Where, in an action for injuries to a traveler by an automobile, the court instructed as to the rights of the parties on the highway, and as to the degree of care required of defendant in running his automobile, and charged that defendant had the right to operate his automobile, and was bound only to use ordinary care to prevent injury to others, an instruction that the running of the automobile on the highway was not of itself negligence, but that defendant was bound to use reasonable care so as not to injure plaintiff, was not objectionable as singling plaintiff out as an object of special care, but applied the rule previously announced to the facts. Erks v. Ewers (Iowa) 119 N. W. 603.

be cured by other instructions upon the same subject embraced in the charge,[20] and it is further true that, as a general rule, errors

[20] **Ala.** Langston v. State, 75 So. 715, 16 Ala. App. 123.

Ariz. Southern Pac. Co. v. Hogan, 108 P. 240, 13 Ariz. 34, 29 L. R. A. (N. S.) 813.

Ark. Paxton v. State, 157 S. W. 396, 108 Ark. 316.

Cal. People v. Griesheimer, 167 P. 521, 176 Cal. 44; People v. Wong Hing, 151 P. 1159, 28 Cal. App. 230; People v. Dunlop, 150 P. 389, 27 Cal. App. 460; People v. Senegram, 149 P. 786, 27 Cal. App. 301; People v. Harris, 145 P. 520, 169 Cal. 53; People v. Bowman, 142 P. 495, 24 Cal. App. 781; People v. Lillard, 123 P. 221, 18 Cal. App. 343; People v. Richardson, 120 P. 20, 161 Cal. 552; Big Three Min. & Mill. Co. v. Hamilton, 107 P. 301, 157 Cal. 130, 137 Am. St. Rep. 118; People v. Del Cerro, 100 P. 887, 9 Cal. App. 764.

Colo. Pouppirt v. Greenwood, 110 P. 195, 48 Colo. 405; Gill v. Schneider, 110 P. 62, 48 Colo. 382; Stratton Cripple Creek Mining & Development Co. v. Ellison, 94 P. 303, 42 Colo. 498.

Conn. Worden v. Gore-Meehan Co., 78 A. 422, 83 Conn. 642; Bogudsky v. Backes, 76 A. 540, 83 Conn. 208; State v. Campbell, 74 A. 927, 82 Conn. 671, 135 Am. St. Rep. 293, 18 Ann. Cas. 236.

D. C. Robinson v. United States, 42 App. D. C. 186; Woodward v. United States, 38 App. D. C. 323.

Ga. Thomas v. State, 91 S. E. 109, 146 Ga. 346; Clonts v. State, 90 S. E. 373, 18 Ga. App. 707; Green v. State, 90 S. E. 284, 18 Ga. App. 677; Tift v. State, 88 S. E. 41, 17 Ga. App. 663; Williams v. State, 85 S. E. 973, 16 Ga. App. 697; Nunn v. State, 85 S. E. 346, 143 Ga. 451; Short v. State, 80 S. E. 8, 140 Ga. 780; McGovern v. State, 74 S. E. 1101, 11 Ga. App. 267; Leonard v. State, 66 S. E. 251, 139 Ga. 435; Atlantic Coast Line R. Co. v. Jones, 63 S. E. 834, 132 Ga. 189; Wholesale Mercantile Co. v. Jackson, 59 S. E. 106, 2 Ga. App. 776.

Ill. East St. Louis & S. Ry. Co. v. Zink, 82 N. E. 283, 229 Ill. 180; Hoge v. People, 117 Ill. 35, 6 N. E. 796; Guminski v. Armour & Co., 156 Ill. App. 503; Etnyre v. Artz, 153 Ill. App. 490; Gorey v. Illinois Cent. R. Co., 153 Ill. App. 17; Colono v. Consolidated Coal Co., 147 Ill. App. 327; Gardner v. Ben Steele Weigher Mfg. Co., 142 Ill. App. 348.

Ind. Flatter v. State, 107 N. E. 9, 182 Ind. 514; Cleveland, C., C. & St. L. Ry. Co. v. Lynn, 95 N. E. 577, 177 Ind. 311; Smurr v. State, 88 Ind. 504.

Iowa. McSpadden v. Axmear, 181 N. W. 4; State v. Harrison, 149 N. W. 452, 167 Iowa, 334; State v. Piernot, 149 N. W. 446, 167 Iowa, 353; State v. Butler, 138 N. W. 383, 157 Iowa, 163; State v. Dean, 126 N. W. 692, 148 Iowa, 566; Marcus v. Omaha & C. B. Ry. & Bridge Co., 120 N. W. 469, 142 Iowa, 84; McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689.

Kan. Every v. Rains, 115 P. 114, 84 Kan. 560, 50 L. R. A. (N. S.) 889.

Ky. McGehee v. Commonwealth, 205 S. W. 577, 181 Ky. 422.

Md. Bannon v. Warfield, 42 Md. 22.

Mich. People v. Schelske, 153 N. W. 781, 187 Mich. 497; People v. Rogulski, 148 N. W. 189, 181 Mich. 481; Borkowski v. American Radiator Co., 130 N. W. 640, 165 Mich. 266; Kryszke v. Kamin, 128 N. W. 190, 163 Mich. 290; Smith v. Hubbell, 114 N. W. 865, 151 Mich. 59.

Minn. Johnson v. McLeod, 127 N. W. 497, 111 Minn. 479, rehearing denied 127 N. W. 1120, 111 Minn. 479; Christiansen v. Chicago, M. & St. P. Ry. Co., 120 N. W. 300, 107 Minn. 341.

Miss. Cumberland Telephone & Telegraph Co. v. Jackson, 48 So. 614, 95 Miss. 79; Mississippi Cent. R. Co. v. Magee, 46 So. 716, 93 Miss. 196.

Mo. State v. Walls, 170 S. W. 1112, 262 Mo. 105; State v. Smith, 157 S. W. 319, 250 Mo. 350; Overstreet v. Street, 136 S. W. 727, 154 Mo. App. 546; Tewksbury v. Metropolitan St. Ry. Co., 134 S. W. 682, 153 Mo. App. 500; Leach v. St. Louis & S. F. R. Co., 118 S. W. 510, 137 Mo. App. 300; State v. Gregory, 30 Mo. App. 582.

Mont. Surman v. Cruse, 187 P.

in instructions, not amounting to positive misstatements of the

890, 57 Mont. 253; Leonard v. City of Butte, 65 P. 425, 25 Mont. 410.

Neb. Parker v. State, 175 N. W. 677, 104 Neb. 12; Francis v. State, 175 N. W. 675, 104 Neb. 5; Bailey v. Kling, 130 N. W. 439, 88 Neb. 699.

Nev. Cutler v. Pittsburg Silver Peak Gold Mining Co., 116 P. 418, 34 Nev. 45.

N. J. State v. Venzio, 87 A. 126, 84 N. J. Law, 418; Corkran v. Taylor, 71 A. 124, 77 N. J. Law, 195.

N. M. State v. Ellison, 144 P. 10, 19 N. M. 428.

N. Y. People v. Smith, 114 N. E. 50, 219 N. Y. 222, affirming judgment 159 N. Y. S. 1073, 172 App. Div. 826; People v. Brown, 96 N. E. 367, 203 N. Y. 44, Ann. Cas. 1913A, 732; Kelleher v. Interurban St. Ry. Co. (Sup.) 102 N. Y. S. 466.

N. D. Zilke v. Johnson, 132 N. W. 640, 22 N. D. 75, Ann. Cas. 1913E, 1005; Boos v. Ætna Ins. Co., 132 N. W. 222, 22 N. D. 11; State v. Winney, 128 N. W. 680, 21 N. D. 72.

Ohio. Cincinnati Gas & Electric Co. v. Coffelder, 31 Ohio Cir. Ct. R. 26; New York, C. & St. L. Ry. Co. v. Roe, 25 Ohio Cir. Ct. R. 628.

Okl. Chicago, R. I. & P. Ry. Co. v. Owens, 186 P. 1092, 78 Okl. 50, certiorari denied 40 S. Ct. 485, 253 U. S. 489, 64 L. Ed. 1027; Chicago, R. I. & P. Ry. Co. v. Johnson, 107 P. 662, 25 Okl. 760, 27 L. R. A. (N. S.) 879.

Or. Blue v. Portland Ry., Light & Power Co., 117 P. 1094, 60 Or. 122.

Pa. Trainer v. McGarrity, 40 Pa. Super. Ct. 57.

R. I. Cardarelli v. Providence Journal Co., 80 A. 583, 33 R. I. 268.

S. C. State v. Martin, 98 S. E. 127, 111 S. C. 352; State v. Milam, 70 S. E. 447, 88 S. C. 127; Martin v. Columbia Electric St. Ry., Light & Power Co., 66 S. E. 993, 84 S. C. 568; Lyles v. Western Union Telegraph Co., 65 S. E. 832, 84 S. C. 1, 137 Am. St. Rep. 829.

Tenn. Fisher v. Travelers' Ins. Co., 138 S. W. 316, 124 Tenn. 450, Ann. Cas. 1912D, 1246.

Tex. Alexander v. State, 204 S. W. 644, 84 Tex. Cr. R. 75; Wood v. State, 189 S. W. 474, 80 Tex. Cr. R. 398; Coker v. State, 160 S. W. 366, 71 Tex. Cr. R. 504; Kirksey v. State, 135 S. W. 577, 61 Tex. Cr. R. 641; Jordan v. State, 131 S. W. 539, 60 Tex. Cr. R. 178; Missouri, K. & T. Ry. Co. of Texas v. Stone, 125 S. W. 587, 58 Tex. Civ. App. 480; St. Louis & S. F. R. Co. v. Franklin, 123 S. W. 1150, 58 Tex. Civ. App. 41; James v. State, 123 S. W. 145, 57 Tex. Cr. R. 342; Montgomery v. State, 116 S. W. 1160, 55 Tex. Cr. R. 502; San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574, 52 Tex. Civ. App. 22; Texas & P. Ry. Co. v. Boleman (Civ. App.) 112 S. W. 805; Consolidated Kansas City Smelting & Refining Co. v. Binkley, 99 S. W. 181, 45 Tex. Civ. App. 100; Galveston, H. & S. A. Ry. Co. v. Cherry, 98 S. W. 898, 44 Tex. Civ. App. 344; Brewin v. State, 92 S. W. 420, 49 Tex. Cr. R. 296; Monticue v. State, 51 S. W. 236, 40 Tex. Cr. R. 528.

Utah. O'Neill v. San Pedro, L. A. & S. L. R. Co., 114 P. 127, 38 Utah, 475; Grow v. Utah Light & Ry. Co., 106 P. 514, 37 Utah, 41; Gimnich Furniture Mfg. Co. v. Sorensen, 96 P. 121, 34 Utah, 109.

Va. Saunders v. Bank of Mecklenburg, 71 S. E. 714, 112 Va. 443, Ann. Cas. 1913B, 982; Norfolk & W. Ry. Co. v. Thomas, 66 S. E. 817, 110 Va. 622.

Wash. James v. Pearson, 116 P. 852, 64 Wash. 263; Myhra v. Chicago, M. & P. S. Ry. Co., 112 P. 939, 62 Wash. 1; Averbuch v. Great Northern Ry. Co., 104 P. 1103, 55 Wash. 633; Behling v. Seattle Electric Co., 96 P. 954, 50 Wash. 150.

W. Va. Connolly v. Bollinger, 67 S. E. 71, 67 W. Va. 30, 20 Ann. Cas. 1350.

Illustrations of defects in instructions cured by other instructions. In an action against A. and B., two of several owners of a steamer, for expenses incurred and services rendered in the superintendence of the building of the steamer, an instruction to the jury "that if the plaintiff rendered the services and incurred the expenses in question at the request of A., acting in his own behalf and representing the defendant

B., and if the plaintiff rendered said services expecting to be paid for them, he would be entitled to recover the value of his services and the expenses incurred by him," not given as the whole law of the case, but to be considered in connection with the other instructions, which required the jury to determine the relation of the plaintiff to the transaction and to the defendant at the time of bringing the suit is correct. Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105. Where, in an action for injuries to a passenger, the defense was a release, and the court in a previous instruction had fully charged on the issue of plaintiff's capacity when she signed the settlement, an instruction that, if plaintiff knowingly signed the agreement, but at the time she signed it she gave little attention to its contents, or did not read it, or ask that it be read to her, then she was bound thereby, while an insufficient presentation of the question itself, was not misleading or erroneous when considered with reference to the entire charge. Whittlesey v. Burlington, C. R. & N. Ry. Co., 90 N. W. 516, 121 Iowa, 597, reversed 97 N. W. 66, 121 Iowa, 597. In an action by passenger for injuries, an instruction that the burden of proving the carrier's affirmative defense that the injuries were caused by the negligence of another was on carrier was not erroneous as requiring carrier to prove such negligence by a preponderance of the evidence, where the court also instructed the jury that throughout plaintiff must prove his case by preponderance of the evidence, and that defendant was not liable unless its negligence was either the sole or contributing cause to the accident. Learned v. Peninsula Rapid Transit Co. (Cal. App.) 193 P. 591. Where, in an action for injuries to a passenger bound for G. in consequence of his alighting at the intermediate point R., believing that he had reached G., it was undisputed that he alighted at R., and the court charged that if he was negligent in not reboarding the train before it started from R., and such negligence contributed to the injuries, there could be no recovery, the error in an instruction that if an ordinarily prudent person would have discovered that he "was at G." before alighting, and the passenger attempted to reboard the train under circumstances constituting contributory negligence, there could be no recovery, etc., arising from the omission of the word "not" before "at" in the quoted phrase, was not prejudicial. Missouri, K. & T. Ry. Co. of Texas v. Redus, 118 S. W. 208, 55 Tex. Civ. App. 205. In an action for injuries to a passenger by the sudden starting of the car as she was alighting, where the court instructed that it was the duty of the carrier to exercise the highest care consistent with its duties of conveying passengers to avoid injuring them, and, on their failure to do so, they would be liable it was not error to instruct that the carrier was required to stop its cars a sufficient time to allow passengers to alight, and to see that they had actually done so. Best v. Columbia Electric St. Ry., Light & Power Co., 67 S. E. 1, 85 S. C. 422. In a death action, tried throughout on the theory that the damages, if any, were such as were suffered by decedent's estate, where there was no testimony as to the existence of any one dependent upon decedent, nor that any one had suffered pecuniary injury from his death, and the jury were plainly charged that the damages to be awarded were those suffered by the estate, a charge that it was not necessary for plaintiff to show the precise money value of decedent's life, or the exact damages suffered by the beneficiaries, to sustain a recovery of substantial damages, was not misleading through the use of the word "beneficiaries," though inappropriate, as allowing a recovery by those dependent upon decedent who had suffered. Phœnix Ry. Co. v. Landis, 108 P. 247, 13 Ariz. 80. An exception to the court's charge on manslaughter as allowing the jury to consider only the provocation arising at the time cannot be sustained, where the court further charged that, in determining the adequacy of the provocation, the jury should consider all the evidence in determining the condition of the

defendant's mind. Jacobs v. State, 213 S. W. 628, 85 Tex. Cr. 505. In suit for false imprisonment against a constable and his sureties, any ambiguity in instructing that, if he unlawfully violated plaintiff's personal liberty, the jury must find for plaintiff, because not restricting the sureties' liability for wrongs committed by the constable in his official capacity, was removed by a subsequent instruction that his sureties would only be liable if he wrongfully restrained plaintiff while acting in his official capacity. Gomez v. Scanlan, 102 P. 12, 155 Cal. 528. An instruction that the jury, in making up its special findings as to the fraud charged to defendants, might "take into consideration the allegation made in the complaint that there was an agreement" between defendants to defraud plaintiff, is not open to objection, where it was evident from the whole instruction that the meaning was that the jury might consider the allegations of the complaint in determining in what manner it was charged that such an agreement had been made, and not that they tended in any manner to establish the fact of an agreement. Limited Inv. Ass'n v. Glendale Inv. Ass'n, 74 N. W. 633, 99 Wis. 54. In an action for injury to an employé a statement in a preamble to the submission of the issues that when one becomes a railway employé he can assume that the company will exercise ordinary care to furnish a reasonably safe place to work was not prejudicial error, where the statement appeared in the paragraph containing explanatory abstract principles applicable to master and servant, and the court charged that plaintiff could not recover unless injured through defendant's negligence in furnishing a defective engine, and where no issue as to defendant's duty to furnish a safe place to work was presented by the charge. Atchison, T. & S. F. Ry. Co. v. Mills, 116 S. W. 852, 53 Tex. Civ. App. 359. Where, in an action for the death of a servant, the court charged that the way to determine whether a person has been negligent is to compare what he had done or left undone with what would have been done or left undone by a man acting with ordinary prudence, and that if a man fails to act as an ordinarily prudent man would under the same circumstances and conditions there is negligence, there was no reversible error in the court's misuse of the word "could" for "would" in certain other of the instructions relating to the acts of a reasonably prudent man, etc. Cox v. Wilkeson Coal & Coke Co., 112 P. 231, 61 Wash. 343. Where an instruction related only to one kind of assumed risk, the ordinary hazards of the service, contention that it ignored the question of assumption of risk, based on patent dangers known to plaintiff brakeman, submitted in another instruction given at defendant's request, cannot be sustained; the instructions not being conflicting, but to be considered in harmony with each other. A. L. Clark Lumber Co. v. Edwards, 216 S. W. 18, 144 Ark. 641. In an action for injuries to plaintiff by the fall of the roof, where it was claimed that the master had promised to remedy the defect in the roof which caused the injury, a charge that if such promise was made, and if the danger was not great and constant, and that if a reasonably prudent person would have remained in the employ and continued to pass under the roof, such promise could be deemed to have relieved plaintiff from the charge of having assumed the risk of employment, was not prejudicial because failing to state the test of negligence to be what a prudent person would have done under the same or similar circumstances; there being nothing in the charge negativing that idea, and the matter being correctly expressed in other instructions, one of which referred directly to plaintiff's contributory negligence. Cotton v. Center Coal Mining Co., 123 N. W. 381, 147 Iowa, 427. In an action for injuries to a servant from the falling of sills of a car, being repaired while the servant was repairing the floor thereunder by directions, where the undisputed evidence showed that the servant was under the general direction of the foreman, a charge that the work of taking apart and repairing cars was

done by sundry skilled mechanics and workmen in the master's employ, that all the work was done under the immediate direction of the master or its servants, and that if the master or his servants knew, or in the exercise of ordinary care ought to have known, that the injured servant was in a dangerous place, notice should have been given him, was not erroneous as placing the duty on every servant to exercise ordinary care in keeping a lookout for him, where the court specifically charged that, if the injury was caused solely or proximately by the negligence of fellow servants, there could be no recovery. Wickham v. Chicago, St. P., M. & O. Ry. Co., 124 N. W. 639, 110 Minn. 74, rehearing denied 124 N. W. 994, 110 Minn. 74. In an action for damages from an alleged nuisance, a charge that, if defendant burned shavings or sawdust from its planing mill in a place where the smoke, cinders, soot, or ashes were blown onto plaintiff's house, so as to reasonably annoy him and his family and disturb them in the peaceful use of the house, plaintiff could recover, if objectionable for uncertainty as using the words "reasonably annoy," instead of the expression "necessarily and materially annoy," was cured by a charge that if the acts complained of were such as "to occasion no unnecessary damage to plaintiff," defendant would not be liable. Junction City Lumber Co. v. Sharp, 123 S. W. 370, 92 Ark. 538. If an instruction, to the effect that persons who desire to cross a railroad track at a point where a highway crosses the same have a right to do so and are only required to use ordinary care in so doing, was too broad in that it failed to state that a railroad had priority where it had given notice of its intention to use a crossing even over a traveler who has used ordinary care, it was harmless, where the jury in a prior instruction had been fully informed as to the railroad's rights. Lake Erie & W. R. Co. v. Howarth (Ind. App.) 124 N. E. 687, rehearing denied 127 N. E. 804. Where the defense in an action for the price on a contract of sale of mining claims is that there were fraudulent representations, and the court at the outset of the general charge states that the burden of proving the fraudulent representations is with defendant, and defines what will constitute such a fraud and deceit as will relieve defendant of his obligation, instructions making no reference to fraud must be read in connection with the general charge. La Grande Inv. Co. v. Shaw, 72 P. 795, 44 Or. 416, reversed 74 P. 919, 44 Or. 416. In an automobile collision case, an instruction to find for defendant if plaintiff approached an intersecting highway above a certain speed did not erroneously preclude the jury from considering the surrounding circumstances, or whether the last clear doctrine applied, or whether plaintiff's negligence proximately caused the collision, where such matters were covered in other portions of the charge. Lawrence v. Goodwill (Cal. App.) 186 P. 781. In an action for destruction of a fish trap by a tug, an instruction as to defendant's negligence that "it is charged" "that the boat was being operated outside of and beyond the channel or course in which vessel should be operated." while insufficient, when standing alone, for omission to allege "negligently operated," the error was cured by another instruction covering negligent operation. Anderson v. Columbia Contract Co., 184 P. 240, 94 Or. 171, 7 A. L. R. 653, rehearing denied 185 P. 231, 94 Or. 171, 7 A. L. R. 653. Where a natural or artificial "stone row" had existed in the bed of the stream on land of defendant for many years, forming, as alleged, a dam which flooded plaintiff's land, it was error to instruct the jury that the "stone row" was not such an obstruction as would create a right in lapse of time; but where, in direct connection therewith, the court charged that, if the stone row did form a dam and raise the water, the question was whether the dam did not swell back the water still further upon plaintiff's land, the error was immaterial. Brown v. Bush, 45 Pa. 61.

law on a material matter, are susceptible of cure by other instructions.[21]

Under the above rule it is not necessary for the court to embody all the issues or every legal proposition applicable to the case in a single instruction, so long as the instructions as a whole do so.[22] It is not necessary that an instruction intended to subserve

[21] **U. S.** Gila Valley, G. & N. Ry. Co. v. Lyon, 27 S. Ct. 145, 203 U. S. 465, 51 L. Ed. 276, affirming judgment 80 P. 337, 9 Ariz. 218; (C. C. A. Minn.) Metropolitan Life Ins. Co. v. Hartman, 183 F. 975, 106 C. C. A. 315; (C. C. A. N. Y.) Morse v. United States, 174 F. 539, 98 C. C. A. 321, 20 Ann. Cas. 938, certiorari denied 30 S. Ct. 406, 215 U. S. 605, 54 L. Ed. 346; (C. C. A. S. C.) Charles v. United States, 213 F. 707, 130 C. C. A. 221, Ann. Cas. 1914D, 1251.

Ark. Banks v. State, 202 S. W. 43, 133 Ark. 169; Smedley v. State, 197 S. W. 275, 130 Ark. 149; Pettus & Buford v. Kerr, 112 S. W. 886, 87 Ark. 396.

Colo. Clarke v. People, 171 P. 69, 64 Colo. 164; Denver N. W. & P. Ry. Co. v. Howe, 112 P. 779, 49 Colo. 256; Petterson v. Payne, 95 P. 301, 43 Colo. 184; Edwards v. People, 59 P. 56, 26 Colo. 539.

Conn. Stevens v. Smoker, 80 A. 788, 84 Conn. 569.

Fla. Johnson v. State, 50 So. 529, 58 Fla. 68; McDuffee v. State, 46 So. 721, 55 Fla. 125.

Ill. Burt v. Garden City Sand Co., 86 N. E. 1055, 237 Ill. 473, affirming judgment 141 Ill. App. 603; Rich v. Lence, 147 Ill. App. 110; City of Rock Island v. Larkin, 136 Ill. App. 579.

Ind. T. Harper v. United States, 104 S. W. 673, 7 Ind. T. 437, judgment reversed (C. C. A. Ind. T.) 170 F. 385, 95 C. C. A. 555.

Ky. Frye's Ex'r v. Bennett, 225 S. W. 499, 189 Ky. 546; Louisville Ry. Co. v. Knocke's Adm'r, 117 S. W. 271.

Miss. Hitt v. Terry, 46 So. 829, 92 Miss. 671.

Mo. Pearman v. Farmers' Mut. Fire Ins. Co. of Charlton County, 214 S. W. 292.

Neb. Turley v. State, 104 N. W. 934, 74 Neb. 471.

N. Y. People v. Jackson, 89 N. E. 924, 196 N. Y. 357; People v. Fitzgerald, 88 N. E. 27, 195 N. Y. 153, affirming judgment 114 N. Y. S. 476, 130 App. Div. 124.

N. C. Lovelace v. Graybeal, 93 S. E. 978, 174 N. C. 503; State v. Foster, 90 S. E. 785, 172 N. C. 960.

N. D. State v. Hoff, 150 N. W. 929, 29 N. D. 412.

Okl. McDonald v. Miller, 186 P. 957, 77 Okl. 97; Missouri, K. & T. Ry. Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A. L. R. 840; Middleton v. State, 183 P. 626, 16 Okl. Cr. 320.

S. C. State v. Davis, 31 S. E. 62, 53 S. C. 150, 69 Am. St. Rep. 845.

Tex. Bassett v. State, 204 S. W. 112, 83 Tex. Cr. R. 479; Tucker v. State (Cr. App.) 43 S. W. 106.

[22] **Cal.** Anderson v. Seropian, 81 P. 521, 147 Cal. 201.

Colo. Davis v. Shepherd, 72 P. 57, 31 Colo. 141; Ames v. Patridge, 58 P. 341, 13 Colo. App. 407; Hindry v. McPhee, 53 P. 389, 11 Colo. App. 398.

Fla. Montgomery v. Knox, 23 Fla. 595, 3 So. 211.

Ga. Standard Cotton Mills v. Cheatham, 54 S. E. 650, 125 Ga. 649; Atlanta Consol. St. Ry. Co. v. Jones, 42 S. E. 524, 116 Ga. 369; Central of Georgia Ry. Co. v. Grady, 39 S. E. 441, 113 Ga. 1045; Atlanta Ry. & Power Co. v. Walker, 38 S. E. 107, 112 Ga. 725.

Idaho. Breshears v. Callender, 131 P. 15, 23 Idaho, 348.

Ill. Mobile & O. R. Co. v. Vallowe, 73 N. E. 416, 214 Ill. 124; Catholic Order of Foresters v. Fitz, 54 N. E. 952, 181 Ill. 206, affirming judgment 81 Ill. App. 389; Chicago & E. I. Ry. Co. v. Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Toledo, P. & W. Ry. Co. v. Hammett, 115 Ill. App. 268, reversed 77 N. E. 72, 220 Ill. 9, 5 Ann. Cas. 73; Chicago & N. W. Ry. Co. v. Jamieson, 112 Ill. App.

some particular office, or to declare the law of some particular branch of the case, should have embodied in it every fact or ele-

69; Masonic Fraternity Temple Ass'n v. Collins, 110 Ill. App. 504, judgment affirmed 71 N. E. 396, 210 Ill. 482; O'Leary v. Zindt, 109 Ill. App. 309; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185, reversed 75 N. E. 900, 218 Ill. 327; Springfield Consol. Ry. Co. v. Pintenney, 101 Ill. App. 95, judgment affirmed 65 N. E. 442, 200 Ill. 9; McNulta v. Jenkins, 91 Ill. App. 309.

Ind. Indianapolis Traction & Terminal Co. v. Smith, 128 N. E. 38; Same v. Howard, Id. 35; Grand Trunk Western Ry. Co. v. Poole, 93 N. E. 26, 175 Ind. 567; Pittsburgh, C., C. & St. L. Ry. Co. v. Higgs, 76 N. E. 299, 165 Ind. 694, 41 L. R. A. (N. S.) 1081; Germania Fire Ins. Co. v. Pitcher, 64 N. E. 921, 160 Ind. 392, rehearing denied 66 N. E. 1003, 160 Ind. 392; Pittsburgh, C., C. & St. L. Ry. Co. v. Noftsker, 60 N. E. 372, 26 Ind. App. 614; Maxon v. Clark, 57 N. E. 260, 24 Ind. App. 620; Bowman v. Bowman, 55 N. E. 422, 153 Ind. 498; Hamilton v. Love, 53 N. E. 181, 152 Ind. 641, 71 Am. St. Rep. 384, reversing judgment on rehearing 43 N. E. 873; Mendenhall v. Stewart, 47 N. E. 943, 18 Ind. App. 262; Lofland v. Goben, 16 Ind. App. 67, 44 N. E. 553; White v. New York, C. & St. L. R. Co., 142 Ind. 648, 42 N. E. 456; Craig v. Frazier, 127 Ind. 286, 26 N. E. 842; Cline v. Lindsey, 110 Ind. 337, 11 N. E. 441; Western Union Tel. Co. v. Buskirk, 107 Ind. 549, 8 N. E. 557; Louisville, N. A. & C. Ry. Co. v. Grantham, 104 Ind. 353, 4 N. E. 49; Wright v. Nipple, 92 Ind. 310; Wallace v. Ransdell, 90 Ind. 173.

Iowa. Witt v. Town of Latimer, 117 N. W. 680, 139 Iowa, 273; Mitchell v. Pinckney, 104 N. W. 286, 127 Iowa, 696; Stomme v. Hanford Produce Co., 78 N. W. 841, 108 Iowa, 137; De Goey v. Van Wyk, 97 Iowa, 491, 66 N. W. 787; Tobey v. Burlington, C. R. & N. Ry. Co., 94 Iowa, 256, 62 N. W. 761, 33 L. R. A. 496; Albertson v. Keokuk & D. M. R. Co., 48 Iowa, 292.

Kan. Gillies v. Linscott, 157 P. 423, 98 Kan. 78; City of Atchison v. Acheson, 57 P. 248, 9 Kan. App. 33.

Ky. Lexington & Carter Mining Co. v. Welburn, 11 Ky. Law Rep. (abstract) 307.

Minn. Fruit Dispatch Co. v. Murray, 96 N. W. 83, 90 Minn. 286; Peterson v. Chicago, M. & St. P. Ry. Co., 38 Minn. 511, 39 N. W. 485.

Miss. Clisby v. Mobile & O. R. Co., 29 So. 913, 78 Miss. 937.

Mo. Royle Mining Co. v. Fidelity & Casualty Co. of New York, 142 S. W. 438, 161 Mo. App. 185; Brown v. Globe Printing Co., 112 S. W. 462, 213 Mo. 611, 127 Am. St. Rep. 627; Weston v. Lackawanna Min. Co., 105 Mo. App. 702, 78 S. W. 1044; Mathew v. Wabash R. Co., 78 S. W. 271, 115 Mo. App. 468, affirmed Wabash R. Co. v. Mathew, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Swafford v. Spratt, 67 S. W. 701, 93 Mo. App. 631; Senn v. Southern Ry. Co., 135 Mo. 512, 36 S. W. 367; Crawford v. Doppler, 120 Mo. 362, 25 S. W. 93; Spillane v. Missouri Pac. Ry. Co., 111 Mo. 555, 20 S. W. 293; Harrington v. City of Sedalia, 98 Mo. 583, 12 S. W. 342; First Nat. Bank v. Hatch, 98 Mo. 376, 11 S. W. 739; Schroeder v. Michel, 98 Mo. 43, 11 S. W. 314; Dougherty v. Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; Parton v. McAdoo, 68 Mo. 327; Meyers v. Chicago, R. I. & P. R. Co., 59 Mo. 223; Fullerton v. St. Louis, I. M. & S. Ry. Co., 84 Mo. App 498; Schaaf v. Fries, 77 Mo. App. 346; Pray v. Union Casualty & Surety Co., 73 Mo. App. 679; Benham v. Taylor, 66 Mo. App. 308; Basye v. Kansas City, P. & G. R. Co., 65 Mo. App. 468; Shaw v. Missouri & K. Dairy Co., 56 Mo. App. 521; Fletcher v. Milburn Mfg. Co., 35 Mo. App. 321; Safety Fund Nat. Bank v. Westlake, 21 Mo. App. 565.

Mont. Allen v. Bear Creek Coal Co., 115 P. 673, 43 Mont. 269.

Neb. City of South Omaha v. Burke, 94 N. W. 528, 3 Neb. (Unof.)

ment essential to sustain the cause of action or the prosecution,[23] and the fact that a charge states, independently of each other, rules which must be considered together in applying them, is not error, if the jury are not misled thereby.[24] The court may convey one element of a rule of law in one portion of its charge, disassociated from other portions, if the other elements are in fact presented to the jury as necessary to be found by them.[25] Thus it is not necessary that all exceptions to, or modifications of, a general rule should be stated in connection with such general rule.[26] It is sufficient if

314, affirming judgment 91 N. W. 562, 3 Neb. (Unof.) 309.

N. C. Crampton v. Ivie, 32 S. E. 968, 124 N. C. 591.

Ohio. Ohio & Indiana Torpedo Co. v. Fishburn, 56 N. E. 457, 61 Ohio St. 608, 76 Am. St. Rep. 437; Price v. Coblitz, 21 Ohio Cir. Ct. R. 732, 12 O. C. D. 34.

Okl. Grant v. Milam, 95 P. 424, 20 Okl. 672.

S. C. Humphries v. Union & Glenn Springs R. Co., 65 S. E. 1051, 84 S. C. 202; Lowrimore v. Palmer Mfg. Co., 38 S. E. 430, 60 S. C. 153.

S. D. Davis v. Holy Terror Min. Co., 107 N. W. 374, 20 S. D. 399; Hedlun v. Holy Terror Min. Co., 92 N. W. 31, 16 S. D. 261.

Tex. Texas Cent. R. Co. v. Powell, 86 S. W. 21, 38 Tex. Civ. App. 157; Galveston, H. & S. A. Ry. Co. v. Renz, 59 S. W. 280, 24 Tex. Civ. App. 335; Bomar v. Powers (Civ. App.) 50 S. W. 142.

Utah. Cromeenes v. San Pedro, L. A. & S. L. R. Co., 109 P. 10, 37 Utah, 475, Ann. Cas. 1912C. 307; McCornick v. Queen of Sheba Gold Min. & Mill. Co., 63 P. 820, 23 Utah, 71.

Va. City of Richmond v. Wood, 63 S. E. 449, 109 Va. 75.

Wis. Lathers v. Wyman, 76 Wis. 616, 45 N. W. 669.

Wyo. Wallace v. Skinner, 88 P. 221, 15 Wyo. 233.

[23] Judy v. Sterrett, 38 N. E. 633, 153 Ill. 94; Thrawley v. State, 55 N. E. 95, 153 Ind. 375.

[24] **Conn.** Stevens v. Kelley, 66 Conn. 570, 34 A. 502.

Ga. McCall v. State, 99 S. E. 471, 23 Ga. App. 770; Nail v. State, 54 S. E. 145, 125 Ga. 234; Beacham v. Kennedy, 53 S. E. 589, 125 Ga. 113; Howell v. State, 52 S. E. 649, 124 Ga. 693; Rawlins v. State, 52 S. E. 1, 124 Ga. 31, judgment affirmed 26 S. Ct. 560, 201 U. S. 638, 50 L. Ed. 899, 5 Ann. Cas. 783; Tucker v. Central of Georgia Ry. Co., 50 S. E. 128, 122 Ga. 387; Jenkins v. National Union, 45 S. E. 449, 118 Ga. 587; Anderson v. State, 43 S. E. 835, 117 Ga. 255; Hayes v. State, 40 S. E. 13, 114 Ga. 25; Tucker v. State, 39 S. E. 926, 114 Ga. 61; Lucas v. State, 36 S. E. 87, 110 Ga. 756.

Ill. Gustafson v. Peterson, 203 Ill. App. 242.

Ind. Harrod v. Bisson, 93 N. E. 1093, 48 Ind. App. 549.

Iowa. Deere v. Wolf, 77 Iowa, 115, 41 N. W. 588.

Mo. Norton v. Kramer, 79 S. W. 699, 180 Mo. 536.

Neb. Stull v. Stull, 96 N. W. 196, 1 Neb. (Unof.) 380, 389.

[25] Buchman v. Jeffery, 115 N. W. 372, 135 Wis. 448.

[26] Stratton v. Central City Horse Ry. Co., 95 Ill. 25; Kelley v. School Dist. No. 71 of King County, 173 P. 333, 102 Wash. 343; State v. Dodds, 46 S. E. 228, 54 W. Va. 289.

Contra, Culbertson v. McCullom, 1 Ky. Law Rep. (abstract) 267.

Stating only general rule. An instruction may state the general rule applicable to the case, leaving the opposite party to ask for a statement of any exceptions, limitations, or qualifications that may be deemed relevant in view of the proof. Terre Haute & I. Ry. Co. v. Williams, 69 Ill. App. 392, affirmed 50 N. E. 116, 172 Ill. 379, 64 Am. St. Rep. 44.

such exceptions or qualifications are contained in the charge, and there is nothing in the charge so obscure, absurd, or contradictory as to mislead or confuse the jury.[27]

Where an instruction as far as it goes states a correct proposition of law, but is defective in failing to qualify or explain the proposition it lays down in consonance with the facts of the case, such defect is cured by subsequent instructions containing the required qualifications or exceptions,[28] and where one instruction is aimed to be explanatory of another, the two should be read and considered together.[29]

Ordinarily the omission in an instruction, which does not direct a verdict, of some element it should contain, may be supplied

[27] **U. S.** (C. C. A. Ark.) Western Coal & Mining Co. v. Ingraham, 70 F. 219, 17 C. C. A. 71.

Cal. People v. Welch, 49 Cal. 174.

Ill. Schneider v. Manning, 121 Ill. 376, 12 N. E. 267; Lodge v. Gatz, 76 Ill. 272; Durham v. Goodwin, 54 Ill. 469; Van Buskirk v. Day, 32 Ill. 260.

Ind. Brown v. Anderson, 90 Ind. 93.

Md. Lurssen v. Lloyd, 76 Md. 360, 25 A. 294.

Minn. Simpson v. Krumdick, 28 Minn. 352, 10 N. W. 18; Gates v. Manny, 14 Minn. 21 (Gil. 13).

Miss. Gordon v. Sizer, 39 Miss. 805.

Mo. Underwood v. Metropolitan St. Ry. Co., 102 S. W. 1045, 125 Mo. App. 490; Gamache v. Piquignot, 17 Mo. 310; Ostner v. Lynn, 57 Mo. App. 187.

N. Y. Hickenbottom v. Delaware, L. & W. R. Co., 122 N. Y. 91, 25 N. E. 279.

Pa. Chambers v. Bedell, 2 Watts & S. 225, 37 Am. Dec. 508.

S. C. Lynn v. Thomson, 17 S. C. 129.

Wash. Hammock v. City of Tacoma, 87 P. 924, 44 Wash. 623.

[28] **U. S.** (C. C. A. Ark.) Choctaw, O. & G. R. Co. v. Tennessee, 116 F. 23, 53 C. C. A. 497, affirmed 24 S. Ct. 99, 191 U. S. 326, 48 L. Ed. 201; (C. C. A. Mo.) Chicago, R. I. & P. Ry. Co. v. Linney, 59 F. 45, 7 C. C. A. 656; (C. C. A. Ohio) Toledo, St. L. & W. R. Co. v. Kountz, 168 F. 832, 94 C. C. A. 244.

Cal. Boin v. Spreckels Sugar Co., 102 P. 937, 155 Cal. 612.

Fla. Pensacola Electric Co. v. Bissett, 52 So. 367, 59 Fla. 360; Atlantic Coast Line R. Co. v. Dees, 48 So. 28, 56 Fla. 127; Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400.

Ga. Bagwell v. Milam, 71 S. E. 684, 9 Ga. App. 315.

Ill. Van Cleef v. City of Chicago, 88 N. E. 815, 240 Ill. 318, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275; Cleveland, C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328, 36 N. E. 965; Lake Erie & W. R. Co. v. Morain, 140 Ill. 117, 29 N. E. 869, affirming 36 Ill. App. 632; Chicago, M. & St. P. Ry. Co. v. Halsey, 31 Ill. App. 601; Tomle v. Hampton, 28 Ill. App. 142, affirmed 129 Ill. 379, 21 N. E. 800.

Iowa. Roney v. City of Des Moines, 130 N. W. 396, 150 Iowa, 447; Knott v. Dubuque & S. C. Ry. Co., 84 Iowa, 462, 51 N. W. 57.

Mich. Brogetski v. Detroit United Ry., 131 N. W. 810, 166 Mich. 91.

Miss. Yazoo & M. V. R. Co. v. Kelly, 53 So. 779, 98 Miss. 367.

Mo. Neale v. McKinstry, 7 Mo. 128.

S. C. Dover v. Lockhart Mills, 68 S. E. 525, 86 S. C. 229; Lamb v. Southern Ry. Co., 67 S. E. 958, 86 S. C. 106, 138 Am. St. Rep. 1030.

Wash. Caldwell v. Northern Pac. Ry. Co., 113 P. 1099, 62 Wash. 420; Edwards v. Seattle, R. & S. Ry. Co., 113 P. 563, 62 Wash. 77.

[29] Lake Erie & W. R. Co. v. Douglas (Ind. App.) 125 N. E. 474.

by other instructions which fully cover the omitted element.[30] The omission of certain matters, however, when taken in connection with emphasis placed upon other matters may be of such a character as to be likely to mislead the jury, although such omission is supplied by other instructions, and in such a case it will constitute ground for reversal.[31]

Special charges given at the request of either party are to be construed with the rest of the charge under the above rule,[32] and it is not error to give an instruction at the request of a party submitting his theory of the case only, if the instructions given on behalf of his adversary cover every aspect of his case,[33] and the

[30] **Ark.** A. L. Clark Lumber Co. v. Johns, 135 S. W. 892, 98 Ark. 211.

Cal. Stein v. United Railroads of San Francisco, 113 P. 663, 159 Cal. 368; Winslow v. Glendale Light & Power Co., 107 P. 1020, 12 Cal. App. 530.

Ga. Southern Ry. Co. v. Dean, 57 S. E. 702, 128 Ga. 366.

Ill. Moore v. Aurora, E. & C. R. Co., 92 N. E. 573, 246 Ill. 56; Suehr v. Sanitary Dist. of Chicago, 90 N. E. 197, 242 Ill. 496; East St. Louis & S. Ry. Co. v. Zink, 82 N. E. 283, 229 Ill. 180; Illinois Cent. R. Co. v. Hopkins, 65 N. E. 656, 200 Ill. 122, affirming judgment 100 Ill. App. 594; Donk Bros. Coal & Coke Co. v. Peton, 61 N. E. 330, 192 Ill. 41, affirming judgment 95 Ill. App. 193; Chicago & A. R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381; Hackett v. Harmon, 155 Ill. App. 55; Dukeman v. Cleveland, C., C. & St. L. Ry. Co., 142 Ill. App. 622, judgment affirmed 86 N. E. 712, 237 Ill. 104; Southern Ry. Co. v. Cullen, 122 Ill. App. 293, judgment affirmed 77 N. E. 470, 221 Ill. 392; City of Highland Park v. Gerkin, 122 Ill. App. 149; Elgin, A. & S. Traction Co. v. Wilson, 120 Ill. App. 371, judgment affirmed 75 N. E. 436, 217 Ill. 47.

Ind. Chicago & E. R. Co. v. Kiracofe, 95 N. E. 1117, 48 Ind. App. 407; New v. Jackson, 95 N. E. 328, 50 Ind. App. 120; South Bend Brick Co. v. Goller, 93 N. E. 37, 46 Ind. App. 531; Pittsburgh, C., C. & St. L. Ry. Co. v. Wood, 84 N. E. 1009, 45 Ind. App. 1.

Ind. T. Waples-Painter Co. v. Bank of Commerce, 97 S. W. 1025, 6 Ind. T. 326.

Kan. Lillard v. Chicago, R. I. & P. Ry. Co., 98 P. 213, 79 Kan. 25.

Mich. Joslin v. Le Baron, 6 N. W. 214, 44 Mich. 160.

Mo. Asbill v. City of Joplin, 124 S. W. 22, 140 Mo. App. 259; Gibler v. Terminal R. Ass'n of St. Louis, 101 S. W. 37, 203 Mo. 208, 11 Ann. Cas. 1194; Deschner v. St. Louis & M. R. R. Co., 98 S. W. 737, 200 Mo. 310.

Neb. Cornelius v. City Water Co., 120 N. W. 944, 84 Neb. 130; In re Wilson's Estate, 111 N. W. 788, 78 Neb. 758.

S. C. Dempsey v. Western Union Telegraph Co., 58 S. E. 9, 77 S. C. 399.

Tex. Houston & T. C. R. Co. v. Mayfield, 124 S. W. 141, 58 Tex. Civ. App. 52; Texas & N. O. R. Co. v. Plummer, 122 S. W. 942, 57 Tex. Civ. App. 563; St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 108 S. W. 736, 49 Tex. Civ. App. 545; Chicago, R. I. & P. Ry. Co. v. Burns (Civ. App.) 104 S. W. 1081, affirmed 107 S. W. 49, 101 Tex. 329.

Va. Marbury v. Jones, 71 S. E. 1124, 112 Va. 389.

[31] Washington, B. & A. R. Co. v. State, 111 A. 164, 136 Md. 103.

[32] Galveston, H. & S. A. Ry. Co. v. Berry (Tex. Civ. App.) 105 S. W. 1019.

An improper qualification by the court of a requested charge is no ground of reversal, if the benefit of the rule of law claimed in such request is secured to the party making it by another instruction. Metcalf v. Little Rock St. Ry. Co. (Ark.) 13 S. W. 729; Lamar v. Williams, 39 Miss. 342.

[33] Meadows v. Pacific Mut. Life Ins.

jury are told that the instructions given are those of the court and must all be read together.[84]

§ 535. Specific instances of defects, omissions, or objectionable matters cured by other instructions

In many jurisdictions the fact that an instruction authorizing a recovery for negligence omits to require the jury to find that the injured person was not guilty of contributory negligence is not error, if the latter question is properly submitted in other instructions.[85] So error in instructions in negligence cases in failing to limit the liability of the defendant to the duty to use ordinary or reasonable care,[86] or in omitting the element of proximate cause,[87] may disappear when the other instructions are considered.

The above rule has been applied to objections to instructions upon contributory negligence,[88] to instructions bearing on the cred-

Co. of California, 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; State ex rel. Robertson v. Hope, 102 Mo. 410, 14 S. W. 985.

[84] City of Danville v. Thornton, 66 S. E. 839, 110 Va. 541.

[85] **Cal.** Stephenson v. Southern Pac. Co., 102 Cal. 143, 36 P. 407, affirming 102 Cal. 143, 34 P. 618.

Ind. Morgantown Mfg. Co. v. Hicks, 92 N. E. 199, 46 Ind. App. 623.

Iowa. Larkin v. Burlington, C. R. & N. Ry. Co., 85 Iowa, 492, 52 N. W. 480.

Minn. Holm v. Village of Carver, 55 Minn. 199, 56 N. W. 826.

Mo. Johnston v. St. Louis & S. F. R. Co., 130 S. W. 413, 150 Mo. App. 304; Shanahan v. St. Louis Transit Co., 83 S. W. 783, 109 Mo. App. 228; Hughes v. Chicago & A. R. Co., 127 Mo. 447, 30 S. W. 127; Dougherty v. Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251.

Neb. Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724.

Tex. Galveston, H. & S. A. Ry. Co. v. Grant, 124 S. W. 145, 58 Tex. Civ. App. 181; Shippers' Compress & Warehouse Co. v. Davidson, 80 S. W. 1032, 35 Tex. Civ. App. 558; Galveston, H. & S. A. Ry. Co. v. Matula, 79 Tex. 577, 15 S. W. 573.

Utah. Olson v. Oregon Short Line R. Co., 68 P. 148, 24 Utah, 460.

Wash. Morrison v. Seattle Electric Co., 115 P. 1076, 63 Wash. 531.

[86] **U. S.** (C. C. A. Mo.) Chicago, R. I. & P. Ry. Co. v. Linney, 59 F. 45, 7 C. C. A. 656.

Cal. Sappenfield v. Main St. & A. P. R. Co., 91 Cal. 48, 27 P. 590.

Ga. East Tennessee, V. & G. Ry. Co. v. Daniel, 91 Ga. 768, 18 S. E. 22.

Ill. City of Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748.

Ind. Pennsylvania Co. v. Ebaugh, 144 Ind. 687, 43 N. E. 936; Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430, 32 N. E. 85, affirming 132 Ind. 430, 31 N. E. 661.

Iowa. Brooke v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 504, 47 N. W. 74

Tex. Texas & P. Ry. Co. v. Nix (Civ. App.) 23 S. W. 328; Galveston, H. & S. A. Ry. Co. v. Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

[87] Cleveland, C., C. & St. L. Ry. Co. v. Monaghan, 140 Ill. 474, 30 N. E. 869, affirmed 41 Ill. App. 498; Spickelmeir v. Hartman (Ind. App.) 123 N. E. 232; Jones v. Chicago & A. R. Co., 28 Mo. App. 28; Holt v. School Dist. No. 71 of King County, 173 P. 335, 101 Wash. 442.

[88] Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2, 182 Cal. 93; Williams v. Mt. Vernon Car Mfg. Co., 211 Ill. App. 68; Rasten v. Calderwood, 175 N. W. 1007, 145 Minn. 493; Hulse v. St. Joseph Ry. Co. (Mo. App.) 214 S. W. 150; Bullock v. Yakima Valley Transp. Co., 184 P. 641, 108 Wash. 418.

ibility of witnesses,[39] to instructions on the burden of proof or amount of evidence required to find a fact in issue,[40] to instructions upon the measure of damages or the amount of recovery,[41]

[39] Griffin v. State, 216 S. W. 34, 141 Ark. 43; St. Louis Southwestern Ry. Co. v. Johnson, 59 Ark. 122, 26 S. W. 593; Morehouse v. Remson, 59 Conn. 392, 22 A. 427; Roberts v. Morrison, 75 Iowa, 321, 39 N. W. 519; State v. Keys, 53 Kan. 674, 37 P. 167.

Illustrations of errors not cured by other instructions. Error in instructing that where two witnesses directly contradict each other the evidence is balanced unless one is corroborated, was not rendered harmless by a subsequent instruction that two witnesses did not necessarily outweigh one, and that the jury should consider all the circumstances surrounding each witness in determining his credibility. Sickle v. Wolf, 91 Wis. 396, 64 N. W. 1028. An instruction that the jury should consider "the character of the witness, so far as you know it, as bearing upon the question whether a witness would be truthful and reliable, or not. My observation is that pretty good persons sometimes lie, and that pretty bad persons sometimes tell the truth"—is erroneous, and is not cured by another instruction that nothing is to be found "by conjecture," but that the verdict "must be based upon evidence," and facts inferable from the proofs. Johnson v. Superior Rapid Transit Ry. Co., 91 Wis. 233, 64 N. W. 753.

[40] **U. S.** Ætna Life Ins. Co. v. Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371.

Ala. Montgomery v. Crossthwait, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832.

Cal. Foley v. Hornung, 169 P. 705, 35 Cal. App. 304; Beckman v. McKay, 14 Cal. 250.

Conn. Appeal of City Bank of New Haven, 54 Conn. 269, 7 A. 548.

Ga. Postal Telegraph Cable Co. v. Douglass, 96 Ga. 816, 22 S. E. 930.

Ill. Holliday v. O'Gara Coal Co., 203 Ill. App. 89; Smiley v. Barnes, 196 Ill. App. 530; Hinchliff v. Robinson, 118 Ill. App. 450.

Neb. Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N. W. 503.

Illustrations of objections cured. A charge that, to sustain a plea of truth in justification of slanderous language, defendant must prove the plaintiff "actually" guilty, while standing alone, was objectionable in that the word "actually" placed too heavy a burden on defendant, yet when taken in connection with other charges, that it was only necessary to sustain the plea by a preponderance of the evidence, was not error. Gilstrap v. Leith, 102 S. E. 169, 24 Ga. App. 720. In an action for death in an accident to which there were no eyewitnesses, an instruction that the law "presumes" that deceased was exercising due care was not objectionable as shifting on defendant the burden of proof as to contributory negligence, where the court subsequently and repeatedly charged that the burden was at all times on plaintiff to prove that decedent exercised ordinary care, in view of the fact that the word "presumption" is frequently used as the equivalent and synonym of the word "inference." Anderson v. Chicago, R. I. & P. Ry. Co. (Iowa) 175 N. W. 583.

[41] **U. S.** Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 14 S. Ct. 579, 38 L. Ed. 422.

Ga. City of Atlanta v. Whitley, 101 S. E. 2, 24 Ga. App. 411.

Ill. McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476, affirming judgment 212 Ill. App. 664; Malott v. Crow, 90 Ill. App. 628.

Ind. Otter Creek Coal Co. v. Archer, 115 N. E. 952, 64 Ind. App. 381.

Iowa. Flanagan v. Baltimore & O. R. Co., 83 Iowa, 639, 50 N. W. 60; Davis v. Walter, 70 Iowa, 465, 30 N. W. 804.

Mich. Neely v. Detroit Sugar Co., 101 N. W. 664, 138 Mich. 469.

Mo. Wojciechowski v. Coryell (App.) 217 S. W. 638; Buck v. People's St. Ry. & Electric Light & Power Co., 108 Mo. 179, 18 S. W. 1090; Hulett v. Missouri, K. & T. Ry. Co., 80 Mo.

that an instruction does not confine the jury to the evidence in assessing the damages,[42] to instructions given in connection with the submission of special interrogatories,[43] to objections that instructions given are not applicable to the facts,[44] that the court misstated the evidence or the testimony of a witness,[45] that a mistake was made in giving a date,[46] to the use of the word "plaintiff," instead of "defendant," or vice versa,[47] that instructions are argumentative,[48] that they devolve upon the jury the duty of determining what the issues in the case are, or of deciding what the material allegations of the pleadings are,[49] that they refer the jury to the pleadings to determine their contents or the issue,[50] that they use inappropriate phrases or contain improper definitions or fail

App. 87; Price v. Barnard, 70 Mo. App. 175.

Or. Farmers' & Traders' Nat. Bank v. Woodell, 61 P. 837, 38 Or. 294, affirmed 65 P. 520, 38 Or. 294.

Use of words suggesting bare possibility instead of reasonable certainty. In an action for malpractice, an instruction on the question of reasonable certainty of future operations and suffering, while the use of the word "may" might give the jury the meaning of "bare possibility," instead of "reasonable certainty," yet where the instruction refers to such suffering as the jury "believes she will in the future endure," the word "may" was not likely to mislead, and must be considered as harmless, and not warranting reversal. Krinard v. Westerman, 216 S. W. 938, 279 Mo. 680.

[42] Indianapolis Traction & Terminal Co. v. Thornburg (Ind. App.) 125 N. E. 57; Terre Haute, I. & E. Traction Co. v. Stevenson (Ind.) 123 N. E. 785, rehearing denied 126 N. E. 3; Indianapolis Traction & Terminal Co. v. Beckman, 81 N. E. 82, 40 Ind. App. 100.

[43] McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Chopin v. Badger Paper Co., 83 Wis. 192, 53 N. W. 452.

[44] **U. S.** (C. C. A. Tex.) Texas & P. Ry. Co., v. Nolan, 62 F. 552, 11 C. C. A. 202.

Ark. McNeill v. Arnold, 22 Ark. 477.

Fla. Keech v. Enriquez, 28 Fla. 597, 10 So. 91.

Ill. North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958.

Ind. Evansville & I. R. Co. v. Darting, 6 Ind. App. 375, 33 N. E. 636.

Kan. Burns v. Clark, 185 P. 27, 105 Kan. 454.

Mo. Tillery v. Harvey (App.) 214 S. W. 246; Taylor v. Scherpe & Koken Architectural Iron Co., 133 Mo. 349, 34 S. W. 581.

Tex. Gulf, C. & S. F. Ry. Co. v. Kelly (Civ. App.) 34 S. W. 140.

Vt. Bragg v. Laraway, 65 Vt. 673, 27 A. 492.

[45] Foote v. Brown, 70 A. 699, 81 Conn. 218; Wally v. Clark, 106 A. 542, 263 Pa. 322; Stremme v. Dyer, 72 A. 274, 223 Pa. 7; Senft v. McIlvain, 43 Pa. Super. Ct. 518.

[46] Wilson v. Chicago Heights Terminal Transfer R. Co., 212 Ill. App. 271.

[47] Central of Georgia Ry. Co. v. Hartley (Ga. App.) 103 S. E. 259; Manes v. St. Louis, San Francisco Ry. Co., 220 S. W. 14, 205 Mo. App. 300.

[48] McCormick v. Parriott, 80 P. 1044, 33 Colo. 382.

[49] Stringham v. Parker, 159 Ill. 304, 42 N. E. 794, affirming Stringam v. Same, 56 Ill. App. 36; Boynton v. Chicago City Ry. Co., 155 Ill. App. 448; Robertson v. Monroe, 7 Ind. App. 470, 33 N. E. 1002; Hatfield v. Chicago, R. I. & P. Ry. Co., 61 Iowa, 434, 16 N. W. 336.

[50] Probert v. Anderson, 77 Iowa, 60, 41 N. W. 574; Southern Ry. Co. v. Ganong, 55 So. 355, 99 Miss. 540; Missouri, K. & T. Ry. Co. of Texas v. Aycock (Tex. Civ. App.) 135 S. W. 198.

to define certain terms,[51] and that they apparently leave to the jury a question of law.[52]

In criminal cases the above rule has been applied to objections to sufficiency of instructions on the elements of the offense charged,[53] on the question of the intent of the defendant,[54] on self-defense,[55] on question of defense of insanity or intoxication,[56] to instructions on the issue of the defense of alibi,[57] to instructions criticized as suggesting the interest of defendant on the question of his credibility,[58] to instructions on accomplice testimony,[59] to instructions on inferences arising from flight and concealment,[60] to instructions bearing on the burden of proof,[61] to instructions on the right to convict on circumstantial evidence,[62] on the character

[51] **U. S.** (C. C. A. N. Y.) Texas & P. Ry. Co. v. Coutourie, 135 F. 465, 68 C. C. A. 177.

Colo. Doherty v. Morris, 17 Colo. 105, 28 P. 85.

Ga. Holland v. Durham Coal & Coke Co., 63 S. E. 290, 131 Ga. 715.

Iowa. Collier v. McClintic-Marshall Const. Co., 138 N. W. 522, 157 Iowa, 244; Webber v. Sullivan, 58 Iowa, 260, 12 N. W. 319.

Mich. Smith v. Detroit United Ry., 119 N. W. 640, 155 Mich. 466.

Minn. Witaker v. Chicago, St. P., M. & O. Ry. Co., 131 N. W. 1061, 115 Minn. 140.

Mo. Wamsganz v. Blanke-Wenneker Candy Co. (App.) 216 S. W. 1025; Bond v. Williams (Sup.) 214 S. W. 202; Muehlhausen v. St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Waller v. Missouri, K. & T. Ry. Co., 59 Mo. App. 410.

Tex. Magnolia Motor Sales Corp. v. Chaffee (Civ. App.) 192 S. W. 562; Friedrich v. Geisler (Civ. App.) 141 S. W. 1079; Fordyce v. Chancy, 2 Tex. Civ. App. 24, 21 S. W. 181.

Utah. Downey v. Gemini Min. Co., 68 P. 414, 24 Utah, 431, 91 Am. St. Rep. 798.

[52] Seaboard Air Line Ry. v. Scarborough, 42 So. 706, 52 Fla. 425.

[53] Ayers v. State, 178 P. 782, 20 Ariz. 189; Zinn v. State, 205 S. W. 704, 135 Ark. 342; People v. Wademan, 175 P. 791, 38 Cal. App. 116.

[54] People v. McKeighan, 171 N. W. 500, 205 Mich. 367; State v. Reagan, 217 S. W. 83, 280 Mo. 57.

[55] **Ark.** Mallory v. State, 217 S. W. 482, 141 Ark. 496; Hines v. State, 215 S. W. 735, 140 Ark. 13; Branscum v. State, 203 S. W. 13, 134 Ark. 66.

Cal. People v. Fowler, 174 P. 892, 178 Cal. 657.

Ga. White v. State, 94 S. E. 222, 147 Ga. 377; Swilling v. State, 90 S. E. 78, 18 Ga. App. 618; Cox v. State, 88 S. E. 214, 17 Ga. App. 727.

Ky. Copley v. Commonwealth, 211 S. W. 558, 184 Ky. 185.

S. C. State v. Brown, 101 S. E. 847, 113 S. C. 513; State v. Gandy, 101 S. E. 644, 113 S. C. 147.

Tex. Anderson v. State, 217 S. W. 390, 86 Tex. Cr. R. 207; Swilley v. State, 166 S. W. 733, 73 Tex. Cr. R. 619; Young v. State, 135 S. W. 127, 61 Tex. Cr. R. 303.

[56] Brown v. State, 96 S. E. 435, 148 Ga. 264.

[57] McDonald v. State, 94 S. E. 262, 21 Ga. App. 125; Horton v. State, 93 S. E. 1012, 21 Ga. App. 120.

[58] Murphy v. State, 80 So. 636, 119 Miss. 220.

[59] Lockhead v. State, 213 S. W. 653, 85 Tex. Cr. R. 459.

[60] State v. Ching Lem, 176 P. 590, 91 Or. 611.

[61] State v. Tachin, 108 A. 318, 93 N. J. Law, 485, affirming judgment 106 A. 145, 92 N. J. Law, 269; Lagrone v. State, 209 S. W. 411, 84 Tex. Cr. R. 609.

[62] State v. Arnett (Mo.) 210 S. W. 82.

of the defendant,[63] and on the doctrine of reasonable doubt,[64] to

[63] Commonwealth v. Tenbroeck, 108 A. 635, 265 Pa. 251; Commonwealth v. Stoner, 108 A. 624, 265 Pa. 139.

Illustrations of instructions held not erroneous. Where the court correctly and properly charges as to the consideration to be given evidence of good character, it cannot be convicted of error in further charging as follows: "This does not mean that because a man has behaved well in a certain particular heretofore, and has there and then ceased to behave well and has in fact committed the crime charged, it does not mean that, if he is guilty, he shall be acquitted or have any benefit of the fact that he has heretofore behaved well, but it does mean that in determining whether you are satisfied beyond a reasonable doubt that he is guilty, that he did commit the act, you shall give him the benefit of a full and fair consideration of the evidence of good reputation in connection with all the other evidence in the case." Commonwealth v. Stoner, 70 Pa. Super. Ct. 365. Where the trial judge fully and accurately instructs as to the effect of good character as a defense, it is not error to add, "but where the jury is satisfied beyond a reasonable doubt under all the evidence that defendant is guilty, evidence of previous good character is not to overcome the conclusion which follows from that view of the case." Commonwealth v. Tenbroeck, 108 A. 635, 265 Pa. 251.

[64] **Ala.** Brown v. State, 74 So. 733, 15 Ala. App. 611.

Cal. People v. Hatch, 125 P. 907, 163 Cal. 368; People v. Corey, 97 P. 907, 8 Cal. App. 720; People v. Nunley, 75 P. 676, 142 Cal. 105; Id., 76 P. 45, 142 Cal. 441; People v. Gilmore, 53 P. 806, 121 Cal. xvii; People v. Ross, 46 P. 1059, 115 Cal. 233; People v. Core, 59 Cal. 390.

Conn. State v. Bailey, 65 A. 951, 79 Conn. 589.

Ga. Langston v. State, 97 S. E. 444, 23 Ga. App. 82; Harrison v. State, 92 S. E. 970, 20 Ga. App. 157; Brooks v. State, 90 S. E. 971, 19 Ga. App. 45; Ponder v. State, 90 S. E. 376, 18 Ga. App. 727; Helms v. State, 76 S. E. 353, 138 Ga. 826; Dickens v. State, 73 S. E. 826, 137 Ga. 523.

Ind. Hinshaw v. State, 124 N. E. 458, 188 Ind. 447; Sherer v. State, 121 N. E. 369, 188 Ind. 14.

Iowa. State v. Smith, 99 N. W. 579; State v. Phillips, 92 N. W. 876, 118 Iowa, 660.

Kan. State v. Adams, 20 Kan. 311.

Ky. Daniels v. Commonwealth, 205 S. W. 402, 181 Ky. 392; Long v. Commonwealth, 197 S. W. 843, 177 Ky. 391; O'Day v. Commonwealth, 99 S. W. 937, 30 Ky. Law Rep. 848.

Mich. People v. Williams, 175 N. W. 187, 208 Mich. 586.

Mo. State v. Miles, 98 S. W. 25, 199 Mo. 530.

N. J. State v. Kuehnle, 88 A. 1085, 85 N. J. Law, 220, Ann. Cas. 1916A, 69, affirming judgment 85 A. 1014, 84 N. J. Law, 164.

N. M. Territory v. Caldwell, 98 P. 167, 14 N. M. 535; Faulkner v. Territory, 6 N. M. 464, 30 P. 905.

N. C. State v. Fain, 97 S. E. 716, 177 N. C. 120; State v. Martin, 92 S. E. 597, 173 N. C. 808.

Or. State v. Morris, 163 P. 567, 83 Or. 429.

Pa. Commonwealth v. Rusic, 79 A. 140, 229 Pa. 587.

Tex. Graham v. State, 163 S. W. 726, 73 Tex. Cr. R. 28; Harrolson v. State, 113 S. W. 544, 54 Tex. Cr. R. 452; Stephens v. State, 103 S. W. 904, 51 Tex. Cr. R. 406.

Utah. State v. Vacos, 120 P. 497, 40 Utah, 169.

Wash. State v. Lance, 162 P. 574, 94 Wash. 484; State v. Shea, 139 P. 203, 78 Wash. 342; State v. Wappenstein, 121 P. 989, 67 Wash. 502.

Wis. Till v. State, 111 N. W. 1109, 132 Wis. 242.

Illustrations of defects cured. In a prosecution of a physician for soliciting patients by means of a drummer or solicitor, an instruction that it was not necessary to prove accused guilty by the testimony of witnesses who heard him employ a drummer or solicitor to solicit patients for him, but that such guilt might be established by proof of facts and cir-

instructions criticized as not confining the jury to the evidence,[65]

cumstances from which his guilt might reasonably and satisfactorily be implied beyond a reasonable doubt, while not in apt language, was not misleading when taken in connection with instructions that accused was presumed to be innocent, that the presumption obtained through the trial, and that he was not required to produce evidence of his innocence until every allegation material to the crime charged had been proved beyond a reasonable doubt, and that, before he could be convicted on circumstantial evidence, the testimony should be so strong as to convince the jury of his guilt to such an extent as to exclude every other reasonable hypothesis, and that, if the evidence in any essential point admitted of reasonable doubt, accused should be acquitted. Burrow v. City of Hot Springs, 108 S. W. 823, 85 Ark. 396. An instruction that the term "reasonable doubt" does not mean a "mere possible doubt, a conjectural doubt," nor "a doubt which is merely capricious," when read in connection with a preceding instruction that a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that defendant committed the offense, was entirely correct. People v. Botkin, 98 P. 861, 9 Cal. App. 244. Where the court had charged that the law presumed every man to be innocent until his guilt was established beyond all doubt, which presumption attaches at every stage of the case and to every fact essential to a conviction, and, again, that if the jury entertained any reasonable doubt on any single fact or element necessary to constitute the crime it was their duty to give the defendant the benefit of such doubt, and acquit, defendant was not entitled to object to a further instruction that if the jury entertained a reasonable doubt on any single material fact, which was inconsistent with defendant's guilt, arising from the evidence in the case, it was their duty to acquit, on the ground that such instruction dealt only with facts inconsistent with guilt. People v. Waysman, 81 P. 1087, 1 Cal. App. 246. Where the court charged that the law presumes every man innocent until his guilt is established to a moral certainty, and beyond all reasonable doubt, and that such presumption attaches to every fact essential to a conviction, an instruction that, while every fact essential to prove defendant's guilt to a moral certainty must be fully proven, the law permits this to be done by circumstantial evidence, and where the evidence is circumstantial, but proves every fact essential to sustain the hypothesis of guilt, and to exclude the hypothesis of innocence, and is inconsistent with any other rational conclusion than that of guilt, it is the jury's duty to convict, was not erroneous. People v. Cain, 93 P. 1037, 7 Cal. App. 163. An instruction that an alibi meant that a defendant was elsewhere at the time of the crime, and that if there was a reasonable doubt as to whether the two defendants were present the jury should acquit them, but, if one of defendants was present and the other not, the defendant not present should be acquitted and the one present should be convicted, was not erroneous for failing to state the law of reasonable doubt, burden of proof, and the various ingredients of the offense, stated in other instructions, the court having charged that no one instruction contained all the law, but that the instructions taken together should govern the jury. Van Wyk v. People, 99 P. 1009, 45 Colo. 1. Where, in a trial for homicide, the question of reasonable doubt was fully presented to the jury, an instruction that, if defendant inflicted the wound on deceased which caused, or contributed to, his death, the state would not be required to show that neither the deceased, nor any one in attendance on him, was guilty of negligence in the care of the wound was not objection-

[65] People v. Silver, 122 N. E. 115, 286 Ill. 496.

to the omission of particular words, such as "as charged in the

able as failing to tell the jury that they must find from the testimony, beyond a reasonable doubt, that defendant inflicted the wound. State v. Baker, 121 N. W. 1028, 143 Iowa, 224. A conviction of larceny will not be reversed because the court, in referring to defendant's story, instructed the jury to consider from all the facts whether the defense was probably true, where they were also told that defendant is not required to prove his innocence, and that if, after consideration of all the evidence, there was any reasonable doubt of guilt, he must be acquitted. State v. Wolfley, 89 P. 1046, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412, rehearing denied 93 P. 337, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412. The jury having been instructed that, if on the whole case they had a reasonable doubt of defendant's guilt, they should find him not guilty, they could not find him guilty unless they believed the facts therein set forth beyond a reasonable doubt under an instruction that if at the time defendant killed decedent he believed, and had reasonable grounds to believe, that he was in danger of death or great bodily harm, and that it was necessary to kill decedent, then defendant was not guilty on the ground of self-defense, but if the jury believed beyond a reasonable doubt that defendant when not in danger began the difficulty, or if the combat was voluntarily engaged in by both, then in each event defendant could not be acquitted. Kennedy v. Commonwealth, 109 S. W. 313, 33 Ky. Law Rep. 83. A charge that suspicious circumstances may come to the point where the jury is satisfied of the existence of a fact, and it may be they would go so far as to satisfy the jury beyond a reasonable doubt of some of the facts claimed to have been proved by such evidence, is not erroneous, particularly where taken with other parts of the charge stating that to prove the existence of a fact by circumstances they must be such as will lead the jury to but one conclusion; that is, proof of the fact beyond a reasonable doubt. State v. Ready, 72 A. 445, 77 N. J. Law, 329, judgment reversed 75 A. 564, 78 N. J. Law, 599, 28 L. R. A. (N. S.) 240. An instruction that, when the plea of self-defense is relied on, it must be proved by a preponderance of evidence, is not erroneous, because it was not added that defendant was entitled to every reasonable doubt, where such instruction is afterwards given. State v. Way, 56 S. E. 653, 76 S. C. 91. Where, in a prosecution for homicide, where the trial court repeatedly charged that defendant must show by the weight of the evidence that he acted in self-defense, and that, if there was a doubt as to the preponderance of the evidence on that issue, it should be resolved in favor of defendant, and in one part of the instruction charged that "the law holds one who admits the killing of another to a very strict account, and it requires of him very satisfactory evidence that it was necessary, that is, apparently necessary," it was held that the language could only be understood to mean that accused must show that amount of evidence which would overbalance the state's showing that it was not self-defense, or raise a doubt in accused's favor, and that the instruction was not erroneous. State v. Hibler, 60 S. E. 438, 79 S. C. 170. An instruction that if the jury believed beyond reasonable doubt that accused intentionally and unlawfully killed decedent, and found that the facts did not establish express malice beyond reasonable doubt, and that the facts established beyond reasonable doubt that the homicide was not of the grade of manslaughter and was not justified on the ground of self-defense, as manslaughter and self-defense were thereinafter defined, then the facts did not tend to mitigate or justify the act, and there was nothing to reduce the killing below murder, "as these expressions are used in the above charge on murder in the second degree, and you may find implied malice and that the offense is murder in the second degree," was not erroneous, as infringing the doctrine of reasonable doubt, when con-

indictment,"[66] to the omission of the word "express" before "malice,"[67] to the omission to define "adequate cause,"[68] to the failure to define "heat of passion,"[69] and to the cure of an improper reference to the indictment.[70]

An error in a charge for the state on a particular matter, which is merely calculated to mislead or confuse the jury, is cured by full instructions on the subject given for the defendant.[71] It is not necessary for each instruction in a series given in a homicide case to contain the whole law of the case, or to call the attention of the jury to all the contentions of the respective parties; but it is sufficient if the instructions, considered as a whole, fully and fairly announce the rules of law applicable to the prosecution and the defense,[72] and an instruction, misleading as charging that the plea of insanity must be proven beyond a reasonable doubt, is cured by a further instruction that, if the jury have a reasonable doubt as to any fact necessary to constitute the guilt of defendant, they must acquit.[73]

§ 536. Objection that instructions invade province of jury

In determining whether instructions trench upon the province of the jury by commenting upon the evidence, or expressing an opinion upon the weight thereof, or impairing the right of the jury to determine the credibility of the witnesses,[74] or by the assump-

sidered with other instructions distinguishing murder in the first and second degrees, defining implied malice and manslaughter, and giving accused the benefit of any doubt as to the grade of the offense committed. Dobbs v. State, 113 S. W. 923, 54 Tex. Cr. R. 550. Where the court charged that if accused killed deceased, but at the time or prior thereto, deceased had said or done anything which aroused accused's anger, etc., so as to render his mind incapable of cool reflection when he killed deceased, the jury should find him guilty of manslaughter, but in another charge stated that if they had a reasonable doubt as to whether accused was guilty of first or second degree murder, they should acquit him of the higher offense, and if they believed that accused was guilty of some grade of culpable homicide, but had a reasonable doubt whether it was murder or manslaughter, they should only find him guilty of the latter offense, it was held that the charge as a whole was correct, and was not erroneous because the first part of it did not include the element of reasonable doubt. Mitchell v. State, 114 S. W. 830, 55 Tex. Cr. R. 62.

[66] Uzzell v. People, 173 Ill. App. 257.

[67] Johnson v. State, 138 S. W. 1021, 63 Tex. Cr. R. 50.

[68] Hendricks v. State, 154 S. W. 1005, 69 Tex. Cr. R. 209.

[69] State v. Fox, 207 S. W. 779, 276 Mo. 378.

[70] State v. McLaughlin, 50 S. W. 315, 149 Mo. 19.

[71] Kennard v. State, 28 So. 858, 42 Fla. 581; State v. Steffens, 89 N. W. 974, 116 Iowa, 227; State v. Lackey, 82 P. 527, 72 Kan. 95; Rodgers v. State (Miss.) 21 So. 130.

[72] People v. Strause, 125 N. E. 339, 290 Ill. 259.

[73] Smith v. Commonwealth, 17 S. W. 868, 13 Ky. Law Rep. 612.

[74] U. S. (C. C. A. Ohio) Shea v.

tion of disputed facts,[75] the general rule is that the instructions should be considered as a whole, and that any merely misleading tendencies of one instruction in this regard may be cured by other instructions.

If, however, an instruction clearly and unequivocally invades the province of the jury with respect to any matters of fact, the rule supported by the weight of authority is that such an erroneous instruction cannot be cured by other instructions submitting such questions of fact to the determination of the jury,[76] or by

United States, 251 F. 440, 163 C. C. A. 458, writ of certiorari denied 39 S. Ct. 132, 248 U. S. 581, 63 L. Ed. 431.

Ark. Camp v. State, 215 S. W. 170, 144 Ark. 641.

Cal. People v. Haney (App.) 189 P. 338; People v. Gibson, 178 P. 388, 39 Cal. App. 202.

Ga. Towns v. State, 101 S. E. 678, 149 Ga. 613; Washington v. State, 100 S. E. 31, 24 Ga. App. 65; Scoggins v. State, 98 S. E. 240, 23 Ga. App. 366.

Mich. Labarge v. Pere Marquette R. Co., 95 N. W. 1073, 134 Mich. 139; Henry v. Henry, 80 N. W. 800, 122 Mich. 6; Whelpley v. Stoughton, 78 N. W. 137, 119 Mich. 314.

Mo. Rice v. Jefferson City Bridge & Transit Co. (Sup.) 216 S. W. 746.

N. C. State v. Chambers, 104 S. E. 670, 180 N. C. 705; Neal v. Yates, 104 S. E. 537, 180 N. C. 266; Cochran v. Smith, 88 S. E. 499, 171 N. C. 369.

S. C. Galluchat v. Atlantic Coast Line R. Co., 93 S. E. 241, 108 S. C. 51; Williams v. Greenville, S. & A. R. Co., 88 S. E. 131, 103 S. C. 321.

Wis. Twentieth Century Co. v. Quilling, 117 N. W. 1007, 136 Wis. 481.

[75] **U. S.** Coffin v. United States, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109.

Ala. Birmingham Ry., Light & Power Co. v. Moore, 50 So. 115, 163 Ala. 43.

Ark. Bowden v. Dennis, 217 S. W. 798, 144 Ark. 642; Burke Const. Co. v. St. Louis & S. F. Ry. Co., 214 S. W. 13, 139 Ark. 199; Louisiana & A. Ry. Co. v. Anderson, 213 S. W. 753, 139 Ark. 349.

Colo. Pickett v. Handy, 48 P. 820, 9 Colo. App. 357.

Conn. State v. Perretta, 105 A. 690, 93 Conn. 328.

Ga. City of Atlanta v. Young, 93 Ga. 265, 20 S. E. 317.

Ill. East St. Louis Connecting Ry. Co. v. Enright, 152 Ill. 246, 38 N. E. 553; Cleveland, C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328, 36 N. E. 965; Small v. Roberts, 43 Ill. App. 577.

Ind. Kelley v. Kelley, 8 Ind. App. 606, 34 N. E. 1009; Evansville & T. H. R. Co. v. Talbot, 131 Ind. 221, 29 N. E. 1134; Bishop v. State, 83 Ind. 67.

Ky. Kentucky Cent. R. Co. v. Musselman, 14 Ky. Law Rep. (abstract) 893.

Mich. Pierce v. C. H. Bidwell Thresher Co., 122 N. W. 628, 158 Mich. 356; Rouse v. Michigan United Rys. Co., 122 N. W. 532, 158 Mich. 109.

Minn. Egan v. Faendel, 19 Minn. 231 (Gil. 191).

Mo. Sparks v. Harvey (App.) 214 S. W. 249; La Riviere v. La Riviere, 97 Mo. 80, 10 S. W. 840; Ruth v. Chicago, R. I. & P. Ry. Co., 70 Mo. App. 190.

N. D. Watson v. Nelson, 172 N. W. 823.

Pa. Irvin v. Kutruff, 152 Pa. 609, 25 A. 796, 31 Wkly. Notes Cas. 485.

Tex. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 129 S. W. 1159; Missouri, K. & T. Ry. Co. of Texas v. Hood, 120 S. W. 236, 55 Tex. Civ. App. 636.

Wash. State v. Vane, 178 P. 456, 105 Wash. 421.

[76] People v. Harvey, 122 N. E. 138, 286 Ill. 593; Rouden v. Heisler's Estate (Mo. App.) 219 S. W. 691; State v. Herbert, 105 A. 796, 92 N. J. Law,

anything short of an express withdrawal of the objectionable instruction.[77]

C. Conflicting Instructions and Cure of Positive Error in Instructions by Giving Other Instructions

§ 537. General rule

While the instructions must be considered as a series, and may supplement each other, each one must state the law correctly as far as it goes, and there should be such harmony between them that the jury will not be misled;[78] and where instructions are in irreconcilable conflict, or they are so conflicting as to confuse or mislead the jury, the rule requiring them to be read together has no application.[79]

An instruction stating the law incorrectly is seldom remedied by another correct instruction,[80] and the general rule is that an

341; G. W. McNear, Inc., v. American & British Mfg. Co., 107 A. 242, 42 R. I. 302.

Contra, Harvey v. Epes, 12 Grat. (Va.) 153.

See. also, ante, § 31, notes 46. 47.

Cases in which assumption of disputed facts held not to have been cured. Where the evidence is conflicting, and the balance doubtful, an instruction, erroneously assuming a fact in issue, is not cured by other instructions which assume that the question is still open. Illinois Cent. R. Co. v. Sanders, 58 Ill. App. 117. Where instructions assumed that an alleged settlement, which was the question at issue, was not made, other instructions given, stating, "If the settlement had been made," did not cure the error. Bressler v. Schwertferger, 15 Ill. App. 294. In an action by an employé against a railroad company for injuries alleged to have been sustained, in boarding his train, by reason of a pile of cinders negligently allowed to accumulate near the track, an instruction that, "before plaintiff can recover, it must be shown that the negligence of" defendants "concerning the pile of cinders, as alleged, involved him in extra risk, and thereby caused his injuries," is erroneous, because it assumes as a fact that the accumulation of the cinders was negligence, while it is not made so by statute; and the error is not cured by a subsequent instruction, submitting the question to the jury, along with other questions of fact, in such a manner as not to correct the error. Campbell v. Ellsworth (Tex. Sup.) 20 S. W. 120.

[77] Wimberly v. State, 77 S. E. 879, 12 Ga. App. 540.

[78] Funston v. Hoffman, 83 N. E. 917, 232 Ill. 360.

[79] **Ark.** Southern Anthracite Coal Co. v. Bowen, 124 S. W. 1048, 93 Ark. 140.

Cal. Howard v. Worthington (App.) 195 P. 709.

Idaho. Portneuf-Marsh Valley Irr. Co. v. Portneuf Irrigating Co., 114 P. 19, 19 Idaho, 483.

Ill. Baldwin v. Killian, 63 Ill. 550.

Ky. Lexington & E. Ry. Co. v. Fields, 153 S. W. 43, 152 Ky. 19.

Tex. St. Louis Southwestern Ry. Co. of Texas v. Green, 138 S. W. 241.

[80] **Ark.** Doyle & Booth v. Kavanaugh, 112 S. W. 889, 87 Ark. 364.

Cal. People v. Neetens (App.) 184 P. 27; Fogarty v. Southern Pac. Co., 91 P. 650, 151 Cal. 785.

D. C. Baltimore & O. R. Co. v. Morgan, 35 App. D. C. 195.

Ill. Ratner v. Chicago City Ry. Co., 84 N. E. 201, 233 Ill. 169, reversing judgment Chicago City Ry. Co. v.

unambiguous and affirmatively erroneous instruction on a material

Ratner, 133 Ill. App. 628; Sloan v. Cleveland, C., C. & St. L. Ry. Co., 140 Ill. App. 31.

Ind. Chicago & E. R. Co. v. Fretz, 90 N. E. 76, 173 Ind. 519.

Ind. T. Gulf, C. & S. F. R. Co. v. Warlick, 1 Ind. T. 10, 35 S. W. 235.

Iowa. Latta v. Illinois Cent. R. Co., 130 N. W. 1059, 151 Iowa, 244; Parsons v. United States Express Co., 123 N. W. 776, 144 Iowa, 745, 25 L. R. A. (N. S.) 842.

Ky. Burton's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 113 S. W. 442.

Md. Seaboard Air Line Ry. Co. v. Phillips, 70 A. 232, 108 Md. 285; Rosenkovitz v. United Rys. & Electric Co. of Baltimore City, 70 A. 108, 108 Md. 306.

Miss. Mahaffey Co. v. Russell & Butler, 54 So. 945, 100 Miss. 122, overruling suggestion 54 So. 807, 100 Miss. 122.

Mo. Stumpf v. United Rys. Co. of St. Louis (App.) 227 S. W. 852; McGee v. St. Joseph Ry., Light, Heat & Power Co., 133 S. W. 1194, 153 Mo. App. 492; Kirkpatrick v. Metropolitan St. Ry. Co., 109 S. W. 682, 211 Mo. 68, reversing judgment 107 S. W. 1025, 129 Mo. App. 524; Glover v. Atchison, T. & S. F. Ry. Co., 108 S. W. 105, 129 Mo. App. 563; Welch v. Hannibal & St. J. Ry. Co., 20 Mo. App. 477.

Neb. McPherson v. Wiswell, 19 Neb. 117, 26 N. W. 916.

N. H. Gerry v. Kennett, 78 A. 649, 75 N. H. 564.

N. J. State v. Tachin, 108 A. 318, 93 N. J. Law, 485, affirming judgment 106 A. 145, 92 N. J. Law, 269.

N. Y. Goodwin v. Burke, 57 Hun, 592, 10 N. Y. S. 628.

Or. Dalton v. Kelsey, 114 P. 464, 58 Or. 244.

Pa. Arthurs v. Wilson, 40 Pa. Super. Ct. 604.

S. C. Scarborough v. Woodley, 62 S. E. 405, 81 S. C. 329.

Tex. Chicago, R. I. & G. Ry. Co. v. Forrester (Civ. App.) 137 S. W. 162.

Va. American Locomotive Co. v. Whitlock, 63 S. E. 991, 109 Va. 238.

Wash. Rosin v. Danaher Lumber Co., 115 P. 833, 63 Wash. 430, 40 L. R. A. (N. S.) 913.

W. Va. State v. Ringer, 100 S. E. 413, 84 W. Va. 546; Cobb v. Dunlevie, 60 S. E. 384, 63 W. Va. 398.

Wis. Carle v. Nelson, 130 N. W. 467, 145 Wis. 593; Driscoll v. Allis-Chalmers Co., 129 N. W. 401, 144 Wis. 451; Guinard v. Knapp, Stout & Co. Company, 90 Wis. 123, 62 N. W. 625, 48 Am. St. Rep. 901.

Illustrations of errors not cured by other instructions. Error of an instruction in putting on defendant the burden of proof, before plaintiff had made out a prima facie case of negligence, is not cured by an instruction that, if certain facts were found, defendant was not liable. Trotter v. St. Louis & Suburban Ry. Co., 99 S. W. 508, 122 Mo. App. 405. In an action by architects for compensation, an erroneous instruction given at the request of plaintiffs that plaintiffs were entitled to recover if they prepared the plans and specifications for defendant, unless it was "distinctly understood and agreed by the plaintiffs" that they should receive no compensation if the cost of the building proved to be more than their estimate, was not cured by an instruction given at the request of defendant that if plaintiffs undertook to prepare plans and specifications for the building to cost not over a certain sum, and that the lowest bid received was for a sum greatly in excess of the estimate, the jury must find for defendant, since the instructions were contradictory, and it could not be said which instruction the jury observed. Williar v. Nagle, 71 A. 427, 109 Md. 75, 16 Ann. Cas. 928. An instruction that a carrier is required to provide the safest means practicable, the safest means known, in assisting alighting passengers, is not cured by a subsequent instruction that if a carrier failed to provide a safe means of alighting from a train, and plaintiff was injured thereby, to find for plaintiff. Texas & P. Ry. Co. v. Beezley, 120 S. W. 1136, 56 Tex. Civ. App. 245. In an action for carrying a passenger beyond his desti-

matter is not cured by a correct instruction on the same point,[81]

nation, an erroneous instruction that it was the duty of the railroad company to safely carry him from the starting point and deliver him at his destination, and that a failure to do so would be negligence on their part, was not cured by an instruction properly defining the words "negligence" and "ordinary care," and charging that if the passenger was properly on the train and that the employés of defendant negligently, as the term is above defined, carried him past his destination, etc., they should find for plaintiff. Gulf, C. & S. F. Ry. Co. v. Ward, 124 S. W. 130, 58 Tex. Civ. App. 210. In an action for services by a salesman, an instruction that if, at the time when plaintiff was employed and during his employment, the custom existed that salesmen in such business were excused from duty while sick and paid their full salaries, then such custom was a part of the contract, without instructing on the indispensable elements of notoriety and ancientness of the custom, was not cured by the giving of another instruction that a custom was not binding which had not been generally acquiesced in for such length of time as to warrant the jury in finding that such custom entered into the minds of the parties at the time of making the agreement. Sweet v. Leach, 6 Ill. App. 212. Where, in an action for injuries to a servant, the only theory on which a recovery could be had was defendant's failure to supply a pin missing from a machine, error in refusing to charge that plaintiff could not recover unless the jury found that the proximate cause was the failure to supply the pin, and that the accident would not have happened had the pin been in place, was not cured by a subsequent instruction that the failure to supply the pin must have been the proximate cause of the injury. Ladiew v. Sherwood Metal Working Co., 109 N. Y. S. 477, 125 App. Div. 65. The error in an instruction that an employer in supplying materials for a platform was required to exercise reasonable care to inspect the materials, and that if he was negligent, and decedent was injured in consequence thereof, the employer was liable, due to the fact that it ignored evidence that decedent had the exclusive supervision of the construction of the platform, and induced the jury to infer that there was no duty of the employés to inspect the materials, was not cured by an instruction that there could be no recovery if decedent was the foreman directing the details of the work in erecting the platform. Murch Bros. Const. Co. v. Hays, 114 S. W. 697, 88 Ark. 292. Error in an instruction that it is sufficient to charge defendants as partners if it be shown that they were joint owners is not cured by other instructions correctly stating the law, and what is necessary to make them liable as partners. Miller v. Vermurle, 7 Wash. 386, 34 P. 1108. In an action against a street railroad, error in an instruction that defendant was not required to keep its track in a reasonably safe condition and was not required to keep the space between the rails filled, was not cured by the statement that the defendant was only required to use ordinary care to keep the space between the rails in a reasonably safe condition, since such statement was merely a contradiction in terms of the first statement, and rendered the instruction inconsistent and misleading. Huff v. St. Joseph Ry., Light, Heat & Power Co., 111 S. W. 1145, 213 Mo. 495. The error in an instruction that a grantee would, under specified circumstances, be bound by knowledge of the notary of infirmities in the deed acquired in taking the acknowledgment, was not cured by a further instruction that the grantee would not be bound by knowledge or conduct of the notary, unless the notary was authorized to act for him, or unless grantee had knowledge of irregularities and accepted the benefit thereof, where there was no evidence that the grantee had any actual knowledge of any irregularities or in the acknowledgment. Stringfellow v. Braselton, 117 S. W. 204, 54 Tex. Civ. App. 1.

[81] **Ala.** Alabama Consol. Coal & Iron Co. v. Heald, 53 So. 162, 168

which does not give the jury clearly to understand that the erro-

Ala. 626; Alabama City, G. & A. Ry. Co. v. Bates, 46 So. 776, 155 Ala. 347.

Ark. Sweet v. McEwen, 215 S. W. 651, 140 Ark. 162; Goodell v. Bluff City Lumber Co., 57 Ark. 203, 21 S. W. 104.

Cal. Watts v. Murphy, 99 P. 1104, 9 Cal. App. 564; Malone v. Sierra Ry. Co. of California, 91 P. 522, 151 Cal. 113; People v. Maughs, 86 P. 187, 149 Cal. 253; People v. Westlake, 57 P. 465, 124 Cal. 452.

Colo. Harris v. People, 75 P. 427, 32 Colo. 211.

Ga. White v. State, 100 S. E. 9, 24 Ga. App. 122; Beach v. State, 75 S. E. 139, 138 Ga. 265.

Ill. People v. Emmel, 127 N. E. 53, 292 Ill. 477; People v. Dettmering, 116 N. E. 205, 278 Ill. 580; Langan v. Chicago City Ry. Co., 145 Ill. App. 249.

Ind. McEntire v. Brown, 28 Ind. 347.

Iowa. McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689.

La. State v. Ardoin, 22 So. 620, 49 La. Ann. 1145, 62 Am. St. Rep. 678.

Mich. People v. Holmes, 69 N. W. 501, 111 Mich. 364.

Miss. Barnes v. State, 79 So. 815, 118 Miss. 621.

Mo. Doty v. Quincy, O. & K. C. R. Co., 116 S. W. 1126, 136 Mo. App. 254; McKinnon v. Western Coal & Mining Co., 96 S. W. 485, 120 Mo. App. 148; State v. Tatlow, 136 Mo. 678, 38 S. W. 552; State v. Cable, 117 Mo. 380, 22 S. W. 953; State v. Davies, 80 Mo. App. 239.

Mont. State v. Oliver, 50 P. 1018, 20 Mont. 318.

Neb. Howell v. State, 85 N. W. 289, 61 Neb. 391; Thompson v. State, 85 N. W. 62, 61 Neb. 210, 87 Am. St. Rep. 453; Sweenie v. State, 80 N. W. 815, 59 Neb. 269; Bergeron v. State, 74 N. W. 253, 53 Neb. 752; Henry v. State, 70 N. W. 924, 51 Neb. 149, 66 Am. St. Rep. 450; Beck v. State, 70 N. W. 498, 51 Neb. 106; Raker v. State, 69 N. W. 749, 50 Neb. 202; School Dist. of Chadron v. Foster, 31 Neb. 501, 48 N. W. 267; McCleneghan v. Omaha & R. V. R. Co., 25 Neb. 523, 41 N. W. 350, 13 Am. St. Rep. 508.

N. J. State v. Tachin, 106 A. 145, 92 N. J. Law, 269; State v. Clayton, 85 A. 173, 83 N. J. Law, 673.

N. Y. Jacobs v. Katz (Sup.) 176 N. Y. S. 831; Sullivan v. Brooklyn Heights R. Co., 102 N. Y. S. 982, 117 App. Div. 784.

N. C. State v. Morgan, 48 S. C. 670, 136 N. C. 628.

Okl. Davis v. State, 113 P. 220, 4 Okl. Cr. 508.

Or. Anderson v. Columbia Contract Co., 185 P. 231, 94 Or. 171, 7 A. L. R. 653, denying rehearing 184 P. 240, 94 Or. 171, 7 A. L. R. 653.

Tenn. Louisville & N. R. Co. v. Cheatham, 100 S. W. 902, 118 Tenn. 160.

Tex. Patterson v. Williams (Civ. App.) 225 S. W. 89; Galveston, H. & S. A. Ry. Co. v. State (Sup.) 216 S. W. 393, reversing judgment (Civ. App.) 194 S. W. 462, and rehearing denied 218 S. W. 361; St. Louis & S. F. R. Co. v. Brosius & Le Compte, 105 S. W. 1131, 47 Tex. Civ. App. 647; St. Louis, I. M. & S. Ry. Co. v. Moon, 103 S. W. 1176, 47 Tex. Civ. App. 209; Johnson v. Texas & G. Ry. Co., 100 S. W. 206, 45 Tex. Civ. App. 146.

Va. Neal v. Commonwealth, 98 S. E. 629, 124 Va. 842.

Illustrations of errors not cured. An instruction in a murder trial which limits the right of self-defense to actual danger. People v. Scott, 120 N. E. 553, 284 Ill. 465. An erroneous charge, that jury should not acquit unless alibi evidence showed that defendant could not have been at place of crime at time of its commission, was not cured by further charge that, if such proof failed to satisfy the test given, the jury could not convict for such failure, but only if whole evidence established guilt. People v. Montlake, 172 N. Y. S. 102, 184 App. Div. 578. A charge to convict if accused feloniously, willfully, and with malice aforethought, with a deadly weapon, to wit, an ax, did strike at prosecuting witness with intent to murder and kill him, being erroneous, was not cured by the giving for accused of a correct charge that before he could be convicted the jury should be satisfied that he not

neous instruction is intended to be retracted,[82] since, there being in such case a direct conflict in the pronouncements of the court,

only attempted to strike prosecuting witness with an ax, but that he was also at the time sufficiently near prosecuting witness to enable him to strike him and inflict an injury upon his person, since the two charges were inconsistent. Jones v. State, 116 S. W. 230, 89 Ark. 213.

Error in instruction as to credibility of witnesses. Error in an instruction which might have misled the jury to believe that court intended to instruct that plaintiff was entitled to more credit than defendant's witnesses was not cured by other instructions, laying down the rules as to the credibility of witnesses and leaving jury free to decide. Walsh v. Chicago Rys. Co., 128 N. E. 647, 294 Ill. 586. The error in an instruction, authorizing conviction if the jury believed that the evidence of the accomplice tended to show that accused was guilty and that the corroboration of her testimony tended to show the crime, was not cured by a special charge that, before the jury could convict, they must believe beyond a reasonable doubt that the testimony of the prosecutrix was true, and that there was credible independent evidence tending to show that accused was guilty. Barrett v. State, 115 S. W. 1187, 55 Tex. Cr. R. 182. Where court erroneously instructed, "If you should believe that witnesses or a witness has sworn falsely upon some point, then you are not bound to give any credit whatsoever to their testimony, such error was not cured, where the rule was subsequently correctly charged at the request of the defendant; the correction not being charged as a substitute for the previous incorrect charge, to which exception was taken. People v. Parsons, 183 N. Y. S. 100, 192 App. Div. 841.

Instructions tending to mislead jury to disregard proper testimony. Distinct portions of a charge applied in submitting separate issues, and which would naturally tend to mislead the jury to disregard proper testimony in a case wherein it was especially important that the jury should give proper consideration to all the evidence, must be held to necessitate a new trial, regardless of a subsequent correct instruction as to their duty in determining the weight of evidence and the credibility of witnesses. Steber v. Chicago & N. W. Ry. Co., 120 N. W. 502, 139 Wis. 10.

[82] **Ark.** St. Louis Southwestern Ry. Co. v. Jagerman, 59 Ark. 98, 26 S. W. 591.

D. C. Boswell v. District of Columbia, 10 Mackey (21 App. D. C.) 526.

Ga. Rowe v. Spencer, 64 S. E. 468, 132 Ga. 426; Atlanta & B. A. L. Ry. v. McManus, 58 S. E. 258, 1 Ga. App. 302.

Ill. Wilbur v. Wilbur, 129 Ill. 392, 21 N. E. 1076; Counselman v. Collins, 35 Ill. App. 68; Gale v. Rector, 5 Ill. App. 481.

Ind. Abney v. Indiana Union Traction Co., 83 N. E. 387, 41 Ind. App. 53; Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171; Binns v. State, 66 Ind. 428; Toledo, W. & W. Ry. Co. v. Shuckman, 50 Ind. 42.

Ky. Clay v. Miller, 3 T. B. Mon. 146.

Md. Adams v. Capron, 21 Md. 186, 83 Am. Dec. 566.

Mo. Toncrey v. Metropolitan St. Ry. Co., 107 S. W. 1091, 129 Mo. App. 596; Hickman v. Griffin, 6 Mo. 37, 34 Am. Dec. 124; McNichols v. Nelson, 45 Mo. App. 446; Fink v. Algermissen, 25 Mo. App. 186.

Neb. Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077; First Nat. Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568.

N. Y. Sinica v. New York Rys. Co., 180 N. Y. S. 377, 190 App. Div. 727.

N. C. Wilson v. Atlantic Coast Line R. Co., 55 S. E. 257, 142 N. C. 333.

Ohio. Pendleton St. R. Co. v. Stallmann, 22 Ohio St. 1.

Tex. Texas Cent. R. Co. v. Waldie (Civ. App.) 101 S. W. 517; Missouri, K. & T. Ry. Co. of Texas v. Rodgers,

it will ordinarily be impossible to say whether the jury has followed the right or the wrong rule.[88]

Where the instructions of the successful party state an errone-

89 Tex. 675, 36 S. W. 243; Arcia v. State, 28 Tex. App. 198, 12 S. W. 599.

Wash. Peyser v. Western Dry Goods Co., 92 P. 886, 48 Wash. 55; Baxter v. Waite, 2 Wash. T. 228, 6 P. 429.

W. Va. McKelvey v. Chesapeake & O. Ry. Co., 35 W. Va. 500, 14 S. E. 261.

Wis. Jackman v. Inman, 114 N. W. 489, 134 Wis. 297; Imhoff v. Chicago & M. Ry. Co., 20 Wis. 344.

Instructions erroneous within rule. The error in an instruction in an action on a note, arising from the fact that it required plaintiff to prove that the maker knew the contents of the note at the time he signed it by his mark, and that he delivered the same for a valuable consideration, etc., though the law presumes the existence of such facts from the facts proved, is not cured by a charge predicating a right of recovery on facts stated in general terms, without informing the jury that the law presumes the existence of such facts. Dawson v. Wombles, 100 S. W. 547, 123 Mo. App. 340.

[88] **Ala.** Alabama City, G. & A. Ry. Co. v. Bullard, 47 So. 578, 157 Ala. 618.

Ark. St. Louis, I. M. & S. Ry. Co. v. Woods, 131 S. W. 869, 96 Ark. 311, 33 L. R. A. (N. S.) 855; Merchants' Fire Ins. Co. v. McAdams, 115 S. W. 175, 88 Ark. 550.

Cal. Fountain v. Connecticut Fire Ins. Co., 112 P. 546, 158 Cal. 760, 139 Am. St. Rep. 214; Rathbun v. White, 107 P. 309, 157 Cal. 248.

Ga. Pelham Mfg. Co. v. Powell, 64 S. E. 1116, 6 Ga. App. 308.

Ill. Fowler v. Chicago & E. I. R. Co., 85 N. E. 298, 234 Ill. 619, reversing judgment Chicago & E. I. R. Co. v. Fowler, 138 Ill. App. 352; Kath v. East St. Louis & Suburban Ry. Co., 83 N. E. 533, 232 Ill. 126, 15 L. R. A. (N. S.) 1109; Swiercz v. Illinois Steel Co., 83 N. E. 168, 231 Ill. 456; Kankakee Stone & Lime Co. v. City of Kankakee, 128 Ill. 173, 20 N. E. 670; Cleveland, C., C. & St. L. Ry. Co. v. Dukeman, 134 Ill. App. 396; Chicago, M. & St. P. Ry. Co. v. Gill, 132 Ill. App. 310; Chicago, R. I. & P. Ry. Co. v. Turck, 131 Ill. App. 128; Cleveland, C., C. & St. L. Ry. Co. v. Dukeman, 130 Ill. App. 105; Belvidere City Ry. Co. v. Bute, 128 Ill. App. 620; Second Nat. Bank v. Thuet, 124 Ill. App. 501.

Ind. Monongahela River Consol. Coal & Coke Co. v. Hardsaw, 81 N. E. 492, 169 Ind. 147.

Iowa. McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689.

Mo. Gordy v. Manufacturers' Coal & Coke Co., 132 S. W. 21, 151 Mo. App. 455; Butz v. Murch Bros. Const. Co., 117 S. W. 635, 137 Mo. App. 222.

Mont. Sullivan v. Metropolitan Life Ins. Co., 88 P. 401, 35 Mont. 1.

N. Y. Blumberg v. Sterling Bronze Co., 107 N. Y. S. 142, 56 Misc. Rep. 477.

N. C. Kimbrough v. Hines, 104 S. E. 684, 180 N. C. 274; Jones v. Life Ins. Co. of Virginia, 65 S. E. 602, 151 N. C. 54.

Pa. Commonwealth v. Ross, 110 A. 327, 266 Pa. 580; Commonwealth v. Divomte, 105 A. 821, 262 Pa. 504.

Tex. Petty v. Jordan-Spencer Co. (Civ. App.) 135 S. W. 227.

Va. Atlantic Coast Line R. Co. v. Caple's Adm'x, 66 S. E. 855, 110 Va. 514.

Wyo. Palmer v. State, 59 P. 793, 9 Wyo. 40, 87 Am. St. Rep. 910.

Instructions on insanity as a defense to accusation of crime. An instruction that defendant must prove that at the time of the killing he was laboring under such defect of reason from diseased mind as not to know the nature and quality of the act is correct, but where it is followed by another, erroneously charging that insanity will only excuse crime where the person was so insane as not to know right from wrong, the two are irreconcilable, and constitute reversible error. Bolling v. State, 54 Ark. 588, 16 S. W. 658.

in withdrawing an erroneous part of its charge, and giving them the correct rule on the issue covered by it, cures the error.[95]

[95] **Ala.** United States Casualty Co. v. Perryman, 82 So. 462, 203 Ala. 212; Null v. State, 79 So. 678, 16 Ala. App. 542.

Ark. St. Louis, I. M. & S. Ry. Co. v. Stamps, 104 S. W. 1114, 84 Ark. 241.

Ga. Central of Georgia Ry. Co. v. Ray, 65 S. E. 281, 133 Ga. 126; Rawlins v. State, 52 S. E. 1, 124 Ga. 31, judgment affirmed 26 S. Ct. 560, 201 U. S. 638, 50 L. Ed. 899, 5 Ann. Cas. 783.

La. State v. Jones, 36 La. Ann. 204.

Neb. Reed v. State, 92 N. W. 321, 66 Neb. 184.

Tex. International & G. N. R. Co. v. Ford (Civ. App.) 118 S. W. 1137.

Vt. Dyer v. Lalor, 109 A. 30, 94 Vt. 103; Barrell v. Dickinson, 74 A. 234, 82 Vt. 551.

Withdrawal held insufficient within the above rule. Withdrawal by the court of the objectionable portion of its charge, and instructing, at counsel's request, that the law is directly contrary to that previously charged, being qualified by the court's statement that his ideas of the case are entirely different from those of both of the counsel, whose views, however, he has just accepted and charged as the law, does not correct the original error. Orendorf v. New York Cent. & H. R. R. Co., 104 N. Y. S. 222, 119 App. Div. 638. Where, in an action for injuries to a servant, the court charged unfavorably to defendant at length, with reference to the provisions of the labor law, and, when requested to give defendant an exception, withdrew all that portion of the charge from the jury by a single sentence, such withdrawal did not obviate the objection. Ladiew v. Sherwood Metal Working Co., 109 N. Y. S. 477, 125 App. Div. 65.

[END OF VOLUME 1]

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v. Grimsley, 117 S. W. 1064, 90 Ark. 64. Where, in an action for injuries to a passenger, the court charged that it was the duty of the carrier to exercise that degree of care for the passenger's personal safety which a very cautious and prudent person would exercise under the same circumstances, the refusal to charge that the carrier was required to exercise the highest degree of care that could reasonably be exercised to protect the passenger from injury, was not erroneous. Cornelison v. Ft. Worth & R. G. Ry. Co., 103 S. W. 1186, 46 Tex. Civ. App. 509. An instruction, in an action for injuries to a passenger, that defendant was bound to exercise the highest degree of care, consistent with the operation of the railway and taking into consideration the existing conditions, to prevent the injury, and that defendant was liable for the slightest negligence, covered all the substantial features of a refused instruction that defendant was not required to exercise the highest degree of care possible to avoid the accident, but only the highest degree reasonably practicable under the circumstances, and that by "highest degree of care" was meant that degree which would be exercised under like circumstances by careful and experienced conductors and motormen. Jordan v. Seattle, R. & S. Ry. Co., 92 P. 284, 47 Wash. 503. In an action against a carrier for injuries to an alighting passenger, where the only contributory negligence claimed was that plaintiff attempted to alight while the car was in motion, and the court fully charged that if he did so he was negligent, it was not error to refuse a request that a slight want of ordinary care by plaintiff contributing to his injury would render him negligent. Jirachek v. Milwaukee Electric Ry. & Light Co., 121 N. W. 326, 139 Wis. 505, 131 Am. St. Rep. 1070. Where, in an action against a railroad company for personal injuries, all the damages suffered by plaintiff were shown by the undisputed evidence to have been the proximate consequences of the injury, unless the evidence raised the issue that such damages were aggravated by plaintiff's failure to follow instructions given by the physician who treated him, and such issue was submitted to the jury in a charge requested by defendant, there was no error in refusing to charge at defendant's request on the issue whether the damages sustained were the proximate result of the injury. San Antonio & A. P. Ry. Co. v. Muecke, 105 S. W. 1009, 47 Tex. Civ. App. 380. Where a court, in an action for negligent death, charged that the damages recoverable were the damages occasioned to the estate of the decedent by his premature death, taking into consideration his age, health, occupation, earnings, ability to earn, and other matters showing the extent of the loss, the refusal to charge that in estimating the damages to decedent's estate the jury should not allow anything for decedent's pain and suffering or as exemplary damages, etc., was not erroneous. Kelly v. Chicago, R. I. & P. Ry. Co., 114 N. W. 536, 138 Iowa, 273, 128 Am. St. Rep. 195. Where an instruction on the issue of value of property in controversy directed that the jury might consider the return of the property for taxes as a circumstance with other circumstances in the case in determining the value of the property, the failure to charge that such return should be considered as an admission was not ground for a new trial. Western & A. R. Co. v. Tate, 59 S. E. 266, 129 Ga. 526. A requested instruction that if defendant had a mortgage on the goods of her husband, and that if the jury believed that plaintiff attempted to collect his notes against the husband, that he employed counsel and threatened to attack the mortgage, and that thereupon defendant executed the note, then the note was a valid contract and could be enforced, was fully covered by a charge that a wife may make a valid obligation in settlement of notes of her husband if they apparently constitute a prior claim against property derived from her husband and to which she has title. Sims v. Scheussler, 64 S. E. 99, 5 Ga. App. 850. In libel, where trial court charged the issue of privilege in the language of the statute, which clearly defines and enumerates the

matter made privileged thereby, a charge that defendant was not required to prove its defense of privilege literally, but only substantially, was properly refused. San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574, 52 Tex. Civ. App. 22. Where, in an action for injuries to an employé, the court charged that to find a verdict for the employé they must find by preponderance of the evidence that the injuries were not the result of the employé's own carelessness, or the result of the negligence of a fellow servant, the refusal to charge that if the injuries were occasioned by the employé's own negligence, or that of a fellow servant, the jury should render a verdict for defendant, was not erroneous. Clifford v. Pioneer Fireproofing Co., 83 N. E. 448, 232 Ill. 150. A requested charge, in an action for injuries sustained by a fall over an obstruction on a sidewalk, that plaintiff is required to exercise ordinary care for his own safety, was covered by an instruction given that, if plaintiff's injury was wholly or in part caused by his negligence "in failing to watch or observe his footsteps," the verdict must be for defendant. Lattimore v. Union Electric Light & Power Co., 106 S. W. 543, 128 Mo. App. 37. Where, in an action for injuries by falling down an unguarded cellar way in a store, the court charged that defendant was bound only to use ordinary care, and, if he discharged the obligation to warn plaintiff that the cellar way was open, the jury should find for defendant, there was no error, in denying defendant's request to charge that the mere existence of the trapdoor and the cellar way in the way in which defendant maintained it was not negligence per se. Montague v. Hanson, 99 P. 1063, 38 Mont. 376. Where plaintiff in an action for negligence had made out a prima facie case, it was not error to refuse to charge that the burden of proving negligence on the part of one defendant was on the plaintiff, where the court charged, not only that the jury should be satisfied that such defendant was negligent, but it must appear from all the evidence that such conclusion is established. Daggett v. North Jersey St. Ry. Co., 68 A. 179, 75 N. J. Law, 630. An instruction, as to the burden of proof as to contributory negligence, that the jury, in determining whether defendant had "discharged such burden," should look to all the evidence, whether introduced by either party, or both, is not materially different from a charge requested by defendant, to the effect that the jury should look to all such evidence in determining, not whether defendant had "discharged the burden," but whether plaintiff was guilty of contributory negligence. Beaumont Traction Co. v. Happ, 122 S. W. 610, 57 Tex. Civ. App. 427. An instruction that, where a person deals with an agent, he must assure himself that the agent has the necessary authority in the transaction in question, sufficiently covered a request that it is not sufficient to establish agency that the agent had claimed to be such, but that it is the duty of the person dealing with the agent to ascertain the act of agency and his authority to do the particular act. Johnson v. W. H. Goolsby Lumber Co. (Tex. Civ. App.) 121 S. W. 883. Where, in an action for damages for a nuisance incident to the construction and operation of a railroad, the instructions only authorized a recovery for damages incident to the construction of the road along a strip lying between plaintiff's lots, and only in the event that such strip was not a part of a public street, defendant was not entitled to an instruction requiring the jury to find for defendant, if they were unable to separate the injuries caused by the construction of the road on the strip between plaintiff's lands from the injuries caused by the construction of the road on such strip and on other lands. St. Louis, S. F. & T. Ry. Co. v. Payne, 104 S. W. 1077, 47 Tex. Civ. App. 194. Where the court in its general charge restricted plaintiff's right to recover to defendant's negligence in operating a switch engine, refusal of an instruction that plaintiff could not recover because of the proximity of a post to the track was properly refused. Cunningham v. Neal, 109 S. W. 455, 49 Tex. Civ. App. 613. Where, in an

action for injuries to a child struck by a switch engine, the court left it to the jury whether there was proof that the trainmen exercised ordinary care, and might have seen the child in time to have avoided the injury, the refusal to give an instruction that, if the child was a licensee, he assumed the risk of dangers caused by the proper use of the tracks and operation of trains, was not erroneous. Tarashonsky v. Illinois Cent. R. Co., 117 N. W. 1074, 139 Iowa, 709. Where the court stated the nature of the mental disability to avoid a release for injury, and that the burden was on plaintiff to establish such disability, refusal to charge that the burden was on plaintiff to show himself incompetent when the release was executed was not erroneous. Schmidt v. Southwestern Brewery & Ice Co., 107 P. 677, 15 N. M. 232. Where, in an action for seduction, there was no evidence of loss of wages, an instruction that the jury could not find anything on that score, because there was nothing on which they could compute damages, sufficiently covered a request to charge that plaintiff could not recover for any loss of his daughter's services or earnings after the date of the writ. Thiebault v. Prendergast, (R. I.) 69 A. 922. In an action for injuries to plaintiff by being struck by a street car after being thrown from his bicycle at a cross-over switch, a request to charge that, though plaintiff was guilty of negligence in attempting to ride over the cross-over track, if the motorman saw the peril of plaintiff in time to have stopped the car by ordinary diligence before it ran onto plaintiff, and he failed to do so, then defendant was liable, and if the motorman, by reasonable care ought to have seen plaintiff, plaintiff was entitled to recover is substantially covered by an instruction given that, if plaintiff's negligence was the proximate cause of the injury, he could not recover, unless defendant, having knowledge of plaintiff's negligence could, by the use of ordinary care, have prevented the injury. Hall v. Washington Water Power Co., 89 P. 553, 46 Wash. 207. In an action against a street railroad company for injuries received while driving on the track, defendant's request for a ruling that, if plaintiff intrusted the care of the horse to the driver, in order to recover she must show that he exercised due care and diligence, is properly refused, where the court instructed that, if plaintiff had authority or control over the driver, she could not recover where he was at fault, but if she had no authority or control, and was under no duty to warn him, and had no reason to suspect want of care and skill on his part, she could recover, although he was at fault. Miller v. Boston & N. St. Ry. Co., 83 N. E. 990, 197 Mass. 535. In action for injury when struck by automobile, plaintiff's refused instruction that, even if its speed was lawful and reasonable, defendant might be liable if injury resulted from his failure to keep sufficient lookout, was properly covered by other instructions that he should have kept a lookout, and should have used ordinary care to avoid injury. Coughlin v. Layton, 180 P. 805, 104 Kan. 752. A requested instruction, in an action for the overflow of plaintiffs' land, that, if the washing of plaintiffs' land was caused by the breaking of a milldam, the verdict should be for defendant, although defendant had, by obstructing the stream, diverted it towards the bank on plaintiffs' side, was substantially covered by an instruction that the verdict should be for defendant unless it had thrown dirt or other obstructions into the stream, and thereby diverted it and caused the water to overflow the land of plaintiffs, in which case the verdict should be for plaintiffs. Louisville & N. R. Co. v. Ponder, 104 S. W. 279, 31 Ky. Law Rep. 878. In a will contest, it was not error to refuse a charge consisting of a definition of undue influence and a proposition as to the influence resulting from relationship, where the definition of undue influence was fully covered by the court's general charge, since it would not be proper to repeat the one, and it was not incumbent on the court to separate the propositions. Goodloe v. Goodloe, 105 S. W. 533, 47 Tex. Civ. App. 493.

Illustrations of requested instructions not within rule. In detinue for oxen which plaintiff claimed were sold to him by a third person authorized by defendant to do so, a requested charge that, though the jury might believe that he made an admission of authority, plaintiff could not recover unless the jury was reasonably satisfied that he in fact authorized the sale, was not covered by a charge that the burden of proof was on plaintiff to prove to the reasonable satisfaction of the jury that defendant authorized the third person to sell the steers. Boswell v. Thompson, 49 So. 73, 160 Ala. 306. A charge that damages in a libel case could not be awarded for injury to plaintiff's business does not fairly cover the theory of a requested charge that plaintiff could not recover such damages unless the plaintiff at such time was in the exercise of or actually performing such business. Age-Herald Pub. Co. v. Waterman, 81 So. 621, 202 Ala. 665. In an action for the wrongful discharge of an employé under contract to act as general manager of defendant's stores, an instruction that, if the jury found and believed from the evidence that, because of employé's refusal to change his employment to one materially different and inferior from that which he had contracted for, the keys of the store in which his headquarters as general manager were located were demanded from and surrendered by him, the plaintiff was wrongfully discharged was not objectionable as being covered by the main charge, where no reference to the surrender of the keys was made in the main charge. Wolf Cigar Stores Co. v. Kramer, 109 S. W. 990, 50 Tex. Civ. App. 411. Where, in an action against a railroad for injuries to an employé through a defective car step, the charge permitted a recovery only on the facts and theory alleged by plaintiff, and instructed that, unless the jury believed the facts set forth, they should find for defendant, the refusal of a charge that plaintiff alleged that he was injured by reason of the step or stirrup on the car being loose and by his attempting to get on the car by putting his foot on the stirrup, and that in so doing the stirrup moved, and he was injured, and that, if the jury believed he was injured in any other manner than in the manner alleged by him, the verdict must be for defendant, was error. El Paso & S. W. R. Co. v. O'Keefe, 110 S. W. 1002, 50 Tex. Civ. App. 579. A requested instruction that the employer was only obliged to use reasonable care for the safety of the employé held not sufficiently covered by an instruction merely that the employer was not an insurer of the employé's safety. Mitchell v. T. A. Gillespie Co., 137 N. Y. S. 550, 152 App. Div. 536. In an action for injuries to a servant, alleged to be due to the defective condition of a car, it was error to refuse an instruction that defendant was not an insurer of plaintiff's safety, but was obliged only to exercise reasonable care to provide a reasonably safe car, and was not bound to know of hidden defects not discoverable by the exercise of reasonable care, on the ground that it was covered by a given instruction that if the car was reasonably safe on the morning of the day of plaintiff's injury, and became out of repair later, so as to cause the accident, plaintiff could not recover unless defendant knew, or by the exercise of reasonable care might have known, of its defects. Clippard v. St. Louis Transit Co., 101 S. W. 44, 202 Mo. 432. Where, in an action for injuries to a pedestrian falling into a drain on the side of a public highway, there was evidence that she became confused and lost all sense of direction, and stumbled along in the dark without knowing where she was going and fell into the ditch, and that she knew of its existence near by, the refusal to charge that if she realized that she was confused, and did not know where she was going, but continued blindly, she was guilty of contributory negligence, was reversible error, though the court charged generally on contributory negligence. Hunt v. Douglass Tp., 130 N. W. 648, 165 Mich. 187. Instructions that the presumption of negligence arising from evidence that fire was communicated from defendant's engines was rebuttable, and might be overcome by

principles in as favorable a form to the party making the request as the instructions offered,[14] although the instruction refused embraces correct legal doctrine.[15]

proof that the engines alleged to have caused the fire were properly constructed, and had the most approved appliances for arresting sparks, and were carefully operated in a skillful manner by competent employés, that defendant was not bound to use the best and most approved appliances, but was bound to exercise reasonable care in obtaining the most approved mechanical engines and appliances to prevent the escape of fire and putting them into practical use, and that the gist of the action was negligence, which must be sustained by proof, as defendant could not be liable for unavoidable or unusual consequences of the proper operation of his trains, did not cover a requested charge that if the jury found defendant's servants, in operating the train in question, acted as reasonably prudent and careful persons having due regard of the rights of others would have acted under the same circumstances, defendant was not negligent, and that if defendant actually used on the engine the most approved appliances to arrest fire, or had exercised reasonable care and diligence to obtain and use them, defendant was not negligent in that respect, and the refusal of such request was error. Chenoweth v. Southern Pac. Co., 99 P. 86, 53 Or. 111. In action for injuries resulting from collision between automobiles, in which it was shown that a defendant, in whose car plaintiff was a passenger, turned to the left, a requested instruction that driver of car of other defendant could assume that a turn to the right would be made until such time as that an ordinarily prudent person would know otherwise, is not covered by given instruction in abstract terms of duty to avoid injury. John v. Pierce, 178 N. W. 297, 172 Wis. 44.

[14] Haman v. Preston, 173 N. W. 894, 186 Iowa, 1292; Fred Mercer Dry Goods Co. v. Fikes (Tex. Civ. App.) 211 S. W. 830.

[15] **U. S.** Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Chicago & N. W. R. Co. v. Whitton, 80 U. S. (13 Wall.) 270, 20 L. Ed. 571; St. Louis Public Schools v. Risley, 77 U. S. (10 Wall.) 91, 19 L. Ed. 850; Laber v. Cooper, 74 U. S. (7 Wall.) 565, 19 L. Ed. 151; Jelke v. United States, 255 F. 264, 166 C. C. A. 434.

Ark. Crisman v. McDonald, 28 Ark. 8.

Cal. People v. Shortridge, 177 P. 458, 179 Cal. 507.

Fla. Atlantic Coast Line R. Co. v. Dees, 48 So. 28, 56 Fla. 127; Seaboard Air Line Ry. v. Scarborough, 42 So. 706, 52 Fla. 425.

Ga. Henderson v. Francis, 75 Ga. 178; Powers v. State, 44 Ga. 209.

Ill. Town of Normal v. Bright, 79 N. E. 90, 223 Ill. 99, affirming judgment 125 Ill. App. 478; Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850; Germania Fire Ins. Co. v. Hick, 125 Ill. 361, 17 N. E. 792, 8 Am. St. Rep. 384; Fairbank Canning Co. v. Innes, 125 Ill. 410, 17 N. E. 720; Brace v. Black, 125 Ill. 33, 17 N. E. 66; City of Sterling v. Merrill, 124 Ill. 522, 17 N. E. 6, affirming 25 Ill. App. 596; Keeler v. Stuppe, 86 Ill. 309; Prior v. White, 12 Ill. 261; Andrews v. City of White Hall, 184 Ill. App. 298; Chicago City Ry. Co. v. Kastrzewa, 141 Ill. App. 10.

Ind. Deep Vein Coal Co. v. Ward (App.) 123 N. E. 228; Cleveland, C. C. & St. L. Ry. Co. v. Schneider, 82 N. E. 538, 40 Ind. App. 524; White v. Gregory, 126 Ind. 95, 25 N. E. 806.

Iowa. Parsons v. Thomas, 62 Iowa, 319, 17 N. W. 526.

Kan. Sibley v. Kansas City Cotton Mills Co., 116 P. 889, 85 Kan. 256; City of Emporia v. Schmidling, 33 Kan. 485, 6 P. 893.

Ky. Stafford v. Hussey, 33 S. W. 1115, 17 Ky. Law Rep. 1194.

Md. Mason v. Poulson, 43 Md. 161; Philadelphia, W. & B. R. Co. v. Harper, 29 Md. 330; Baltimore & O. R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578; Pettigrew v. Bar-

The above rule applies in criminal prosecutions,[16] and in a crim-

num, 11 Md. 434, 69 Am. Dec. 212; Mutual Safety Ins. Co. v. Cohen, 3 Gill, 459, 43 Am. Dec. 341.

Mich. Westra v. Westra's Estate, 101 Mich. 526, 60 N. W. 55; Anderson v. Walter, 34 Mich. 113.

Mo. Levering v. Union Transp. & Ins. Co., 42 Mo. 88, 97 Am. Dec. 320; Bay v. Sullivan, 30 Mo. 191; Carroll v. Paul's Adm'r, 19 Mo. 102; Young v. White, 18 Mo. 93; Phillips v. Smoot, 15 Mo. 598; Pond v. Wyman, 15 Mo. 175; Flynn v. St. Louis & S. F. Ry. Co., 43 Mo. App. 424; Teichman Commission Co. v. American Bank, 35 Mo. App. 472.

Neb. Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; Hitchcock v. Hassler, 16 Neb. 467, 20 N. W. 396.

N. J. Smith v. Irwin, 51 N. J. Law (22 Vroom) 507, 18 A. 852, 14 Am. St. Rep. 699.

N. Y. Garbaczewski v. Third Ave. R. Co., 5 App. Div. 186, 39 N. Y. S. 33.

N. C. Muse v. Seaboard Air Line Ry., 63 S. E. 102, 149 N. C. 443, 19 L. R. A. (N. S.) 453; Redmond v. Stepp, 100 N. C. 212, 6 S. E. 727.

Ohio. United States Home & Dower Ass'n v. Kirk, 8 Ohio Dec. 592, 9 Wkly. Law Bul. 48.

Or. Roth v. Northern Pacific Lumbering Co., 18 Or. 205, 22 P. 842.

Tex. Blackwell v. Speer (Civ. App.) 98 S. W. 903; Gulf, C. & S. F. Ry. Co. v. Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699; Bewley v. Massie (Civ. App.) 31 S. W. 1086; Wilson v. Lorane, 15 Tex. 492; Robinson v. State, 15 Tex. 311; Austin City Water Co. v. Capital Ice Co., 1 White & W. Civ. Cas. Ct. App. § 1132.

Utah. Cunningham v. Union Pac. Ry. Co., 4 Utah, 206, 7 P. 795.

Va. Harman v. Cundiff, 82 Va. 239.

[16] **U. S.** Sugarman v. United States, 39 S. Ct. 191, 249 U. S. 182, 63 L. Ed. 550, dismissing writ of error United States v. Sugarman (D. C. Minn.) 245 F. 604; Humes v. United States, 18 S. Ct. 602, 170 U. S. 210, 42 L. Ed. 1011; (C. C. A. Alaska) Stockslager v. United States, 116 F. 590, 54 C. C. A. 46; (C. C. A. Cal.) Pappens v. United States, 252 F. 55, 164 C. C. A. 167; Dimmick v. United States, 135 F. 257, 70 C. C. A. 141; (C. C. A. Ga.) Lamb v. U. S., 204 F. 660; (C. C. A. Ind.) Brown v. United States, 142 F. 1, 73 C. C. A. 187; (C. C. A. La.) Apgar v. United States, 255 F. 16, 166 C. C. A. 344, certiorari denied 39 S. Ct. 492, 250 U. S. 642, 63 L. Ed. 1185; Le More v. United States, 253 F. 887, 165 C. C. A. 367, certiorari denied 39 S. Ct. 184, 248 U. S. 586, 63 L. Ed. 434; Alexis v. United States, 129 F. 60, 63 C. C. A. 502; (C. C. A. Mo.) Hamilton v. United States, 255 F. 511, 167 C. C. A. 1, certiorari denied 39 S. Ct. 291, 249 U. S. 610, 63 L. Ed. 800; Dr. J. H. McLean Medicine Co. v. United States, 253 F. 694, 165 C. C. A. 288; (D. C. N. J.) United States v. Le Fanti, 255 F. 210, judgment affirmed Le Fanti v. United States, 259 F. 460, 170 C. C. A. 436; (C. C. A. N. Y.) Browne v. United States, 145 F. 1, 76 C. C. A. 31, affirming judgments United States v. Rosenthal (C. C.) 126 F. 766, and United States v. Cohn (C. C.) 128 F. 615; (C. C. A. N. D.) O'Hare v. United States, 253 F. 538, 165 C. C. A. 208, certiorari denied 39 S. Ct. 257, 249 U. S. 598, 63 L. Ed. 795; (C. C. A. Ohio) Shea v. United States, 251 F. 440, 163 C. C. A. 458, writ of certiorari denied 39 S. Ct. 132, 248 U. S. 581, 63 L. Ed. 431; (C. C. A. Okl.) Bradley v. United States, 254 F. 289, 165 C. C. A. 577; (C. C. A. Tex.) Roberts v. United States, 126 F. 897, 61 C. C. A. 427; (C. C. A. Wash.) Wells v. United States, 257 F. 605, 168 C. C. A. 555; (C. C. A. W. Va.) Showalter v. U. S., 260 F. 719, 171 C. C. A. 457, certiorari denied 40 S. Ct. 14, 250 U. S. 672, 63 L. Ed. 1200.

Ala. Castona v. State, 84 So. 871, 17 Ala. App. 421; Evans v. State, 82 So. 645, 17 Ala. App. 155; Id., 82 So. 625, 17 Ala. App. 141; Buckner v. State, 81 So. 687, 17 Ala. App. 57; Crawley v. State, 79 So. 804, 16 Ala. App. 545, certiorari denied Ex parte Crawley, 80 So. 893, 202 Ala. 698; Craut v. State, 79 So. 768, 16 Ala. App. 548; Barnett v. State, 79 So. 675, 16 Ala. App. 539, certiorari de-

inal case it is not reversible error to refuse an instruction requested

nied State v. Barnett, 79 So. 677, 202 Ala. 191; Kuhn v. State, 79 So. 394, 16 Ala. App. 489, certiorari denied 79 So. 877, 202 Ala. 697; Hardley v. State, 79 So. 362, 202 Ala. 24; Tucker v. State, 79 So. 303, 202 Ala. 5; Grizzard v. State, 79 So. 266, 16 Ala. App. 505; Moore v. State, 79 So. 201, 16 Ala. App. 503; Sims v. State, 41 So. 413, 146 Ala. 109; Patterson v. State, 41 So. 157, 146 Ala. 39; Whatley v. State, 39 So. 1014, 144 Ala. 68; Parrish v. State, 36 So. 1012, 139 Ala. 16; Rollings v. State, 34 So. 349, 136 Ala. 126; Jacobi v. State, 32 So. 158, 133 Ala. 1; Winter v. Same, 32 So. 125, 133 Ala. 176; Ragland v. State, 27 So. 983, 125 Ala. 12; Liner v. State, 27 So. 438, 124 Ala. 1; Lodge v. State, 26 So. 200, 122 Ala. 107; Koch v. State, 22 So. 471, 115 Ala. 99.

Ariz. Sheehy v. Territory, 80 P. 356, 9 Ariz. 269; Elias v. Territory, 76 P. 605, 9 Ariz. 1, 11 Ann. Cas. 1153.

Ark. Paxton v. State, 224 S. W. 437; Jordan v. State, 217 S. W. 788, 141 Ark. 504; McCully v. State, 217 S. W. 453, 141 Ark. 450; Dean v. State, 214 S. W. 38, 139 Ark. 433; Howard v. State, 208 S. W. 293, 137 Ark. 111; Lind v. State, 207 S. W. 47, 137 Ark. 92; Barker v. State, 205 S. W. 805, 135 Ark. 404; Lasater v. State, 94 S. W. 59, 77 Ark. 468; Holland v. State, 84 S. W. 468, 73 Ark. 425; Furlow v. State, 81 S. W. 232, 72 Ark. 384.

Cal. People v. Nunes (App.) 190 P. 486; People v. Luttrell (App.) 183 P. 681; People v. Bonfanti, 181 P. 80, 40 Cal. App. 614; People v. Bernal, 180 P. 825, 40 Cal. App. 358; People v. Seeley, 179 P. 541, 39 Cal. App. 586; People v. Tyren, 178 P. 132, 179 Cal. 575; People v. Hartwell, 177 P. 885, 39 Cal. App. 24; People v. Votaw, 177 P. 485, 38 Cal. App. 714; People v. Swenson, 173 P. 934, 37 Cal. App. 262; People v. Castile, 86 P. 746, 3 Cal. App. 487; People v. Castile, 86 P. 745, 3 Cal. App. 485; People v. Cook, 83 P. 43, 148 Cal. 334; People v. Jailles, 79 P. 965, 146 Cal. 301; People v. Donnolly, 77 P. 177, 143 Cal. 394; People v. Buckley, 77 P. 169, 143 Cal. 375; People v. Amaya, 66 P. 794, 134 Cal. 531; People v. Ross, 66 P. 229, 134 Cal. 256; People v. Clementshaw, 59 Cal. 385.

Colo. Covington v. People, 85 P. 832, 36 Colo. 183; Thompson v. People, 59 P. 51, 26 Colo. 496.

Conn. State v. Laudano, 51 A. 860, 74 Conn. 638.

D. C. Norman v. United States, 20 App. D. C. 494; Howgate v. United States, 7 App. D. C. 217; Travers v. United States, 6 App. D. C. 450.

Fla. Hall v. State, 83 So. 513, 78 Fla. 420, 8 A. L. R. 1234; Howard v. State, 83 So. 297, 78 Fla. 413; Long v. State, 83 So. 293, 78 Fla. 464; Russell v. State, 82 So. 805, 78 Fla. 223; Miller v. State, 80 So. 314, 76 Fla. 518; Maloy v. State, 41 So. 791, 52 Fla. 101; Blanton v. State, 41 So. 789, 52 Fla. 12; Robinson v. State, 39 So. 465, 50 Fla. 115; Jordan v. State, 39 So. 155, 50 Fla. 94; Snelling v. State, 37 So. 917, 49 Fla. 34; Starke v. State, 37 So. 850, 49 Fla. 41; Harmon v. State, 37 So. 520, 48 Fla. 44; Parnell v. State, 36 So. 165, 47 Fla. 90; Peaden v. State, 35 So. 204, 46 Fla. 124; Sylvester v. State, 35 So. 142, 46 Fla. 166; Brown v. State, 35 So. 82, 46 Fla. 159; Driggers v. State, 20 So. 758, 38 Fla. 7.

Ga. Hollingsworth v. State, 101 S. E. 115, 149 Ga. 512; Brown v. State, 100 S. E. 452, 24 Ga. App. 268; Phillips v. State, 99 S. E. 874, 149 Ga. 255; Wooten v. State, 99 S. E. 316, 23 Ga. App. 768; Smith v. State, 99 S. E. 142, 23 Ga. App. 541; Cook v. State, 97 S. E. 264, 22 Ga. App. 770; Coppedge v. State, 96 S. E. 1046, 22 Ga. App. 631; Darby v. State, 96 S. E. 707, 22 Ga. App. 606; Fordham v. State, 54 S. E. 694, 125 Ga. 791; White v. State, 54 S. E. 188, 125 Ga. 256; Napper v. State, 51 S. E. 592, 123 Ga. 571; McDuffie v. State, 49 S. E. 708, 121 Ga. 580; Griner v. State, 49 S. E. 700, 121 Ga. 614; Pike v. State, 49 S. E. 680, 121 Ga. 604; Jordan v. State, 48 S. E. 352, 120 Ga. 864; May v. State, 47 S. E. 548, 120 Ga. 135; Johnson v. State, 47 S. E. 510, 120 Ga. 135; Taylor v. State, 25 S. E. 320, 97 Ga. 432.

Idaho. State v. Cotterel, 86 P.

by the defendant, if one given for the state contains the same

527, 12 Idaho, 572; State v. Roland, 83 P. 337, 11 Idaho, 490; State v. Rooke, 79 P. 82, 10 Idaho, 388; State v. Rathbone, 67 P. 186, 8 Idaho, 161; State v. Lyons, 64 P. 236, 7 Idaho, 530.

Ill. People v. Marx, 125 N. E. 719, 291 Ill. 40; People v. Meyer, 124 N. E. 447, 289 Ill. 184; People v. Foster, 123 N. E. 534, 288 Ill. 371; People v. Dear, 121 N. E. 615, 286 Ill. 142, writ of error dismissed Dear v. People of State of Illinois, 39 S. Ct. 493, 250 U. S. 635, 63 L. Ed. 1182; People v. Findley, 121 N. E. 608, 286 Ill. 368; People v. Bopp, 120 N. E. 790, 285 Ill. 396; People v. Robertson, 120 N. E. 539, 284 Ill. 620, affirming judgment 210 Ill. App. 234; People v. Grove, 120 N. E. 277, 284 Ill. 429; Spears v. People, 77 N. E. 112, 220 Ill. 72, 4 L. R. A. (N. S.) 402; Mash v. People, 77 N. E. 92, 220 Ill. 86; Hoch v. People, 76 N. E. 356, 219 Ill. 265, 109 Am. St. Rep. 327; Parsons v. People, 75 N. E. 993, 218 Ill. 386; Donovan v. People, 74 N. E. 772, 215 Ill. 520; Kyle v. People, 74 N. E. 146, 215 Ill. 250; Delahoyde v. People, 72 N. E. 732, 212 Ill. 554; Moore v. People, 60 N. E. 535, 190 Ill. 331; Schintz v. People, 52 N. E. 903, 178 Ill. 320; People v. Susmarski, 210 Ill. App. 233; People v. Jones, 207 Ill. App. 218.

Ind. Bush v. State (Sup.) 128 N. E. 443; Jackson v. State, 121 N. E. 114, 187 Ind. 694; Guy v. State, 77 N. E. 855, 37 Ind. App. 691; Coolman v. State, 72 N. E. 568, 163 Ind. 503; Ginn v. State, 68 N. E. 294, 161 Ind. 292; Musser v. State, 61 N. E. 1, 157 Ind. 423; Whitney v. State, 57 N. E. 398, 154 Ind. 573; Blume v. State, 56 N. E. 771, 154 Ind. 343; Thrawley v. State, 55 N. E. 95, 153 Ind. 375; Cromer v. State, 52 N. E. 239, 21 Ind. App. 502; Hinshaw v. State, 47 N. E. 157, 147 Ind. 334; Siberry v. State, 39 N. E. 936, 149 Ind. 684; Richie v. State, 58 Ind. 355.

Ind. T. Jennings v. United States, 53 S. W. 456, 2 Ind. T. 670.

Iowa. State v. Schumann, 175 N. W. 75, 187 Iowa, 1212; State v. Athey, 108 N. W. 224, 133 Iowa, 382; State v. Linhoff, 97 N. W. 77, 121 Iowa, 632; State v. Soper, 91 N. W. 774, 118 Iowa, 1; State v. Maxwell, 91 N. W. 772, 117 Iowa, 482; State v. Comer, 90 N. W. 825; State v. Shunka, 89 N. W. 977, 116 Iowa, 206; State v. Mulholland, 88 N. W. 325, 115 Iowa, 170; State v. Easton, 85 N. W. 795, 113 Iowa, 516, 86 Am. St. Rep. 389, reversed Easton v. State of Iowa, 23 S. Ct. 288, 188 U. S. 220, 47 L. Ed. 452; State v. Hamann, 85 N. W. 614, 113 Iowa, 367; State v. Petersen, 82 N. W. 329, 110 Iowa, 647; State v. Fogerty, 74 N. W. 754, 105 Iowa, 32; State v. Case, 68 N. W. 434, 99 Iowa, 743.

Kan. State v. Tucker, 84 P. 126, 72 Kan. 481; State v. Buffington, 81 P. 465, 71 Kan. 804, 4 L. R. A. (N. S.) 154; State v. Appleton, 78 P. 445, 70 Kan. 217; State v. Elliott, 64 P. 1027, 63 Kan. 879; State v. Start, 63 P. 448, 10 Kan. App. 583; State v. Tulip, 60 P. 659, 9 Kan. App. 454.

Ky. Thomas v. Commonwealth, 214 S. W. 929, 185 Ky. 226; Ulrich v. Commonwealth, 205 S. W. 586, 181 Ky. 519; Havens v. Commonwealth, 82 S. W. 369, 26 Ky. Law Rep. 706; Alderson v. Commonwealth, 74 S. W. 679, 25 Ky. Law Rep. 32; Stevens v. Commonwealth, 45 S. W. 76, 20 Ky. Law Rep. 48; Temple v. Commonwealth, 14 Bush, 769, 29 Am. Rep. 442.

La. State v. Le Blanc, 41 So. 105, 116 La. 822; State v. Aspara, 37 So. 883, 113 La. 940; State v. Guidor, 37 So. 622, 113 La. 727; State v. Woods, 36 So. 626, 112 La. 617; State v. Brown, 35 So. 501, 111 La. 170; State v. Sims, 31 So. 645, 107 La. 188; State v. Cain, 31 So. 300, 106 La. 708.

Mass. Commonwealth v. Magoon, 51 N. E. 1082, 172 Mass. 214; Commonwealth v. Burns, 167 Mass. 374, 45 N. E. 755; Commonwealth v. Dill, 156 Mass. 226, 30 N. E. 1016.

Mich. People v. Rice, 173 N. W. 495, 206 Mich. 644; People v. Hawks, 172 N. W. 405, 206 Mich. 233; People v. Hutchings, 100 N. W. 753, 137 Mich. 527; People v. Hilliard, 77 N. W. 306, 119 Mich. 24; People v. Swartz, 76 N. W. 491, 118 Mich. 292;

legal principle and is aptly drawn, intelligible, and pertinent.[17] In Alabama the rule of the text is embodied in statutory form.[18]

People v. Hughes, 74 N. W. 309, 116 Mich. 80; People v. Hare, 24 N. W. 843, 57 Mich. 505; People v. Marion, 29 Mich. 31.

Minn. State v. Ronk, 98 N. W. 334, 91 Minn. 419.

Miss. Schrader v. State, 36 So. 385, 84 Miss. 593.

Mo. State v. Gallagher (Sup.) 222 S. W. 465; State v. Canton (Sup.) 222 S. W. 448; State v. Dooms, 217 S. W. 43, 280 Mo. 84; State v. Conley, 217 S. W. 29, 280 Mo. 21; State v. Cole (Sup.) 213 S. W. 110; State v. Bowman, 213 S. W. 64, 278 Mo. 492; State v. Mastin, 211 S. W. 15, 277 Mo. 495; State v. Jones, 207 S. W. 793, 276 Mo. 299; State v. Yocum (App.) 205 S. W. 232; State v. Martin (Sup.) 204 S. W. 537; State v. Barrington, 95 S. W. 235, 198 Mo. 23, writ of error dismissed 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890; State v. Valle, 93 S. W. 1115, 196 Mo. 29; State v. Maupin, 93 S. W. 379, 196 Mo. 164; State v. Davis, 92 S. W. 484, 194 Mo. 485, 4 L. R. A. (N. S.) 1023, 5 Ann. Cas. 1000; State v. Day, 87 S. W. 465, 188 Mo. 359; State v. Atchley, 84 S. W. 984, 186 Mo. 174; State v. Brown, 79 S. W. 1111, 181 Mo. 192; State v. Bauerle, 145 Mo. 1, 46 S. W. 609; State v. Breitweiser, 88 Mo. App. 648; State v. Baber, 11 Mo. App. 586.

Mont. State v. Kahn, 182 P. 107, 56 Mont. 108; State v. Kremer, 85 P. 736, 34 Mont. 6; State v. Martin, 74 P. 725, 29 Mont. 273; State v. Dotson, 67 P. 938, 26 Mont. 305; State v. Howell, 66 P. 291, 26 Mont. 3; State v. Mahoney, 61 P. 647, 24 Mont. 281; State v. Bowser, 53 P. 179, 21 Mont. 133.

Neb. Neal v. State, 175 N. W. 669, 104 Neb. 56; Williams v. State, 174 N. W. 302, 103 Neb. 710; Reed v. State, 106 N. W. 649, 75 Neb. 509; Sweet v. State, 106 N. W. 31, 75 Neb. 263; Keeler v. State, 103 N. W. 64, 73 Neb. 441; Palmer v. State, 97 N. W. 235, 70 Neb. 136; Lamb v. State, 95 N. W. 1050, 69 Neb. 212; McCormick v. State, 92 N. W. 606, 66 Neb. 337; Rhea v. State, 88 N. W. 789, 63 Neb. 461; Argabright v. State, 87 N. W. 146, 62 Neb. 402; Coil v. State, 86 N. W. 925, 62 Neb. 15; Chapman v. State, 86 N. W. 907, 61 Neb. 888; Spaulding v. State, 85 N. W. 80, 61 Neb. 289; Smith v. State, 85 N. W. 49, 61 Neb. 296; Kastner v. State, 79 N. W. 713, 58 Neb. 767.

Nev. State v. Burns, 74 P. 983, 27 Nev. 289; State v. Buraill, 71 P. 532, 27 Nev. 41; State v. Maher, 62 P. 236, 25 Nev. 465.

N. H. State v. Buzzell, 59 N. H. 65.

N. J. State v. Haines, 106 A. 27, 92 N. J. Law, 642.

N. M. State v. Martino, 192 P. 507; State v. Goodrich, 176 P. 813, 24 N. M. 660; State v. Sedillo, 174 P. 985, 24 N. M. 549; State v. Starr, 173 P. 674, 24 N. M. 180; Miera v. Territory, 81 P. 586, 13 N. M. 192; Territory v. Taylor, 71 P. 489, 11 N. M. 588.

N. Y. People v. Ammon, 71 N. E. 1135, 179 N. Y. 540, affirming judgment 87 N. Y. S. 358, 92 App. Div. 205; People v. Benham, 55 N. E. 11, 160 N. Y. 402; People v. Polstein, 171 N. Y. S. 501, 184 App. Div. 260; People v. Conrad, 92 N. Y. S. 606, 102 App. Div. 566, affirmed 74 N. E. 1122, 182 N. Y. 529; People v. Ammon, 87 N. Y. S. 358, 92 App. Div. 205, affirmed 71 N. E. 1135, 179 N. Y. 540; People v. Mills, 3 N. Y. Cr. R. 184.

N. C. State v. Baldwin, 100 S. E. 345, 178 N. C. 693; State v. Booker, 31 S. E. 376, 123 N. C. 713.

Ohio. Donald v. State, 21 Ohio Cir. Ct. R. 124, 11 O. C. D. 483.

Okl. Lamb v. State, 185 P. 1101, 16 Okl. Cr. 724; Welch v. State, 185 P. 119, 16 Okl. Cr. 513; Creek v. State, 184 P. 917, 16 Okl. Cr. 492; Johnson v. State, 183 P. 926, 16 Okl.

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[17] State v. Rice, 98 S. E. 432, 83 W. Va. 409.

[18] Welch v. Evans Bros. Const. Co., 78 So. 850, 201 Ala. 496; Hood & Wheeler Furniture Co. v. Royal, 76 So. 965, 200 Ala. 607; Southern Ry. Co. v. Fisher, 74 So. 580, 199 Ala. 377.

It is enough that the court by its charge concretely applies to the facts the principle of law which a party attempts to state ab-

Cr. 428; Harding v. State, 150 P. 391, 16 Okl. Cr. 47; Conley v. State, 179 P. 480, 15 Okl. Cr. 531; Clingan v. State, 178 P. 486, 15 Okl. Cr. 483; McClatchey v. State, 177 P. 922, 15 Okl. Cr. 448; Davis v. State, 177 P. 621, 15 Okl. Cr. 386; Lewis v. State, 174 P. 1094, 15 Okl. Cr. 1; Morgan v. Territory, 85 P. 718, 16 Okl. 530; Robinson v. Territory, 85 P. 451, 16 Okl. 241, reversed 148 F. 830, 78 C. C. A. 520; Wells v. Territory, 78 P. 124, 14 Okl. 436; Queenan v. Territory, 71 P. 218, 11 Okl. 261, 61 L. R. A. 324, judgment affirmed 23 S. Ct. 762, 190 U. S. 548, 47 L. Ed. 1175; Watkins v. United States, 50 P. 88, 5 Okl. 729.

Or. State v. Stickel, 176 P. 799, 99 Or. 415; State v. Gray, 79 P. 53, 46 Or. 24; State v. Eggleston, 77 P. 738, 45 Or. 346; State v. Sally, 70 P. 396, 41 Or. 366; State v. McDaniel, 56 P. 520, 39 Or. 161; State v. Tucker, 61 P. 894, 36 Or. 291, 51 L. R. A. 246; State v. Magers, 58 P. 892, 36 Or. 38; State v. Branton, 56 P. 267, 33 Or. 533.

Pa. Commonwealth v. Danz, 60 A. 1070, 211 Pa. 507.

R. I. State v. Quigley, 58 A. 905, 26 R. I. 263, 67 L. R. A. 322, 3 Ann. Cas. 920.

S. C. State v. Ready, 96 S. E. 287, 110 S. C. 177; State v. Dean, 51 S. E. 524, 72 S. C. 74; State v. Gadsen, 50 S. E. 16, 70 S. C. 430.

S. D. State v. Larson, 172 N. W. 114, 41 S. D. 553.

Tex. Earnest v. State, 224 S. W. 777, 87 Tex. Cr. R. 651; Narango v. State, 222 S. W. 564, 87 Tex. Cr. R. 493; Dollar v. State, 216 S. W. 1089, 86 Tex. Cr. R. 398; McCormick v. State, 216 S. W. 871, 86 Tex. Cr. R. 366; Brown v. State, 215 S. W. 97, 85 Tex. Cr. R. 618; Gribble v. State, 210 S. W. 215, 85 Tex. Cr. R. 52, 3 A. L. R. 1096; Alsup v. State, 210 S. W. 195, 85 Tex. Cr. R. 36; Gill v. State, 208 S. W. 926, 84 Tex. Cr. R. 531; Roach v. State, 208 S. W. 520, 84 Tex. Cr. R. 471; Ice v. State, 208 S. W. 343, 84 Tex. Cr. R. 509; Rice v. State, 94 S. W. 1024, 49 Tex. Cr. R. 569; Counts v. State, 94 S. W. 220, 49 Tex. Cr. R. 329; Willis v. State, 90 S. W. 1100, 49 Tex. Cr. R. 139; Grant v. State, 89 S. W. 274, 48 Tex. Cr. R. 418; Tones v. State, 88 S. W. 217, 48 Tex. Cr. R. 363, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455; Sanders v. State (Cr. App.) 85 S. W. 1147; Johnson v. State, 84 S. W. 824, 47 Tex. Cr. R. 523; Wright v. State, 84 S. W. 593, 47 Tex. Cr. R. 433; Bearden v. State, 83 S. W. 808, 47 Tex. Cr. R. 271; Kimberlain v. State, 82 S. W. 1043, 47 Tex. Cr. R. 235; Becknell v. State, 82 S. W. 1039, 47 Tex. Cr. R. 240; Fine v. State (Cr. App.) 81 S. W. 723; Teague v. State, 4 Tex. App. 147.

Utah. State v. Morgan, 74 P. 526, 27 Utah, 103; State v. Haworth, 68 P. 155, 24 Utah, 398; People v. Callaghan, 6 P. 49, 4 Utah, 49.

Vt. State v. Warm, 105 A. 244, 92 Vt. 447, 2 A. L. R. 811.

Va. Lufty v. Commonwealth, 100 S. E. 829, 126 Va. 707; Karnes v. Commonwealth, 99 S. E. 562, 125 Va. 758, 4 A. L. R. 1509; Robinson v. Commonwealth, 52 S. E. 690, 104 Va. 888; McCue v. Commonwealth, 49 S. E. 623, 103 Va. 870; Litton v. Commonwealth, 44 S. E. 923, 101 Va. 833; Longley v. Commonwealth, 37 S. E. 339, 99 Va. 807.

Wash. State v. Storrs, 192 P. 984, 112 Wash. 675; State v. Vane, 178 P. 456, 105 Wash. 421; State v. Vane, 177 P. 728, 105 Wash. 170; State v. Palmer, 176 P. 547, 105 Wash. 396; State v. Armstrong, 79 P. 490, 37 Wash. 51; State v. Clark, 76 P. 98, 34 Wash. 485, 101 Am. St. Rep. 1006; State v. Vance, 70 P. 34, 29 Wash. 435; State v. Webb, 55 P. 935, 20 Wash. 500; State v. Cushing, 50 P. 512, 17 Wash. 544.

W. Va. State v. Vineyard, 101 S. E. 440, 85 W. Va. 293; State v. Panetta, 101 S. E. 360, 85 W. Va. 212; State v. Dillard, 53 S. E. 117, 59 W. Va. 197; State v. Cottrill, 43 S. E. 244, 52 W. Va. 363; State v. Clark, 41 S. E. 204, 51 W. Va. 457; State v. Sheppard, 39 S. E. 676, 49 W. Va.

stractly in his request to warrant a refusal of the request,[19] and where instructions sufficiently set forth the concrete claims of a party to give the jury a proper understanding of the issues, it is not error to refuse instructions stating the claimed facts more in detail.[20]

§ 500. Specific applications of rule

The above rule has been applied in civil cases to sustain the refusal of the trial court to instruct on the issue of the abandonment of a contract,[21] on whether a broker suing for commissions was the procuring cause of a sale,[22] on the issue of the liability of a carrier for injuries to live stock,[23] on the care required to prevent injuries by fire,[24] on the care required from a master in supplying a safe place to work,[25] on the duty of a locomotive engineer to heed stop signals,[26] on the duty of a city to place warning signals around obstructions in the street,[27] on the liability of a landowner for the diversion of surface water,[28] on the issue of remote and proximate cause,[29] on the issue of contributory negligence,[30]

582; State v. Staley, 32 S. E. 198, 45 W. Va. 792.

Wis. Roszczyniala v. State, 104 N. W. 113, 125 Wis. 414; Murphy v. State, 102 N. W. 1087, 124 Wis. 635; Suckow v. State, 99 N. W. 440, 122 Wis. 156; Lowe v. State, 96 N. W. 417, 118 Wis. 641; Bannen v. State, 91 N. W. 107, 115 Wis. 317, reversed 91 N. W. 965, 115 Wis. 317; Cornell v. State, 80 N. W. 745, 104 Wis. 527; Buel v. State, 80 N. W. 78, 104 Wis. 132.

Wyo. Horn v. State, 73 P. 705, 12 Wyo. 80.

[19] Condie v. Rio Grande Western Ry. Co., 97 P. 120, 34 Utah, 237.

[20] Hopson v. Union Traction Co., 167 P. 1059, 101 Kan. 499.

[21] Bush v. Wofford, 213 S. W. 751, 139 Ark. 330.

[22] Thomas v. Wyckoff, 174 N. W. 26, 187 Iowa, 148.

[23] Missouri Pac. R. Co. v. Hill, 215 S. W. 676, 144 Ark. 641.

[24] Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

[25] Seltz v. Pelligreen Const. & Inv. Co. (Mo. App.) 215 S. W. 485.

[26] McGillivray v. Great Northern Ry. Co., 176 N. W. 200, 145 Minn. 51.

[27] Emelle v. Salt Lake City, 181 P. 266, 54 Utah, 360.

[28] Rehfuss v. Weeks, 182 P. 137, 93 Or. 25.

[29] Tillery v. Harvey (Mo. App.) 214 S. W. 246.

Issue of whether carrier liable for injuries caused by wild and unruly nature of animals. In action for injuries to shipper of stock caused by a member of the train crew flashing his lantern at night before horses and mules on loading chute, causing them to rush back and trample plaintiff, who was loading them on the chute, a requested charge that, if plaintiff was injured as the "sole proximate cause" of the wild and unruly nature and disposition of the mules and horses, verdict should be for defendant, even though defendant was guilty of negligence was sufficiently presented by a charge that if their wild and unruly nature and disposition, if any, was the sole proximate cause of plaintiff's injuries, to find for defendant. Galveston, H. & S. A. Ry. Co. v. Wilson (Tex. Civ. App.) 214 S. W. 773.

[30] **Ark.** Central Coal & Coke Co. v. Burns, 215 S. W. 265, 140 Ark. 147.

Cal. Fernald v. Eaton & Smith, 180 P. 944, 40 Cal. App. 498.

S. D. True v. Chicago & N. W. Ry. Co., 173 N. W. 642, 42 S. D. 35.

Tex. Texas Power & Light Co. v.

on the effect of the knowledge by a pedestrian of defects in a street as precluding recovery for injuries caused thereby,[31] on the issue of comparative negligence,[32] on the question of the burden of proof,[33] on the question of the credibility of witnesses,[34] and to the refusal to give instructions defining words.[35]

Where the court defines proximate cause, and clearly states that contributory negligence will not defeat a recovery, unless concurrent with the negligence of the defendant, it is not required to also define proximate and remote cause, with special reference to the doctrine of last clear chance.[36]

In criminal cases it has been held proper, on the ground of instructions already given, to refuse instructions on the issue of self-defense or certain phases thereof,[37] on the necessity for corroboration of the testimony of an accomplice,[38] on the effect of the good character of defendant,[39] on the issue of the voluntary character of an admission or confession,[40] on the effect of an explanation of the possession of stolen property,[41] on circumstantial evidence,[42] on the doctrine of reasonable doubt,[43] on principals and accesso-

Bristow (Civ. App.) 213 S. W. 702; Texas Electric Ry. v. Hooks (Civ. App.) 211 S. W. 654.

Wash. Reames v. Heymanson, 186 P. 325, 109 Wash. 132.

[31] Junkins v. Inhabitants of Town of Stoneham, 125 N. E. 140, 234 Mass. 130.

[32] Western & A. R. Co. v. Jarrett, 100 S. E. 231, 24 Ga. App. 175.

[33] Haun v. Tally, 181 P. 81, 40 Cal. App. 585.

[34] King v. Metropolitan Life Ins. Co. (Mo. App.) 211 S. W. 721.

[35] Missouri Pac. R. Co. v. Carey, 212 S. W. 80, 138 Ark. 563; Ætna Life Ins. Co. v. McCullagh, 215 S. W. 821, 185 Ky. 664.

[36] Duprat v. Chesmore, 110 A. 305, 94 Vt. 218.

[37] **Ark.** Smith v. State, 213 S. W. 403, 139 Ark. 356.

Cal. People v. Hopper (App.) 183 P. 836.

Miss. Higgins v. State, 83 So. 245, 120 Miss. 823.

Tex. Bozeman v. State, 215 S. W. 319, 85 Tex. Cr. R. 653; Mauney v. State, 210 S. W. 959, 85 Tex. Cr. R. 184; Davis v. State, 204 S. W. 652, 83 Tex. Cr. R. 539.

Reasonableness of apprehension of danger. In a prosecution for murder there was no need for special charges telling the jury that they could consider the weakened condition of accused's mind in deciding whether to him the danger of death or serious bodily injury was real or apparent, the court having instructed that defendant be discharged if the conduct of the deceased produced in accused's mind a reasonable apprehension of fear of death or serious bodily injury, viewed from accused's standpoint alone. Zimmerman v. State, 215 S. W. 101, 85 Tex. Cr. R. 630.

[38] Housley v. State, 220 S. W. 460, 143 Ark. 425.

[39] Le More v. United States (C. C. A. La.) 253 F. 887, 165 C. C. A. 367, certiorari denied 39 S. Ct. 184, 248 U. S. 586, 63 L. Ed. 434; Phillips v. State, 99 S. E. 874, 149 Ga. 255; State v. Jones, 123 N. W. 960, 145 Iowa, 176; People v. Mathews, 174 N. W. 532, 207 Mich. 526.

[40] Hardin v. State, 211 S. W. 233, 85 Tex. Cr. R. 220, 4 A. L. R. 1308.

[41] Vaughn v. State, 208 S. W. 527, 84 Tex. Cr. R. 483.

[42] Porter v. State, 215 S. W. 201, 86 Tex. Cr. R. 23; State v. Turfey, 176 P. 563, 100 Wash. 5.

[43] **Ala.** Vaughn v. State, 84 So. 879, 17 Ala. App. 383.

Ark. Barker v. State, 205 S. W.

ries,[44] on the issue of included offenses,[45] and to the refusal to instruct the jury to disregard certain matters not in evidence.[46]

The denial of a request that evidence of the good character of the defendant may alone create a reasonable doubt is not error, where the court charges that the reputation of the accused for good character should be considered together with all the other evidence in the case, and that if the jury should have a reasonable doubt of his guilt he should be acquitted;[47] and where the court charges correctly upon reasonable doubt and the presumption of innocence, it is not error to refuse to instruct that defendant is presumed to be innocent, and that that presumption goes to the jury as independent evidence.[48] So an instruction that each juror should adhere to his own opinion until convinced beyond a reasonable doubt is covered by an instruction that the jury will not be justified in finding a verdict of guilty unless they are convinced by the evidence beyond a reasonable doubt.[49]

§ 501. Limitations of rule

Where instructions are asked by either party to a suit which correctly state the law on the issues presented and the evidence, it is error to exclude them, unless the points are fairly covered by other instructions given by the court on its own motion.[50] Within such rule it is not sufficient that the instruction requested is inferentially given in the main charge of the court,[51] or in other

805, 135 Ark. 404; Gramlich v. State, 204 S. W. 848, 135 Ark. 243.

Cal. People v. Epperson, 176 P. 702, 38 Cal. App. 486.

Fla. Witherspoon v. State, 80 So. 61, 76 Fla. 445; Street v. State, 79 So. 729, 76 Fla. 217.

Ga. Brown v. State, 96 S. E. 435, 148 Ga. 264.

Mo. State v. Finley, 213 S. W. 463, 278 Mo. 474.

N. J. State v. Runyon, 107 A. 33, 93 N. J. Law, 16.

Okl. Burton v. State, 185 P. 842, 16 Okl. Cr. 602; Bornheim v. State, 183 P. 514, 16 Okl. Cr. 704.

Pa. Commonwealth v. Ross, 110 A. 327, 266 Pa. 580.

W. Va. State v. Panetta, 101 S. E. 360, 85 W. Va. 212.

[44] State v. Stickel, 176 P. 799, 90 Or. 415.

[45] Morris v. State, 206 S. W. 82, 84 Tex. Cr. R. 100.

[46] Grammer v. State, 172 N. W. 41, 103 Neb. 325.

[47] Warren v. United States (C. C. A. Okl.) 250 F. 89, 162 C. C. A. 261.

[48] Hall v. State, 83 So. 513, 78 Fla. 420, 8 A. L. R. 1234.

[49] People v. Epperson, 176 P. 702, 38 Cal. App. 486.

[50] Struble v. Village of De Witt, 116 N. W. 154, 81 Neb. 504.

[51] State v. Williams, 169 N. W. 371, 184 Iowa, 1070; Isley v. Virginia Bridge & Iron Co., 55 S. E. 416, 143 N. C. 51.

Instructions improperly refused within rule. In an action for the malicious prosecution of a replevin suit, an instruction that the burden of proof was upon plaintiff was insufficient to justify the refusal of requests to charge that it was incumbent on plaintiff to show that defendants acted without probable cause. Harris v. Thomas, 103 N. W. 863, 140 Mich. 462. Though the court instructed that plaintiff could not recover for injuries received in a prior accident, the refusal to instruct that plaintiff

special requests which the court has granted,[52] and a requested instruction correctly defining the special rule of law on which a party relies, and grouping the facts to establish it, should not be refused because the jury might infer from the general charge that the requested rule is correct,[53] or because the court has made a general and abstractly correct presentation of the issues involved.[54]

The court should not refuse, as having been already more correctly given in accordance with the evidence, a correct instruction requested by the accused, when the charge given makes conditions that are not contained in the proffered instruction essential to an acquittal.[55]

Although, technically speaking, a general statement in a charge may be said to include the specific application of the law to the evidence in the case as expressed in a request, yet if it is probable that the jury will not understand that the request is included

could not recover for aggravation of previous injuries, not pleaded, was error. Boatright v. Portland Ry., Light & Power Co., 135 P. 771, 68 Or. 26.

[52] People v. Taleisnik, 122 N. E. 615, 225 N. Y. 489, reversing judgment (Sup.) 172 N. Y. S. 912.

[53] Yellow Pine Oil Co. v. Noble, 105 S. W. 318, 101 Tex. 125, affirming judgment (Civ. App.) 101 S. W. 276; El Paso & S. W. R. Co. v. Foth, 105 S. W. 322, 101 Tex. 133, reversing judgment (Civ. App.) 100 S. W. 171.

[54] Western Coal & Mining Co. v. Buchanan, 102 S. W. 694, 82 Ark. 499; Texas & N. O. R. Co. v. McAllister (Tex. Civ. App.) 183 S. W. 82; Atchison, T. & S. F. Ry. Co. v. Hill (Tex. Civ. App.) 171 S. W. 1028; J. H. W. Steele Co. v. Dover (Tex. Civ. App.) 170 S. W. 809.

Effect of general instruction as dispensing with specific instructions. In an action on an insurance policy, the company is entitled to a special instruction as to any defect in or failure to furnish proof of loss within time, although the court has given a general instruction on that point. American Fire Ins. Co. v. Haynie, 120 S. W. 825, 91 Ark. 43. It is error in an action for negligence to refuse a request of defendant pointing out the concrete question of fact as to which the parties differ, but on which the existence of negligence is predicated, and a statement to the jury in lieu thereof of a general rule of law in general terms is insufficient. Mellon v. Victor Talking Mach. Co., 73 A. 494, 77 N. J. Law, 670. In an action for failure to deliver a telegram, where it appeared that upon the receipt of the message defendant's agent made inquiry, and learned that the plaintiff lived in the country several miles away, and immediately mailed the message to him, and thereafter sent a service message to the plaintiff's agent, stating that the message was not delivered, and that the party lived in the country, and that he had mailed it to him, it was error for the court to refuse an instruction grouping these facts, and charging that, if the defendant's agent in so doing exercised such care as an ordinarily prudent person would have exercised under the same circumstances, the verdict should be for defendant, although the court had instructed in its main charge in general terms that, if the agent acted with such ordinary care and diligence in attempting to deliver the message as an ordinarily prudent person would have exercised, then the verdict should be for the defendant. Western Union Telegraph Co. v. Timmons, 125 S. W. 376, 59 Tex. Civ. App. 146.

[55] Marshall v. State, 32 Fla. 462. 14 So. 92.

in the general charge, it will be error to refuse the request.[56] Thus the giving of a general instruction, as required by a statute, that to recover the plaintiff must prove the material allegations of the complaint by a preponderance of the evidence, does not authorize the refusal of a particular instruction applicable to the evidence and issues,[57] and a general charge upon the issue of contributory negligence is not sufficient to warrant refusing a special charge upon the issue of assumption of risk.[58]

In a criminal case a pertinent charge adjusted to the particular facts relied on as a defense should be given on request, although the judge in his charge states generally the abstract principle of law applicable to the facts.[59] The right of a party to have given an instruction presenting his theory of the case is not impaired by the fact that instructions presenting practically the same legal propositions from the viewpoint of his adversary have been given.[60]

In some jurisdictions under statutory provisions the court is not justified, in a criminal case, in refusing a special charge because it is covered by a paragraph of the general charge of the court.[61]

I. Erroneous Requests

§ 502. Rule that such requests may be refused without attempt at correction

It is not the duty of the court to grant a request for an instruction which is incorrect or inaccurate in the form in which it is prayed.[62] It is therefore proper to refuse, as an entirety, an in-

[56] Simoneau v. Keene Electric Ry., 100 A. 551, 78 N. H. 363, L. R. A. 1918A, 620.

[57] Baltimore & O. R. Co. v. Peck, 101 N. E. 674, 53 Ind. App. 281.

[58] Cleburne Electric & Gas Co. v. McCoy (Tex. Civ. App.) 128 S. W. 457.

[59] Stribling v. State, 65 S. E. 1068, 6 Ga. App. 864.

[60] Fujise v. Los Angeles Ry. Co., 107 P. 317, 12 Cal. App. 207; Kemendo v. Fruit Dispatch Co., 131 S. W. 73, 61 Tex. Civ. App. 631; Northern Texas Traction Co. v. Moberly (Tex. Civ. App.) 109 S. W. 483.

[61] Snyder v. State, 40 So. 978, 145 Ala. 33; Orr v. State, 23 So. 696, 117 Ala. 69.

[62] **U. S.** (C. C. Mass.) Locke v. United States, Fed. Cas. No. 8,442, 2 Cliff. 574a.

Ark. Newman v. Peay, 176 S. W. 143, 117 Ark. 579.

D. C. Jackson v. U. S., 48 App. D. C. 272.

Ga. Spillar v. Dickson, 95 S. E. 994, 148 Ga. 90; Macon, D. & S. R. Co. v. Joyner, 59 S. E. 902, 129 Ga. 683.

Ind. Crumrine v. Crumrine's Estate, 43 N. E. 322, 14 Ind. App. 641; Keller v. Reynolds, 40 N. E. 76, 12 Ind. App. 383; Goodwine v. State, 5 Ind. App. 63, 31 N. E. 554; Mosier v. Stoll, 20 N. E. 752, 119 Ind. 244.

Iowa. Mickey v. City of Indianola, 114 N. W. 1072.

Kan. Douglas v. Wolf, 6 Kan. 88.

Mass. Martineau v. National Blank Book Co., 166 Mass. 4, 43 N. E. 513.

Mich. Brown v. Harris, 102 N. W. 960, 139 Mich. 372.

struction which is erroneous in part,[63] or which needs to be quali-

Mont. Herrin v. Sieben, 127 P. 323, 46 Mont. 226.

N. M. State v. Starr, 173 P. 674, 24 N. M. 180.

N. Y. Gardner v. Clark, 17 Barb. 538; Doughty v. Hope, 3 Denio, 594.

R. I. Perry v. Sheldon, 75 A. 690, 30 R. I. 426.

S. D. Grant v. Whorton, 134 N. W. 803, 28 S. D. 599.

Tenn. Raine v. State, 226 S. W. 189, 143 Tenn. 168.

Tex. Turner v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.) 177 S. W. 204; Summerhill v. Wilkes, 133 S. W. 492, 63 Tex. Civ. App. 456; Boardman v. Woodward (Civ. App.) 118 S. W. 550; San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574, 52 Tex. Civ. App. 22.

Wash. Larson v. McMillan, 170 P. 324, 99 Wash. 626.

[63] **U. S.** Sweeney v. Erving, 33 S. Ct. 416, 228 U. S. 233, 57 L. Ed. 815, Ann. Cas. 1914D, 905, affirming judgment 35 App. D. C. 57, 43 L. R. A. (N. S.) 734; (C. C. A. Colo.) Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co., 203 F. 795, 122 C. C. A. 113; (C. C. A. Minn.) Chicago Great Western Ry. Co. v. Roddy, 131 F. 712, 65 C. C. A. 470; (C. C. A. Mo.) Kercheval v. Allen, 220 F. 262, 135 C. C. A. 1; (C. C. A. N. J.) Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., 223 F. 881, 139 C. C. A. 319; Porter v. Buckley, 147 F. 140, 78 C. C. A. 138; (C. C. A. Ohio) Monarch Cycle Mfg. Co. v. Royer Wheel Co., 105 F. 324, 44 C. C. A. 523; (C. C. A. Okl.) Chicago, R. I. & P. Ry. Co. v. Hale, 176 F. 71, 99 C. C. A. 379.

Ala. Dunaway v. Roden, 71 So. 70, 14 Ala. App. 501, certiorari denied Ex parte Dunaway, 72 So. 1019, 196 Ala. 701; Williamson Iron Co. v. McQueen, 40 So. 306, 144 Ala. 265; Southern Ry. Co. v. Bradford, 40 So. 100, 145 Ala. 684; Southern Ry. Co. v. Douglass, 39 So. 268, 144 Ala. 351; United States Life Ins. Co. v. Lesser, 28 So. 646, 126 Ala. 568; Alabama State Land Co. v. Slaton, 24 So. 720, 120 Ala. 259.

Ariz. Arizona Eastern R. Co. v. Bryan, 157 P. 376, 18 Ariz. 106.

Ark. Kanis v. Rogers, 177 S. W. 413, 119 Ark. 120; Randleman v. Taylor, 127 S. W. 723, 94 Ark. 511, 140 Am. St. Rep. 141; C. H. Smith Tie & Timber Co. v. Weatherford, 121 S. W. 943, 92 Ark. 6.

Cal. People v. Wong Sang Lung, 84 P. 843, 3 Cal. App. 221; Williamson v. Tobey, 86 Cal. 497, 25 P. 65; Smith v. Richmond, 19 Cal. 476.

Colo. Gill v. Schneider, 110 P. 62, 48 Colo. 382; Greeley Irr. Co. v. Von Trotha, 108 P. 985, 48 Colo. 12; Allen v. Shires, 107 P. 1072, 47 Colo. 439; Allen v. Shires, 107 P. 1070, 47 Colo. 433.

Conn. Urbansky v. Kutinsky, 84 A. 317, 86 Conn. 22; Johnson v. Connecticut Co., 83 A. 530, 85 Conn. 438; Allen v. Lyness, 71 A. 936, 81 Conn. 626; Stern v. Leopold Simons & Co., 58 A. 696, 77 Conn. 150.

Fla. Florida Ry. Co. v. Dorsey, 52 So. 963, 59 Fla. 260; Jacksonville Electric Co. v. Schmetzer, 43 So. 85, 53 Fla. 370.

Ga. Seaboard Air Line Ry. v. Moseley, 85 S. E. 1021, 144 Ga. 35; Bush v. Fourcher, 59 S. E. 459, 3 Ga. App. 43; Roberts, Cranford & Co. v. Devane, 59 S. E. 289, 129 Ga. 604; City of Rome v. Sudduth, 49 S. E. 300, 121 Ga. 420; Thompson v. O'Connor, 41 S. E. 242, 115 Ga. 120; Grace v. McKinney, 37 S. E. 737, 112 Ga. 425.

Ill. Kelly v. Chicago City Ry. Co., 119 N. E. 622, 283 Ill. 640; Indiana, I. & I. R. Co. v. Otstot, 72 N. E. 387, 212 Ill. 429, affirming judgment 113 Ill. App. 37; Chicago & E. I. R. Co. v. Burridge, 71 N. E. 838, 211 Ill. 9, reversing judgment 107 Ill. App. 23; Smythe's Estate v. Evans, 70 N. E. 906, 209 Ill. 376, reversing judgment 108 Ill. App. 145; Nelson v. Fehd, 67 N. E. 828, 203 Ill. 120, affirming judgment 104 Ill. App. 114.

Ind. Howlett v. Dilts, 30 N. E. 313, 4 Ind. App. 23.

Kan. Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co., 61 P. 504, 9 Kan. App. 863; Kansas Ins. Co. v. Berry, 8 Kan. 159; Mayberry v. Kelly, 1 Kan. 116.

Ky. Stringtown & B. Turnpike Road Co. v. Riley (Super.) 8 Ky. Law Rep. (abstract) 267.

Me. National Furniture Co. v.

fied or explained,[64] although a charge on the subject of the re-

Prussian Nat. Ins. Co., 91 A. 785, 112 Me. 557; York v. Parker, 84 A. 939, 109 Me. 414.

Md. F. W. Dodge Co. v. H. A. Hughes Co., 72 A. 1036, 110 Md. 374.

Mass. Gardiner v. City of Brookline, 181 Mass. 162, 63 N. E. 397; Twomey v. Linnehan, 161 Mass. 91, 36 N. E. 590.

Mich. Williams v. City of Lansing, 115 N. W. 961, 152 Mich. 169; Courtemanche v. Supreme Court, I. O. O. F., 98 N. W. 749, 136 Mich. 30, 64 L. R. A. 668, 112 Am. St. Rep. 345; Bedford v. Penny, 25 N. W. 381, 58 Mich. 424; Weschester Fire Ins. Co. v. Earle, 33 Mich. 143.

Minn. Hayward v. Knapp, 23 Minn. 430; Simmons v. St. Paul & C. Ry. Co., 18 Minn. 184 (Gil. 168); Village of Mankato v. Meagher, 17 Minn. 265 (Gil. 243); Dodge v. Rogers, 9 Minn. 223 (Gil. 209); Selden v. Bank of Commerce, 3 Minn. 166 (Gil. 108); Bond v. Corbett, 2 Minn. 248 (Gil. 209); Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51).

Miss. Doe v. King, 3 How. 125.

Mo. Viles v. Viles (App.) 190 S. W. 41; Thomas v. Thomas, 186 S. W. 993; Fisher v. St. Louis Transit Co., 95 S. W. 917, 198 Mo. 562; McManus v. Metropolitan St. Ry. Co., 92 S. W. 176, 116 Mo. App. 110; Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; Trustees of Christian University v. Hoffman, 69 S. W. 474, 95 Mo. App. 488; Lail v. Pacific Exp. Co., 81 Mo. App. 232.

Mont. Ford v. Drake, 127 P. 1019, 46 Mont. 314; Pelican v. Mutual Life Ins. Co. of New York, 119 P. 778, 44 Mont. 277.

Neb. Buck v. Hogeboom, 90 N. W. 635, 2 Neb. (Unof.) 853.

N. J. Max v. Kahn, 102 A. 737, 91 N. J. Law, 170; Dederick v. Central R. Co. of New Jersey (Sup.) 65 A. 833, 74 N. J. Law, 424; Consolidated Traction Co. v. Chenowith, 58 N. J. Law, 416, 34 A. 817.

N. Y. Kenney v. South Shore Natural Gas & Fuel Co., 119 N. Y. S. 363, 134 App. Div. 859; Wittleder v. Citizens' Electric Illuminating Co. of Brooklyn, 62 N. Y. S. 297, 47 App. Div. 410; Hodges v. Cooper, 43 N. Y. 216; Keller v. New York Cent. R. Co., 24 How. Prac. 172; Vallance v. King, 3 Barb. 548; Halsey v. Rome, W. & O. R. Co., 12 N. Y. St. Rep. 319.

N. C. Washington Horse Exchange v. Louisville & N. R. Co., 87 S. E. 941, 171 N. C. 65; Phifer v. Commissioners of Cabarrus County, 72 S. E. 852, 157 N. C. 150; Vanderbilt v. Brown, 39 S. E. 36, 128 N. C. 498.

Ohio. Columbus Ry. v. Connor, 27 Ohio Cir. Ct. R. 229; Holmes v. Ashtabula Rapid Transit Co., 10 O. C. D. 638.

Okl. Missouri, O. & G. Ry. Co. v. Collins, 150 P. 142, 47 Okl. 761; Missouri, K. & T. Ry. Co. v. West, 134 P. 655, 38 Okl. 581; Continental Casualty Co. v. Owen, 131 P. 1084, 38 Okl. 107; Sanders v. Cline, 101 P. 267, 22 Okl. 154; Friedman v. Weisz, 58 P. 613, 8 Okl. 392.

Pa. Seifred v. Pennsylvania R. Co., 55 A. 1061, 206 Pa. 399.

S. C. McMahan v. Walhalla Light & Power Co., 86 S. E. 194, 102 S. C. 57; Lorenzo v. Atlantic Coast Line R.

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[64] **Ala.** Knowles v. Ogletree, 96 Ala. 555, 12 So. 397; Callan v. McDaniel, 72 Ala. 96; Kirkland v. Trott, 66 Ala. 417; Godbold v. Blair, 27 Ala. 592; Rolston v. Langdon, 26 Ala. 660.

Cal. Garlick v. Bowers, 66 Cal. 122, 4 P. 1138.

Ill. Coney v. Pepperdine, 38 Ill. App. 403.

Ind. Kluse v. Sparks, 10 Ind. App. 444, 37 N. E. 1047; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210; Over v. Schiffling, 102 Ind. 191, 26 N. E. 91; Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325; Howard County Com'rs v. Legg, 93 Ind. 523, 47 Am. Rep. 390; Roots v. Fyner, 10 Ind. 87.

Iowa. Bevan v. Hayden, 13 Iowa, 122; Keenan v. Missouri State Mut. Ins. Co., 12 Iowa, 126; Morrison v. Myers, 11 Iowa, 538; Grimes v. Martin, 10 Iowa, 347; Tifield v. Adams, 3 Iowa (3 Clarke) 487.

Kan. Douglas v. Wolf, 6 Kan. 88.

Me. Tower v. Haslam, 84 Me. 86, 24 A. 587.

Okl. Fulsom-Morris Coal & Mining Co. v. Mitchell, 132 P. 1103, 37 Okl. 575.

quest should be given;[65] it not being considered that the court is under any obligation to reform a requested instruction, and to cast out such parts as render it improper as a whole.[66]

Co., 85 S. E. 964, 101 S. C. 409; Earle v. Poat. 41 S. E. 525, 63 S. C. 439; Ragsdale v. Southern Ry. Co., 38 S. E. 609, 60 S. C. 381; Pickens v. South Carolina & G. R. Co., 32 S. E. 567, 54 S. C. 498; McGee v. Wells, 30 S. E. 602, 52 S. C. 472; Gandy v. Orient Ins. Co., 29 S. E. 655, 52 S. C. 224.

Tenn. Louisville & N. R. Co. v. Smith, 134 S. W. 866, 123 Tenn. 678; Pennsylvania R. Co. v. Naive, 79 S. W. 124, 112 Tenn. 239, 64 L. R. A. 443; City of Knoxville v. Cox, 53 S. W. 734, 103 Tenn. 368.

Tex. Quanah, A. & P. Ry. Co. v. Bone (Civ. App.) 199 S. W. 332; Bennett v. Foster (Civ. App.) 161 S. W. 1078; Peacock v. Coltrane (Civ. App.) 156 S. W. 1087; Souther v. Hunt (Civ. App.) 141 S. W. 359; Evart v. Dalrymple (Civ. App.) 131 S. W. 223; Lyon v. Bedgood, 117 S. W. 897, 54 Tex. Civ. App. 19; Arthur v. Porter (Civ. App.) 116 S. W. 127; Missouri, K. & T. Ry. Co. of Texas v. Wall (Civ. App.) 110 S. W. 453; Galveston, H. & S. A. Ry. Co. v. Still, 100 S. W. 176, 45 Tex. Civ. App. 169; St. Louis Southwestern Ry. Co. of Texas v. Baer, 86 S. W. 653, 39 Tex. Civ. App. 16; Dolan v. Meehan (Civ. App.) 80 S. W. 99; Cranfill v. Hayden (Civ. App.) 75 S. W. 573, reversed 80 S. W. 609, 97 Tex. 544; Western Union Tel. Co. v. McConnico, 66 S. W. 592, 27 Tex. Civ. App. 610; Milmo Nat. Bank v. Convery (Civ. App.) 49 S. W. 926; St. Louis S. W. Ry. Co. of Texas v. Casseday (Civ. App.) 48 S. W. 6, reversed 50 S. W. 125, 92 Tex. 525; Clack v. Wood (Civ. App.) 46 S. W. 1132; Dublin Cotton-Oil Co. v. Jarrard, 42 S. W. 959, 91 Tex. 289, affirming judgment (Civ. App.) 40 S. W. 531; Riviere v. Missouri, K. & T. Ry. Co. (Civ. App.) 40 S. W. 1074.

Utah. Jensen v. Denver & R. G. R. Co., 138 P. 1185, 44 Utah, 100; Evans v. Oregon Short Line R. Co., 108 P. 638, 37 Utah, 431, Ann. Cas. 1912C, 259.

Vt. Needham v. Boston & M. R. Co., 74 A. 226, 82 Vt. 518; Terrill v. Tillison, 54 A. 187, 75 Vt. 193; Amsden v. Atwood, 38 A. 263, 69 Vt. 527.

Va. Keen's Ex'r v. Monroe, 75 Va. 424; Kincheloe v. Tracewells, 11 Grat. 587.

Wash. Singer v. Martin, 164 P. 1105, 96 Wash. 231; Nollmeyer v. Tacoma Ry. & Power Co., 164 P. 229, 95 Wash. 595; Howe v. West Seattle Land & Improvement Co., 59 P. 495, 21 Wash. 594.

W. Va. Berry v. Huntington Masonic Temple Ass'n, 93 S. E. 355, 80 W. Va. 342.

Wis. Lyle v. McCormick Harvesting Mach. Co., 84 N. W. 18, 108 Wis. 81, 51 L. R. A. 906; Stucke v. Milwaukee, C. M. R. Co., 9 Wis. 202.

[65] Rudolph v. Holmes, 78 So. 839, 201 Ala. 461; Hydraulic Cement Block Co. v. Christensen, 114 P. 524, 38 Utah, 525.

[66] **U. S.** (C. C. A. Mo.) Exchange Bank v. Moss, 149 F. 340, 79 C. C. A. 278.

Ark. American Fire Ins. Co. v. Haynie, 120 S. W. 825, 91 Ark. 43.

Colo. Blackmore v. Neale, 60 P. 952, 15 Colo. App. 49.

Conn. Rathbone v. City Fire Ins. Co., 31 Conn. 193.

D. C. Robinson v. Parker, 11 App. D. C. 132.

Ga. Seaboard Air Line Ry. v. Blackshear, 75 S. E. 902, 11 Ga. App. 579; Carter & Ford v. Brown, 61 S. E. 142, 4 Ga. App. 238.

Ill. Rolfe v. Rich, 149 Ill. 436, 35 N. E. 352, affirming 46 Ill. App. 406; Weeks v. Jones, 200 Ill. App. 215; Swigart v. Savely, 176 Ill. App. 369.

Ind. Town of Newcastle v. Grubbs, 86 N. E. 757, 171 Ind. 482; Toops v. State, 92 Ind. 13.

Ind. T. Gulf, C. & S. F. Ry. Co. v. Moseley, 98 S. W. 129, 6 Ind. T. 369.

Mo. Davis v. Springfield Hospital (App.) 196 S. W. 104.

Mont. Anderson v. Northern Pac. Ry. Co., 85 P. 884, 34 Mont. 181.

N. J. Christy v. New York Cent. & H. R. R. Co., 101 A. 372, 90 N. J. Law,

This rule applies where a number of propositions are requested en masse and one or more of them are improper,[67] or where an in-

540; Manchester Building & Loan Ass'n v. Allee, 80 A. 466, 81 N. J. Law, 605, reversing judgment (Sup.) 76 A. 1012, 80 N. J. Law, 185.

N. Y. Dooling v. City of New York, 132 N. Y. S. 1012, 148 App. Div. 713, Appeal to Court of Appeals denied 133 N. Y. S. 1119; Lee v. Sterling Silk Mfg. Co., 118 N. Y. S. 852, 134 App. Div. 123; Frank v. Metropolitan St. Ry. Co., 86 N. Y. S. 1018, 91 App. Div. 485; Smith v. New York Cent. & H. R. R. Co., 9 N. Y. St. Rep. 612.

N. C. Edwards v. Western Union Telegraph Co., 60 S. E. 900, 147 N. C. 126; Harris v. Atlantic Coast Line R. Co., 43 S. E. 589, 132 N. C. 160.

S. C. Stanton v. Southern Ry. Co., 34 S. E. 695, 56 S. C. 398.

Tex. Cunningham v. State, 166 S. W. 519, 73 Tex. Cr. R. 565; San Antonio & A. P. Ry. Co. v. McBride & Dillard, 116 S. W. 638; Houston & T. C. R. Co. v. Oram, 107 S. W. 74, 47 Tex. Civ. App. 526; Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 100 S. W. 182; Gulf, C. & S. F. Ry. Co. v. Minter, 93 S. W. 516, 42 Tex. Civ. App. 235; Creager v. Yarborough (Civ. App.) 87 S. W. 376; Citizens' Nat. Bank v. Cammer (Civ. App.) 86 S. W. 625; International & G. N. R. Co. v. Shuford, 81 S. W. 1189, 36 Tex. Civ. App. 251; St. Louis Southwestern Ry. Co. of Texas v. Kennemore (Civ. App.) 81 S. W. 802; Williams v. Yoe, 54 S. W. 614, 22 Tex. Civ. App. 446; Waco Artesian Water Co. v. Cauble, 47 S. W. 538, 19 Tex. Civ. App. 417; Harris v. First Nat. Bank (Civ. App.) 45 S. W. 311; Lawrence v. State, 20 Tex. App. 536.

Va. Peele v. Bright, 89 S. E. 238, 119 Va. 182; Chesapeake & O. Ry. Co. v. F. W. Stock & Sons, 51 S. E. 161, 104 Va. 97.

Wash. Croft v. Northwestern S. S. Co., 55 P. 42, 20 Wash. 175.

W. Va. Shrewsbury v. Tufts, 41 W. Va. 212, 23 S. E. 692.

[67] **Ala.** Goldstein v. Self, 62 So. 369, 9 Ala. App. 100; Bohanan v. Dodd, 60 So. 955, 7 Ala. App. 220; Mobile & Ohio R. Co. v. Minor, 60 So. 951, 6 Ala. App. 633, certiorari denied Ex parte Mobile & O. R. Co. (Sup.) 61 So. 1005; Birmingham Ry., Light & Power Co. v. Leach, 59 So. 358, 5 Ala. App. 546; Stowers Furniture Co. v. Brake, 48 So. 89, 158 Ala. 639; McEntyre v. Hairston, 44 So. 417, 152 Ala. 251.

Ga. Atlantic Coast Line R. Co. v. Hill, 77 S. E. 316, 12 Ga. App. 392.

Ill. Springfield Electric Light & Power Co. v. Mott, 120 Ill. App. 39.

N. J. Schreiber v. Public Service Ry. Co., 98 A. 316, 89 N. J. Law, 183; Miller v. I. P. Thomas & Son Co., 98 A. 193, 89 N. J. Law, 364.

N. C. Johnson County Sav. Bank v. Chase, 65 S. E. 745, 151 N. C. 108.

Tex. Merchants' Ice Co. v. Scott & Dodson (Civ. App.) 186 S. W. 418; Hermann v. Bailey (Civ. App.) 174 S. W. 865; Western Union Telegraph Co. v. Glass (Civ. App.) 154 S. W. 604; Wall v. Lubbock, 118 S. W. 886, 52 Tex. Civ. App. 405; Gulf, C. & S. F. Ry. Co. v. Garrett (Civ. App.) 98 S. W. 657; International & G. N. R. Co. v. Sein, 26 S. W. 788; International & G. N. R. Co. v. Neff (Civ. App.) 26 S. W. 784; Missouri Pac. Ry. Co. v. King, 2 Tex. Civ. App. 122, 20 S. W. 1014, 23 S. W. 917.

Contrary rule. In some jurisdictions, where a request to charge contains two independent and distinct propositions, one of which is proper to be given and the other not, the proper course is, not to refuse it as a whole, but to refuse the erroneous proposition, and grant that which is correct. Sword v. Keith, 31 Mich. 247; Peshine v. Shepperson, 17 Grat. (Va.) 472, 94 Am. Dec. 468.

Charges written on separate sheets of paper. Where five special charges requested are written on separate sheets of paper, which are pinned together so as to be easily separated, and the style of the cause appears only on the first one, and the signature of counsel only on the last, they must be considered together; and, if one is incorrect, all are prop-

struction contains several alternative propositions, one of which is unsound,[68] or where, in an action based on two counts, instructions asked as applicable to the whole complaint are good only as to one count,[69] or where part of an instruction is argumentative,[70] or where a requested charge contains an incorrect statement of fact,[71] or requests the withdrawal of both improper and proper evidence,[72] or where a part of a request to charge is not applicable to the facts,[73] or invades the province of the jury.[74] So requested instructions, unintelligible for lack of punctuation, may be refused.[75]

§ 503. Qualifications of rule

If instructions, taken as a whole, present the law correctly, and are neither inconsistent nor misleading, they should be given, although one of them, considered by itself, is defective or erroneous;[76] and where different charges, although written upon a single piece of paper, are acted upon by the court as separate charges, and a separate exception is reserved to the refusal of each charge, the fact that one of them is faulty will not absolve the court from error in refusing them all,[77] and while in some jurisdictions it is not error to refuse an instruction unless it ought to be given precisely in the terms prayed,[78] and in one jurisdiction the court has no power to correct even mere verbal inaccuracies, being bound to give or refuse instructions as requested,[79] it is held in some jurisdictions that an error in a requested instruction may be so apparently clerical that it will be the duty of the court to reform the

erly refused. International & G. N. R. Co. v. Neff (Tex. Civ. App.) 26 S. W. 784; Same v. Seln, Id. 788.

[68] Whitsett v. Belue, 54 So. 677, 172 Ala. 256; Boyden v. Fitchburg R. Co., 47 A. 409, 72 Vt. 89.

[69] Manchester Fire Assur. Co. v. Felbelman, 23 So. 759, 118 Ala. 308.

[70] Sloss-Sheffield Steel & Iron Co. v. Sampson, 48 So. 493, 158 Ala. 590.

[71] McNetton v. Herb, 123 N. W. 17, 158 Mich. 525.

[72] Kendrick v. Ryus, 123 S. W. 937, 225 Mo. 150, 135 Am. St. Rep. 585.

[73] Knecht v. Mooney, 85 A. 775, 118 Md. 583; Jackson v. Southwest Missouri R. Co., 156 S. W. 1005, 171 Mo. 430; Zarate v. Villareal (Tex. Civ. App.) 155 S. W. 328; Sabine & E. T. Ry. Co. v. Ewing, 21 S. W. 700, 1 Tex. Civ. App. 531.

[74] Mesker v. Bishop, 103 N. E. 492, 56 Ind. App. 455; International & G. N. R. Co. v. Haddox, 81 S. W. 1036, 36 Tex. Civ. App. 385; Brooke v. Young, 3 Rand. (Va.) 106.

[75] Bailey v. State, 53 So. 296, 168 Ala. 4.

[76] Whalen v. St. Louis, K. C. & N. Ry. Co., 60 Mo. 323; Callaway v. Fash, 50 Mo. 420.

[77] Tennessee Coal, Iron & R. Co. v. Bonner, 51 So. 145, 164 Ala. 57.

[78] American Motor Car Co. v. Robbins, 103 N. E. 641, 181 Ind. 417; Pittsburg, C., C. & St. L. Ry. Co. v. Sudhoff, 90 N. E. 467, 173 Ind. 314; transferred from Appellate Court 88 N. E. 702; Lawrenceburgh & U. M. R. Co. v. Montgomery, 7 Ind. 474; Childers v. Southern Pac. Co., 149 P. 307, 20 N. M. 366; Lynch v. Town of Waldwick, 101 N. W. 925, 123 Wis. 351.

[79] Barfield v. Evans, 65 So. 928, 187 Ala. 579; Louisville & N. R. Co. v. Lile, 45 So. 699, 154 Ala. 556; Banks v. State (Ala.) 39 So. 921.

request, so as to eliminate such error, and to charge the request as so reformed,[80] as where a request improperly uses the word "plaintiff," instead of "defendant."[81]

In Virginia the rule is that, while the court may, as a general rule, refuse to give an instruction which does not correctly expound the law, and is not bound to modify it, or give any other instruction in its place,[82] yet, where the request is so equivocal that to give or generally refuse it might mislead the jury, the court should either accompany a refusal with an explanation to the jury,[83] or should substitute a correct instruction for the one requested,[84] or should modify the request, so as to clearly give it the meaning which will make it proper, and then give the request as so modified.[85] In West Virginia a similar rule prevails.[86]

§ 504. Power of court to reform an erroneous request

In some jurisdictions, where an instruction requested is in part correct and in part erroneous, the court may give the part which is correct,[87] or may modify the instruction asked, so as to make it correct as a whole,[88] as by eliminating argumentative matter,[89]

[80] Kenny v. Marquette Cement Mfg. Co., 149 Ill. App. 173, judgment affirmed 90 N. E. 724, 243 Ill. 396; Ft. Worth & D. C. Ry. Co. v. Anderson (Tex. Civ. App.) 194 S. W. 847; Montgomery v. State, 107 N. W. 14, 128 Wis. 183.

[81] Haney v. Mann (Tex. Civ. App.) 81 S. W. 66.

In Alabama, where, as stated elsewhere, requests must be given, if given at all, in the exact language in which they are framed, the improper use of the word "defendant" for "plaintiff" in a requested instruction need not be corrected by the trial court, but the instruction may be refused. Western Ry. of Alabama v. Stone, 39 So. 723, 145 Ala. 663.

[82] Keen's Ex'r v. Monroe, 75 Va. 424.

[83] Peshine v. Shepperson, 17 Grat. (Va.) 472, 94 Am. Dec. 468.

[84] Lufty v. Commonwealth, 100 S. E. 829, 126 Va. 707.

[85] Virginian Ry. Co. v. Bell, 79 S. E. 396, 115 Va. 429, Ann. Cas. 1915A, 804; Rosenbaum v. Weeden, 18 Grat. (Va.) 785, 98 Am. Dec. 737; Ward v. Chum, 18 Grat. (Va.) 801, 98 Am. Dec. 749; Baltimore & O. R. Co. v. Polly, 14 Grat. (Va.) 447.

[86] Carrico v. West Virginia Cent. & P. Ry. Co., 35 W. Va. 389, 14 S. E. 12.

[87] Marlborough v. Sisson, 23 Conn. 44; Bush v. Fourcher, 59 S. E. 459, 3 Ga. App. 43; French v. Millard, 2 Ohio St. 44; St. Louis, I. M. & S. Ry. Co. v. Berry, 93 S. W. 1107, 42 Tex. Civ. App. 470.

[88] **U. S.** (C. C. A. Mass.) American Agricultural Chemical Co. v. Hogan, 213 F. 416, 130 C. C. A. 52.

Ark. Texas & P. Ry. Co. v. Krieger, 185 S. W. 448, 123 Ark. 619; Dent v. People's Bank of Imboden, 175 S. W. 1154, 118 Ark. 157, 1 A. L. R. 688.

Cal. Fitzgerald v. Southern Pac. Co., 173 P. 91, 36 Cal. App. 660; Fiori v. Agnew, 164 P. 899, 33 Cal. App. 284; Boyce v. California Stage Co., 25 Cal. 460.

Fla. Western Union Telegraph Co. v. Merritt, 46 So. 1024, 55 Fla. 462, 127 Am. St. Rep. 169.

Ill. Chenoweth v. Burr, 89 N. E. 1008, 242 Ill. 312, affirming judgment 146 Ill. App. 443; Pauckner v. Wakem, 83 N. E. 202, 231 Ill. 276, 14 L. R.

[89] Koshinski v. Illinois Steel Co., 83 N. E. 149, 231 Ill. 198; Gibson v. George C. Doyle & Co., 106 P. 512, 37 Utah, 21.

or by reforming the instruction, so as to prevent it from invading the province of the jury,[90] or from being misleading.[91] In other jurisdictions, however, under statutes, if instructions are given at all, they must be given in the precise terms in which they are asked, and the court has no power to amend or correct them.[92]

§ 505. Effect of erroneous request as making it duty of court to give a proper charge

In some jurisdictions the rule is that the court, on refusing a requested instruction which is incorrect in some particular, is not bound, of its own motion, to give a proper instruction upon the question involved in the request.[93] In Missouri this is the rule in civil cases,[94] but in criminal cases, in which the court is required to give all the law of the case necessary for the information

A. (N. S.) 1118; Illinois Collieries Co. v. Haveron, 137 Ill. App. 22; Illinois Collieries Co. v. Davis, 137 Ill. App. 15, judgment affirmed Davis v. Illinois Collieries Co., 83 N. E. 836, 232 Ill. 284; Citizens' Sav., Loan & Building Ass'n v. Weaver, 127 Ill. App. 252; Cary v. Norton, 35 Ill. App. 365.

Kan. St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47.

Ky. Theobald v. Hare, 47 Ky. (8 B. Mon.) 39; Pleak v. Chambers, 46 Ky. (7 B. Mon.) 565.

Md. Blackburn v. Beall, 21 Md. 208.

Miss. Louisville, N. O. & T. R. Co. v. Suddoth, 70 Miss. 265, 12 So. 205.

Mo. Richardson v. St. Louis & H. Ry. Co., 123 S. W. 22, 223 Mo. 325.

Nev. Burch v. Southern Pac. Co., 104 P. 225, 32 Nev. 75, Ann. Cas. 1912B, 1166.

S. C. Dutton v. Atlantic Coast Line R. Co., 88 S. E. 263, 104 S. C. 16.

Tex. Industrial Lumber Co. v. Bivens, 105 S. W. 831, 47 Tex. Civ. App. 396; Wells v. Barrent, 7 Tex. 584.

Wash. Kennedy v. Supreme Tent of Knights of Maccabees of the World, 170 P. 371, 100 Wash. 36.

W. Va. Griffith v. American Coal Co. of Allegheny County, 88 S. E. 595, 78 W. Va. 34.

Wis. Sterling v. Ripley, 3 Chand. (Wis.) 166.

[90] Bidwell v. Los Angeles & S. D. B. Ry. Co., 148 P. 197, 169 Cal. 780; Scott v. Sovereign Camp of Woodmen of the World, 129 N. W. 302, 149 Iowa, 562; Miller v. Mantik, 81 A. 797, 116 Md. 279; Gill v. Ruggles, 78 S. E. 536, 95 S. C. 90.

[91] East St. Louis & St. Louis Express Co. v. Illinois Traction Co., 169 Ill. App. 24; Commonwealth v. McMurray, 47 A. 952, 198 Pa. 51, 82 Am. St. Rep. 787.

[92] Pensacola & A. R. Co. v. Atkinson, 20 Fla. 450.

[93] **Ark.** Atkinson v. State, 202 S. W. 709, 133 Ark. 341; St. Louis, I. M. & S. R. Co. v. Duncan, 177 S. W. 1132, 119 Ark. 287; Lucius v. State, 116 Ark. 260, 170 S. W. 1016; Horton v. Jackson, 113 S. W. 45, 87 Ark. 528.

Ill. Willison v. Dering Coal Co., 156 Ill. App. 209.

Ind. Spurlin v. State, 124 N. E. 753.

Or. Naftzger v. Henneman, 185 P. 233, 94 Or. 109.

Va. Ratcliffe v. Walker, 85 S. E. 575, 117 Va. 569, Ann. Cas. 1917E, 1022; Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

Wash. Ramm v. Hewitt-Lea Lumber Co., 94 P. 1081, 49 Wash. 263.

[94] **Mo.** Alexander v. Star-Chronicle Pub. Co., 198 S. W. 467, 197 Mo. App. 601; Lester v. Sampson (App.) 180 S. W. 419; D'Arcy v. Catherine Lead Co., 133 S. W. 1191, 155 Mo. App. 266; Voelker v. Hill-O'Meara Const. Co., 131 S. W. 907, 153 Mo. App. 1; Barnett v. Sweringen, 77 Mo. App. 64; Dempsey v. Reinsedler, 22 Mo. App. 43.

of the jury, whether so requested or not, the rule is otherwise.[95]

In other jurisdictions the rule prevails that, although error may be so intermingled in a requested charge as to make the refusal of such request proper, it will nevertheless be error for the court, whose attention has thus been called to the subject of the erroneous request, to fail to give an instruction of its own thereon,[96] where the matters involved in such erroneous request are important, and not sufficiently covered by the general charge.[97] Thus, where a requested instruction in a criminal case, although faulty, is sufficient to challenge the court's attention to the only defense on which the accused relies, and in support of which some substantial evidence has been offered, it will be error to give no instruction stating the law in reference to such defense.[98]

In Texas, although there are cases to the contrary,[99] a large number of the decisions support the proposition that if the court, in its main charge, has failed to instruct on a material issue raised by the pleadings and the evidence, and a special charge requested, although incorrect in itself, is sufficient to call the attention of the court to the omission, it is error to fail to correctly instruct on the subject indicated.[100] In Kentucky the rule is that, where a party is entitled to an instruction on the point attempted to be

[95] State v. Goode (Mo.) 220 S. W. 854; State v. Lewkowitz, 178 S. W. 58, 265 Mo. 613; Grant City v. Simmons, 151 S. W. 187, 167 Mo. App. 183; State v. Little, 128 S. W. 971, 228 Mo. 273.

Contra. State v. McNamara, 100 Mo. 100, 13 S. W. 938.

[96] **U. S.** (C. C. A. La.) Audubon Bldg. Co. v. F. M. Andrews & Co., 187 F. 254, 111 C. C. A. 92.

Colo. Harris v. People, 135 P. 785, 55 Colo. 407.

Conn. State v. Wakefield, 90 A. 230, 88 Conn. 164.

D. C. Freed v. U. S., 266 F. 1012, 49 App. D. C. 392; Henry v. U. S., 263 F. 459, 49 App. D. C. 207.

Iowa. State v. Cessna, 153 N. W. 194, 170 Iowa, 726, Ann. Cas. 1917D, 289.

Kan. Kansas City, M. & O. Ry. Co. v. Loosley, 90 P. 990, 76 Kan. 103.

Mich. Dodge v. Brown, 22 Mich. 446.

Okl. McIntosh v. State, 128 P. 735, 8 Okl. Cr. 469; Robison v. United States, 111 P. 984, 4 Okl. Cr. 336; Morris v. Territory, 99 P. 760, 1 Okl. Cr. 617, rehearing denied 101 P. 111, 1 Okl. Cr. 617.

Utah. State v. Terrell, 186 P. 108, 55 Utah, 314.

Vt. Hazard v. Smith, 21 Vt. 123.

Wis. Borchardt v. Wausau Boom Co., 54 Wis. 107, 11 N. W. 440, 41 Am. Rep. 12.

Wyo. Union Pac. Ry. Co. v. Jarvi, 3 Wyo. 375, 23 P. 398.

[97] Rothe v. Pennsylvania Co. (C. C. A. Ohio) 195 F. 21, 114 C. C. A. 627; People v. Scott, 10 Utah, 217, 37 P. 335. See Rome Ins. Co. v. Thomas, 75 S. E. 894, 11 Ga. App. 539.

[98] State v. Miller, 114 P. 855, 84 Kan. 667, reversing judgment on rehearing 111 P. 437, 83 Kan. 410.

[99] Missouri, K. & T. Ry. Co. of Texas v. Dunn (Tex. Civ. App.) 157 S. W. 434; Texas Telegraph & Telephone Co. v. Scott, 127 S. W. 587, 60 Tex. Civ. App. 39.

[100] Hines v. Parry (Tex. Civ. App.) 227 S. W. 339; Alamo Iron Works v. Prado (Tex. Civ. App.) 220 S. W. 282; Chicago, R. I. & G. Ry. Co. v. Wentzel (Tex. Civ. App.) 214 S. W. 710; Rounds v. Coleman (Tex. Civ. App.)

covered by a request, and the court refuses it because of error

214 S. W. 496; Roberts v. Houston Motor Car Co. (Tex. Civ. App.) 188 S. W. 257; Stirling v. Bettis Mfg. Co. (Tex. Civ. App.) 159 S. W. 915; Quanah, A. & P. Ry. Co. v. Galloway (Tex. Civ. App.) 154 S. W. 653; Wichita Falls & W. Ry. Co. v. Wyrick (Tex. Civ. App.) 147 S. W. 694; Davis, Pruner & Howell v. Woods (Tex. Civ. App.) 143 S. W. 950; Warren v. Kimmell (Tex. Civ. App.) 141 S. W. 159; Southwestern Portland Cement Co. v. McBrayer (Tex. Civ. App.) 140 S. W. 388; Porter v. State, 132 S. W. 935, 60 Tex. Cr. R. 588; Cox v. State, 126 S. W. 886, 58 Tex. Cr. R. 545; Moore v. State, 125 S. W. 34, 58 Tex. Cr. R. 183; Johnson v. State, 122 S. W. 877, 57 Tex. Cr. R. 308; Eubanks v. State, 122 S. W. 35, 57 Tex. Cr. R. 153; Lee v. Hail, 114 S. W. 403, 51 Tex. Civ. App. 632; Rushing v. Lanier, 111 S. W. 1089, 51 Tex. Civ. App. 278; Wade v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 110 S. W. 84; McAdams v. Hooks, 104 S. W. 432, 47 Tex. Civ. App. 79; St. Louis Southwestern Ry. Co. of Texas v. Fowler (Tex. Civ. App.) 93 S. W. 484; McNeese v. Carver, 89 S. W. 430, 40 Tex. Civ. App. 129; Ray v. Pecos & N. T. Ry. Co., 88 S. W. 466, 40 Tex. Civ. App. 99; St. Louis Southwestern Ry. Co. of Texas v. Lowe (Tex. Civ. App.) 86 S. W. 1059; Texas Loan & Trust Co. v. Angel, 86 S. W. 1056, 39 Tex. Civ. App. 166; Gulf, C. & S. F. Ry. Co. v. Minter, 85 S. W. 477, 38 Tex. Civ. App. 8; Rea v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 73 S. W. 555; City of Sherman v. Greening (Tex. Civ. App.) 73 S. W. 424; Gulf, C. & S. F. Ry. Co. v. Mangham, 69 S. W. 80, 29 Tex. Civ. App. 486; Johnston v. Johnston (Tex. Civ. App.) 67 S. W. 123; Neville v. Mitchell, 66 S. W. 579, 28 Tex. Civ. App. 89; Corsicana Nat. Bank v. Baum (Tex. Civ. App.) 62 S. W. 812; Gulf, C. & S. F. Ry. Co. v. Hill (Tex. Civ. App.) 58 S. W. 255; Texas & P. Ry. Co. v. Short (Tex. Civ. App.) 58 S. W. 56; Williams v. Emberson, 55 S. W. 595, 22 Tex. Civ. App. 522; Texas & Ft. S. Ry. Co. v. Atchison (Tex. Civ. App.) 54 S. W. 1075; Missouri, K. & T. Ry. of Texas v. Miles, 50 S. W. 168, 20 Tex. Civ. App. 570; Denison & P. Suburban Ry. Co. v. James, 49 S. W. 660, 20 Tex. Civ. App. 358; Missouri, K. & T. Ry. Co. of Texas v. Webb, 49 S. W. 526, 20 Tex. Civ. App. 431; San Antonio & A. P. Ry. Co. v. Horkan (Tex. Civ. App.) 45 S. W. 391; Sharrock v. Ritter (Tex. Civ. App.) 45 S. W. 156; Leeds v. Reed (Tex. Civ. App.) 36 S. W. 347; Gulf, C. & S. F. Ry. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43; Carpenter v. Dowe (Civ. App.) 26 S. W. 1002; Cleveland v. Empire Mills, 6 Tex. Civ. App. 479, 25 S. W. 1055; Bexar Bldg. & Loan Ass'n v. Newman (Tex. Civ. App.) 25 S. W. 461; Willis v. Smith, 72 Tex. 565, 10 S. W. 683.

Illustrations of cases within rule. A carrier's conductor having claimed that his assault was in self-defense, a request to charge that if plaintiff struck the conductor or jerked his arm violently, or both, and the conductor in slapping plaintiff was only resisting the force used by plaintiff, and was acting in self-defense and used no more force than was necessary, defendant was entitled to a verdict, though objectionable, was sufficient to require the court to give a proper charge on such subject. Dallas Consol. Electric St. Ry. Co. v. Pettit, 105 S. W. 42, 47 Tex. Civ. App. 354. Where, in an action for injuries to a servant, the court failed to charge on an issue as to defendant's alleged violation of a speed ordinance, a requested instruction that, if the movement of the cars was at a speed not greater than that allowed by the ordinance, plaintiff could not recover on the alleged ground of negligence that the speed of the cars was unlawful, was sufficient to call the court's attention to such issue. Houston & T. C. R. Co. v. Turner, 78 S. W. 712, 34 Tex. Civ. App. 397.

The rule of the text does not apply as indicated by the statement thereof, where the issue involved in the request has been substantially covered, or where it is sought merely to have placed before

therein, it is its duty to give a proper charge on the subject involved.[101]

The above rule as to the effect of an erroneous request, as making it the duty of the trial court to give a proper charge, is vigorously opposed in a well-considered case in Oregon, where the court says that such a rule makes it unnecessary for counsel to carefully prepare requested instructions and that such a course of practice is not fair to the court, which at the close of a trial has not the time to carefully consider all the matters that may be thus thrust upon it. This criticism of the Oregon court, however, so far as it is directed against the injustice to the trial court, seems to ignore the fact that such rule is intended to remedy the original dereliction of the court in failing to charge on a material issue.[102]

the jury, the converse of that which has already been submitted. Jacksonville Ice & Electric Co. v. Moses, 134 S. W. 379, 63 Tex. Civ. App. 496; Vicksburg, S. & P. Ry. Co. v. Jackson (Tex. Civ. App. 133 S. W. 925.

[101] Louisville & N. R. Co. v. Stephens, 220 S. W. 746, 188 Ky. 1; Cincinnati, N. O. & T. P. Ry. Co. v. Francis, 220 S. W. 739, 187 Ky. 703; Clifton Land Co. v. Reister, 216 S. W. 342, 186 Ky. 155; Louisville & N. R. Co. v. McCoy, 197 S. W. 801, 177 Ky. 415; Stearns Coal & Lumber Co. v. Spradlin, 195 S. W. 781, 176 Ky. 405; Cumberland R. Co. v. Girdner, 192 S. W. 873, 174 Ky. 761; Stearns Coal & Lumber Co. v. Williams, 186 S. W. 931, 171 Ky. 46; Charles Taylor Sons Co. v. Hunt, 173 S. W. 333, 163 Ky. 120; Western Union Telegraph Co. v. Sisson, 160 S. W. 168, 155 Ky. 624; Illinois Cent. R. Co. v. Dallas' Adm'x, 150 S. W. 536, 150 Ky. 442; Louisville, H. & St. L. Ry. Co. v. Roberts, 139 S. W. 1073, 144 Ky. 820; Lewis, Wilson & Hicks v. Durham, 139 S. W. 952, 144 Ky. 704; West Kentucky Coal Co. v. Davis, 128 S. W. 1074, 138 Ky. 667; Crane v. T. J. Congleton & Bro., 116 S. W. 341; Louisville & N. R. Co. v. King's Adm'r, 115 S. W. 196, 131 Ky. 347; Whitley v. Whitley's Adm'r, 108 S. W. 241, 32 Ky. Law Rep. 1211, rehearing denied 109 S. W. 908, 33 Ky. Law Rep. 281; Troutwine v. Louisville & N. R. Co., 105 S. W. 142, 32 Ky. Law Rep. 5; South Covington & C. St. Ry. Co. v. Core, 96 S. W. 562, 29 Ky. Law Rep. 836; Blimm v. Commonwealth, 70 Ky. (7 Bush) 320.

Effect of erroneous request as to measure of damages. Where it was a contested issue whether defendant had erected a depot which complied with its contract, but the instruction on damages applied only to damage in case of failure to construct, an incorrect instruction requested by defendant on the measure of damages if the company had erected the depot as agreed, but not within the time provided by the contract, was sufficient to cast on the court the duty to give a correct instruction on the subject. Elkhorn & B. V. Ry. Co. v. Dingus, 220 S. W. 1047, 187 Ky. 812.

Necessity of written request. To make applicable the rule requiring the court to give a correct instruction in lieu of one asked, which is incorrect, either in form or substance, the instruction must be properly asked—that is, presented in writing. Bell's Adm'r v. Louisville Ry. Co., 146 S. W. 383, 148 Ky. 189.

[102] Sorenson v. Kribs, 161 P. 405, 82 Or. 130.

CHAPTER XXXVII

OBJECTIONS AND EXCEPTIONS

A. RIGHT TO OBJECT OR EXCEPT AS AFFECTED BY WAIVER AND ESTOPPEL

§ 506. General rule.
507. Specific applications of rule.
508. Limitations of rule.

B. TIME FOR OBJECTIONS OR EXCEPTIONS

509. Rule that objections should be made before retirement of jury or before verdict.
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F. EFFECT OF FAILURE TO OBJECT OR EXCEPT

527. General rule.
528. Limitations of rule.
529. Specific applications of rule.

A. RIGHT TO OBJECT OR EXCEPT AS AFFECTED BY WAIVER AND ESTOPPEL

§ 506. General rule

Objections to the substance of instructions, or to their form or the mode of giving them, or with respect to the failure of the

court to charge on certain matters, may be waived by a party, or he may be estopped by his conduct to raise such objections.[1]

§ 507. Specific applications of rule

Under the above rule, a party cannot found an objection on errors in instructions given at his own request,[2] and the consent

[1] **Ill.** Northwestern Elevator & Grain Co. v. Smiley, 154 Ill. App. 351.

Iowa. Ottoway v. Milroy, 123 N. W. 467, 144 Iowa, 631; Kinney v. McFaul, 98 N. W. 276, 122 Iowa, 452; Shoemaker v. Turner, 90 N. W. 709, 117 Iowa, 340; Delmonica Hotel Co. v. Smith, 84 N. W. 906, 112 Iowa, 659.

Kan. Chicago, R. I. & P. Ry. Co. v. Spring Hill Cemetery Ass'n, 57 P. 252, 9 Kan. App. 882.

Ky. Elizabethtown Milling & Coal Co. v. Elizabethtown Milling Co., 13 Ky. Law Rep. (abstract) 96.

Mass. Rand v. Farquhar, 115 N. E. 286, 226 Mass. 91.

Minn. Shattuck v. Shattuck's Estate, 136 N. W. 409, 118 Minn. 60.

Mo. Welland v. Metropolitan St. Ry. Co., 129 S. W. 441, 144 Mo. App. 205.

N. Y. Person v. Stoll, 67 N. E. 1089, 174 N. Y. 548, affirming judgment 76 N. Y. S. 324, 72 App. Div. 141.

Pa. Fern v. Pennsylvania R. Co., 93 A. 590, 250 P. 487.

S. C. Bedenbaugh v. Southern Ry. Co., 48 S. E. 53, 69 S. C. 1.

S. D. Kirby v. Berguin, 90 N. W. 856, 15 S. D. 444.

Tex. Taylor v. Lafevers (Civ. App.) 198 S. W. 651; Galveston, H. & S. A. Ry. Co. v. Sanchez, 122 S. W. 44, 57 Tex. Civ. App. 87.

Illustrations of estoppel or waiver. Where, in an action for injuries at a crossing, defendant contends that an instruction is erroneous as using the words "contributed to," instead of "caused," and also contends that the complaint is erroneous as using the word "caused," instead of the words "contributed to," the contentions are inconsistent and untenable. Lee v. Northwestern R. Co., 65 S. E. 1031, 84 S. C. 125.

[2] **Ala.** Dunn & Lallande Bros. v. Gunn, 42 So. 686, 149 Ala. 583; Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130.

Ark. Dunnington v. Frick Co., 60 Ark. 250, 30 S. W. 212.

Cal. Emerson v. Santa Clara County, 40 Cal. 543.

Colo. Orman v. Mannix, 17 Colo. 564, 30 P. 1037, 17 L. R. A. 602, 31 Am. St. Rep. 340.

Ill. Illinois Cent. R. Co. v. Harris, 162 Ill. 200, 44 N. E. 498, affirming 63 Ill. App. 172; Chicago & A. R. Co. v. Sanders, 154 Ill. 531, 39 N. E. 481; Ives v. McHard, 103 Ill. 97; City of Farmington v. Wallace, 134 Ill. App. 366, judgment affirmed Wallace v. City of Farmington, 83 N. E. 180, 231 Ill. 232; Wabash R. Co. v. Howard, 57 Ill. App. 66; Solomon v. Friend, 42 Ill. App. 407.

Iowa. Hamilton v. Hartinger, 96 Iowa, 7, 64 N. W. 592.

Kan. Ft. Scott, W. & W. Ry. Co. v. Fortney, 51 Kan. 287, 32 P. 904.

Me. Frye v. Hinkley, 18 Me. 320.

Md. Hess v. Newcomer, 7 Md. 325.

Mass. Copp v. Williams, 135 Mass. 401; Commonwealth v. Brigham, 123 Mass. 248.

Mich. Alberts v. Village of Vernon, 96 Mich. 549, 55 N. W. 1022; Silsby v. Michigan Car Co., 95 Mich. 204, 54 N. W. 761.

Minn. Redmond v. St. Paul, M. & M. Ry. Co., 39 Minn. 248, 40 N. W. 64.

Miss. Queen City Mfg. Co. v. Blalack, 18 So. 800, 31 L. R. A. 222; Wilson v. Zook, 69 Miss. 694, 13 So. 351.

Mo. Olfermann v. Union Depot R. Co., 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483; Kansas City Suburban Belt R. Co. v. Kansas City St. L. & C. R. Co., 118 Mo. 599, 24 S. W. 478; Hazell v. Bank of Tipton, 95 Mo. 60, 8 S. W. 173, 6 Am. St. Rep. 22; Reilly v. Hannibal & St. J. R.

of a party to an objectionable instruction waives the same objection to another instruction.[3] So an error in an instruction given at the request of a party is waived by his adversary by requesting an instruction containing the same error,[4] and a party cannot complain of an instruction which is in full accord with his theory of the case.[5] So, where the court gives an instruction of its own motion, on a subject concerning which it is prohibited from charging, except on the request of a party, the error is cured by the subsequent giving of the same instruction on request,[6] and error in an instruction is waived by asking for a modification thereof which does not cover the error.[7] A party who asks for an improper instruction cannot complain of the action of the court in modifying it, even though, according to some of the cases, the modification is wrong.[8]

The above rule has been applied in criminal cases to the failure of the court to reduce its charge to writing,[9] to the failure to read the instructions to the jury,[10] to the failure to accord the right

Co., 94 Mo. 600, 7 S. W. 407; Thorne v. Missouri Pac. Ry. Co., 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; Holmes v. Braidwood, 82 Mo. 610; McGonigle v. Daugherty, 71 Mo. 259; Crutchfield v. St. Louis, K. C. & N. Ry. Co., 64 Mo. 255; Flowers v. Helm, 29 Mo. 324; Farrell v. Farmers' Mut. Fire Ins. Co., 66 Mo. App. 153; Hall v. St. Joseph Water Co., 48 Mo. App. 356; Bybee v. Irons, 33 Mo. App. 659.

Neb. Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co., 42 Neb. 105, 60 N. W. 339; Richards v. Borowsky, 39 Neb. 774, 58 N. W. 277; Dawson v. Williams, 37 Neb. 1, 55 N. W. 284.

N. C. McLennan v. Chisholm, 66 N. C. 100; Buie v. Buie, 24 N. C. 87.

Tenn. East Tennessee, V. & G. R. Co. v. Fain, 12 Lea. 35.

Tex. Byrd v. Ellis (Civ. App.) 35 S. W. 1070; International & G. N. R. Co. v. Sein, 33 S. W. 558, 11 Tex. Civ. App. 386; Id., 89 Tex. 63, 33 S. W. 215; Needham v. State, 19 Tex. 332.

Wash. State v. Duncan, 7 Wash. 336, 35 P. 117, 38 Am. St. Rep. 888.

[3] Boecker v. City of Naperville, 48 N. E. 1061, 166 Ill. 151.

[4] Chicago, R. I. & P. Ry. Co. v. Smith, 127 S. W. 715, 94 Ark. 524; Gracy v. Atlantic Coast Line R. Co., 42 So. 903, 53 Fla. 350.

[5] Rehfuss v. Hill, 90 N. E. 187, 243 Ill. 140.

[6] Gulf City Shingling Co. v. Boyles, 29 So. 800, 129 Ala. 192.

[7] Southern Anthracite Coal Co. v. Bowen, 124 S. W. 1048, 93 Ark. 140.

[8] **Ala.** Southern Ry. Co. v. Howell, 34 So. 6, 135 Ala. 639.

Cal. Harrington v. Los Angeles Ry. Co., 74 P. 15, 140 Cal. 514, 63 L. R. A. 238, 98 Am. St. Rep. 85; Cook v. Los Angeles & P. Electric Ry. Co., 66 P. 306, 134 Cal. 279.

Ill. Crown Coal & Tow Co. v. Taylor, 56 N. E. 328, 184 Ill. 250, affirming judgment 81 Ill. App. 66; Decatur Cereal-Mill Co. v. Gogerty, 54 N. E. 231, 180 Ill. 197.

N. Y. Cochran v. Sess, 62 N. Y. S. 1088, 49 App. Div. 223, judgment reversed 61 N. E. 639, 168 N. Y. 372.

[9] Lane v. State, 70 S. E. 1118, 9 Ga App. 294; Spence v. Commonwealth, 204 S. W. 80, 181 Ky. 206.

[10] Boyd v. State, 45 So. 634, 154 Ala. 9.

to the accused to examine the charge before giving it to the jury,[11] and to the omission to charge on certain matters.[12]

§ 508. Limitations of rule

Acquiescence by a party in an erroneous view of the law taken by the court, by amending the pleadings and introducing evidence to meet the opinion, is not a waiver of the error, and does not preclude such party from insisting on a correct statement of the law in the instructions,[13] and an objection to an erroneous instruction is not waived by a failure to request an instruction in relation to the subject-matter of such instruction.[14]

B. Time for Objections or Exceptions

§ 509. Rule that objections should be made before retirement of jury or before verdict

A party deeming himself aggrieved by the instructions of the court or by omissions therefrom should seasonably call the attention of the court to such errors of commission or omission, in order that it may have an opportunity to correct the same,[15] as a party will not be permitted to speculate on a favorable verdict, and, if disappointed, seek to question the proceedings by a motion for new trial,[16] and undoubtedly good practice requires that objections or exceptions to instructions or to the failure or refusal of the court to instruct should be made at the time the charge is given or the request refused, and before the jury retire, and this is the rule in many jurisdictions.[17] This rule is generally applica-

[11] Freeman v. State, 188 S. W. 425, 80 Tex. Cr. R. 20.

[12] State v. Paxton, 126 Mo. 500, 29 S. W. 705; State v. Debnam, 98 N. C. 712, 3 S. E. 742; State v. Reynolds, 87 N. C. 544; State v. Owens, 44 S. C. 324, 22 S. E. 244; State v. Davis, 27 S. C. 609, 4 S. E. 567.

[13] M. M. Walker Co. v. Dubuque Fruit & Produce Co., 85 N. W. 614, 113 Iowa, 428, 53 L. R. A. 775.

[14] Warrington v. Kallauner, 115 S. W. 492, 135 Mo. App. 5. See, also, ante, § 472.

[15] Jacobs v. Mitchell, 2 Colo. App. 456, 31 P. 235; Busch v. Tjentland, 165 N. W. 999, 182 Iowa, 360; R. W. Bonyea Piano Co. v. Wendt, 160 N. W. 1030, 135 Minn. 378; Middleton v. State, 217 S. W. 1046, 86 Tex. Cr. R. 307.

[16] Colgan v. Farmers' & Mechanics' Bank, 114 P. 460, 59 Or. 469.

[17] **U. S.** United States v. Carey, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67; Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113; Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983; French v. Edwards, 13 Wall. 506, 20 L. Ed. 702; Barton v. Forsyth, 20 How. 532, 15 L. Ed. 1012; United States v. Breitling, 20 How. 252, 15 L. Ed. 900; Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643; (C. C. A. Ark.) St. Louis, I. M. & S. Ry. Co. v. Spencer, 71 F. 93, 18 C. C. A. 114; (C. C. A. Ga.) Greene v. United States, 154 F. 401, 85 C. C. A. 251, certiorari denied 28 S. Ct. 261, 207 U. S. 596, 52 L. Ed. 357, affirming judgment United States v. Greene (D. C.) 146 F. 803; (C. C. A. Ky.) Hindman v. First Nat.

ble to criminal cases,[18] and has been applied to objections based

Bank, 112 F. 931, 50 C. C. A. 623, 57 L. R. A. 108; (C. C. A. Minn.) Wells Fargo & Co. v. Zimmer, 186 F. 130, 108 C. C. A. 242; (C. C. A. Mo.) Northern Central Coal Co. v. Milburn, 205 F. 270, 123 C. C. A. 450; (C. C. A. Neb.) Bracken v. Union Pac. Ry. Co., 56 F. 447, 5 C. C. A. 548; (C. C. A. N. Y.) Mann v. Dempster, 181 F. 76, 104 C. C. A. 110; Klaw v. Life Pub. Co., 145 F. 184, 76 C. C. A. 154; Park Bros. & Co. v. Bushnell, 60 F. 583, 9 C. C. A. 138; (C. C. A. Ohio) American Issue Pub. Co. v. Sloan, 248 F. 251, 160 C. C. A. 329; Sutherland v. Round, 57 F. 467, 6 C. C. A. 428; (C. C. A. Tex.) Emanuel v. Gates, 53 F. 772, 3 C. C. A. 663; (C. C. A. Utah) Southern Pac. Co. v. Arnett, 126 F. 75, 61 C. C. A. 131; (C. C. A. Wash.) Western Union Tel. Co. v. Baker, 85 F. 690, 29 C. C. A. 392; Stone v. United States, 64 F. 667, 12 C. C. A. 451.

Ala. Meadows v. State, 62 So. 737, 182 Ala. 51, Ann. Cas. 1915D, 663; City Council of Montgomery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Cal. Sharp v. Hoffman 79 Cal. 404, 21 P. 846; Sierra Union Water & Mining Co. v. Baker, 70 Cal. 572, 8 P. 305; Mallett v. Swain, 56 Cal. 171; Robinson v. Western Pac. R. Co., 48 Cal. 409; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Colo. Taylor v. Randall, 3 Colo. 399; Smith v. Cisson, 1 Colo. 29.

Fla. Clark v. State, 52 So. 518, 59 Fla. 9, 15; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Ill. Edson Keith & Co. v. Eisendrath, 192 Ill. App. 155; Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 659.

Ind. Blacketer v. House, 67 Ind. 414; Murray v. State, 26 Ind. 141; Atkinson v. Gwin, 8 Ind. 376; Ledley v. State, 4 Ind. 580.

Kan. State v. Sparks, 99 P. 1130, 79 Kan. 548.

Ky. Letton v. Young, 2 Metc. 558; Kennedy v. Cunningham, 2 Metc. 538; Carey v. Callan's Ex'rs, 6 B. Mon. 44; Hughes v. Robinson, 1 T. B. Mon. 215, 15 Am. Dec. 104; Hallowell v. Hallowell, 1 T. B. Mon. 130.

La. State v. Ryan, 30 La. Ann. 1176; Hathcock v. Gray, 22 La. Ann. 472; State v. McClanahan, 9 La. Ann. 210; Buel v. The New York, 17 La. 541; Penn v. Collins, 5 Rob. 213.

Me. Poland v. McDowell, 96 A. 834, 114 Me. 511; McKown v. Powers, 86 Me. 291, 29 A. 1079; State v. Richards, 85 Me. 252, 27 A. 122; State v. Wilkinson, 76 Me. 317.

Mass. Jones v. Newton St. Ry. Co., 71 N. E. 114, 186 Mass. 113; McCoy v. Jordan, 69 N. E. 358, 184 Mass. 575; Spooner v. Handley, 151 Mass. 313, 23 N. E. 840; Lee v. Gibbs (10 Allen) 248.

Mich. People v. Wallin, 55 Mich. 497, 22 N. W. 15; Maclean v. Scripps,

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[18] **Fla.** Lester v. State, 37 Fla. 382, 20 So. 232; Shepherd v. State, 36 Fla. 374, 18 So. 773.

Ky. Reed v. Commonwealth, 7 Bush, 641; Burns v. Commonwealth, 3 Metc. 13.

La. State v. Johnson, 68 So. 843, 137 La. 505; State v. Harris, 31 So. 782, 107 La. 325; State v. West, 30 So. 119, 105 La. 639; State v. Wright, 28 So. 909, 104 La. 44.

Minn. State v. Shtemme, 158 N. W. 48, 133 Minn. 184.

Mo. State v. Bailey, 88 S. W. 733, 190 Mo. 257; State v. Westlake, 61 S. W. 243, 159 Mo. 669; State v. Sacre, 141 Mo. 64, 41 S. W. 905; State v. Hilsabeck, 132 Mo. 348, 34 S. W. 38.

Mont. Territory v. O'Brien, 7 Mont. 38, 14 P. 631.

N. M. Territory v. Watson, 78 P. 504, 12 N. M. 419.

N. C. State v. Foster, 90 S. E. 785, 172 N. C. 960.

Okl. Patterson v. State, 113 P. 216, 4 Okl. Cr. 542.

Tex. Gould v. State, 146 S. W. 172, 66 Tex. Cr. R. 122; Id., 146 S. W. 179 (first and second cases), 65 Tex. Cr. R. 662; Id., 146 S. W. 179 (third case); Martin v. State, 25 Tex. App. 557, 8 S. W. 682; Robinson v. State, 24 Tex. 152.

In capital cases, an exception to the text rule exists in Louisiana. State v. Wright, 28 So. 909, 104 La. 44.

on the failure of the court to reduce its instructions to writing,[19]

18 N. W. 209, 52 Mich. 214, denying rehearing 17 N. W. 815, 52 Mich. 214.

Minn. Skaggs v. Illinois Cent. R. Co., 145 N. W. 381, 124 Minn. 503; Sembum v. Duluth Iron Range R. Co., 141 N. W. 523, 121 Minn. 439; Block v. Great Northern Ry. Co., 118 N. W. 1019, 106 Minn. 285.

Miss. Georgia Pac. Ry. Co. v. West, 66 Miss. 310, 6 So. 207; Haynie v. State, 32 Miss. 400.

Mo. State v. Cantlin, 118 Mo. 100, 23 S. W. 1091; Waller v. Hannibal & St. J. R. Co., 83 Mo. 608; Devlin v. Clark, 31 Mo. 22; Thompson v. Russell, 30 Mo. 498; Bradley v. Creath, 27 Mo. 415; Powers v. Allen, 14 Mo. 367; Bompart v. Boyer, 8 Mo. 234; Naughton v. Stagg, 4 Mo. App. 271.

Neb. Smith v. Kennard, 74 N. W. 859, 54 Neb. 523; Glaze v. Parcel, 40 Neb. 732, 59 N. W. 382; Levi v. Fred, 38 Neb. 564, 57 N. W. 386; Roach v. Hawkinson, 34 Neb. 658, 52 N. W. 373; Schroeder v. Rinehard, 25 Neb. 75, 40 N. W. 593; Nyce v. Shaffer, 20 Neb. 507, 30 N. W. 943; Warrick v. Rounds, 17 Neb. 411, 22 N. W. 785; Black v. Winterstein, 6 Neb. 224.

Nev. Lobdell v. Hall, 3 Nev. 507.

N. H. Nadeau v. Sawyer, 59 A. 369, 73 N. H. 70; Pitman v. Mauran, 40 A. 392, 69 N. H. 230; First Nat. Bank of Gonic v. Ferguson, 58 N. H. 403.

N. C. State v. Wiseman, 101 S. E. 629, 178 N. C. 784, rehearing denied 102 S. E. 706.

Okl. St. Louis & S. F. R. Co. v. Fling, 127 P. 473, 36 Okl. 25.

Pa. General Roofing Mfg. Co. v. Greensburg Title & Trust Co., 71 Pa. Super. Ct. 373.

S. C. Parks v. Laurens Cotton Mills, 56 S. E. 234, 75 S. C. 560; Hatchell v. Chandler, 40 S. E. 777, 62 S. C. 380; South Carolina R. Co. v. Wilmington, C. & A. R. Co. 7 S. C. 410; Fox v. Savannah & C. R. Co., 4 S. C. 543.

Tex. Colorado & S. Ry. Co. v. Rowe (Civ. App.) 224 S. W. 928; Thomas v. Corbett (Civ. App.) 211 S. W. 806; Edwards v. State, 166 S. W. 517, 73 Tex. Cr. R. 380; Texas Brewing Co. v. Walters (Civ. App.) 43 S. W. 548; Corn v. State, 41 Tex. 301; Williams v. State, 4 Tex. App. 5.

Vt. State v. Clark, 37 Vt. 471.

Limiting time after delivery of charge for formulating objections thereto. In a broker's action for commission, where the court's charge submitted only three issues and the controlling issues were exceedingly few and simple, and the court adjourned from 11:45 a. m. until 2:30 p. m., requiring that all special issues be prepared in the interval, and appellant prepared and filed objections to the court's charge, and it does not appear what further objections appellant wanted to prepare, the assignment that the court erred in not granting more time must be overruled. Yarn v. Moeller (Tex. Civ. App.) 216 S. W. 234.

Exception to refusal of request. Where defendant's counsel seasonably presented his requests for rulings, he was not required to except to their refusal until the end of the charge. Maxwell v. Massachusetts Title Ins. Co., 92 N. E. 42, 206 Mass. 197.

Inability of party to present objections before retirement of jury. Where a case was submitted to the jury two hours before the expiration of the term by limitation, and the court refused to detain the jury to give a party time to reduce his objections to the instructions to writing and present the same; but gave him permission to present them within a reasonable time after the jury had retired, which was done, the fact that the objections were not taken before the jury retired does not deprive such party of the benefit thereof. Dalton v. Moore (C. C. A. Alaska) 141 F. 311, 72 C. C. A. 459. An exception to a refusal to grant a request for an instruction, made immediately after the jury had retired, was not too late where the judge had directed the jury to take the case as soon as he had concluded his remarks about said request. State v. Pirlot, 38 A. 656, 20 R. I. 273.

[19] **Ala.** Louisville & N. R. Co. v.

on its failure to observe the statutory requirement that the charge be written in consecutively numbered paragraphs,[20] on its failure to read the charge to the jury,[21] on misstatements by the court of the evidence,[22] and on the alteration of written instructions by interlineation.[23]

In some jurisdictions objections to the charge, not made prior to the reading of it to the jury, cannot be considered.[24] Under this rule exceptions taken after the jury have retired, and when they have returned to ask for further instructions, are too late.[25] In the great majority of jurisdictions objections or exceptions made or taken after verdict to the action of the court with respect to charging the jury are too late,[26] and such rule cannot be waived by the parties after the verdict.[27]

Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863.

Ark. E. O. Barnett Bros. v. Porter, 203 S. W. 842, 134 Ark. 268.

Fla. Hubbard v. State, 37 Fla. 156, 20 So. 235; Gibson v. State, 26 Fla. 109, 7 So. 376; Baker v. Chatfield, 23 Fla. 540, 2 So. 822; West v. Blackshear, 20 Fla. 457.

Mich. Garton v. Union City Nat. Bank, 34 Mich. 279.

Mo. State v. Dewitt, 53 S. W. 429, 152 Mo. 76.

Tex. Franklin v. State, 2 Tex. App. 8; Browning v. State, 1 Tex. App. 96.

Utah. United States v. Gough, 8 Utah, 428, 32 P. 695.

[20] Gibson v. Sullivan, 18 Neb. 558, 26 N. W. 368.

[21] State v. Clark, 63 S. E. 402, 64 W. Va. 625.

[22] **Me.** Skene v. Graham, 100 A. 938, 116 Me. 202; State v. Fenlason, 78 Me. 495, 7 A. 385; Jameson v. Weld, 45 A. 299, 93 Me. 345; Knight v. Thomas, 7 A. 538.

Mich. Middlebrook v. Slocum, 116 N. W. 422, 152 Mich. 286.

N. C. State v. Wiseman, 101 S. E. 629, 178 N. C. 784, rehearing denied 102 S. E. 706; State v. Caylor, 101 S. E. 627, 178 N. C. 807; Ball-Thrash Co. v. McCormick, 90 S. E. 916, 172 N. C. 677.

S. C. State v. Jones, 21 S. C. 596.

[23] Tracy v. State, 46 Neb. 361, 64 N. W. 1069.

[24] **N. M.** State v. Lucero, 171 P. 785, 24 N. M. 343.

Tex. Shumaker v. Byrd (Civ. App.) 203 S. W. 461; Ochoa v. Edwards (Civ. App.) 189 S. W. 1022; Arensman v. State, 187 S. W. 471, 79 Tex. Cr. R. 546; McPherson v. State, 182 S. W. 1114, 79 Tex. Cr. R. 93; Walker v. State, 181 S. W. 191, 78 Tex. Cr. R. 237; McLaughlin v. Terrell Bros. (Civ. App.) 179 S. W. 932; Consolidated Kansas City Smelting & Refining Co. v. Schulte (Civ. App.) 176 S. W. 94; Glasper v. State, 174 S. W. 585, 76 Tex. Cr. R. 310; Missouri, K. & T. Ry. Co. of Texas v. Smith (Civ. App.) 172 S. W. 750; Bodkins v. State, 172 S. W. 216, 75 Tex. Cr. R. 499; Guiterrez v. State, 170 S. W. 717, 75 Tex. Cr. R. 119; Eldridge v. Citizens' Ry. Co. (Civ. App.) 169 S. W. 375; Hawkins v. State, 168 S. W. 93, 74 Tex. Cr. R. 452.

[25] Hayes v. Solomon, 90 Ala. 520, 7 So. 921; Garoutte v. Williamson, 108 Cal. 135, 41 P. 35, 413.

[26] **U. S.** Illinois Cent. R. Co. v. Skaggs, 36 S. Ct. 249, 240 U. S. 66, 60 L. Ed. 528, affirming judgment Skaggs v. Illinois Cent. R. Co., 147 N. W. 1135, 125 Minn. 532; Reagan v. Aiken, 138 U. S. 109, 11 Sup. Ct. 283, ⇒

[27] Farr v. Swigart, 13 Utah, 150, 44 P. 711.

§ 510. Rule permitting objections after retirement of jury or after verdict

In some jurisdictions, in the absence of any rule to the contrary or under statutory provisions, such an objection or exception may be taken after the retirement of the jury and before the return of their verdict,[28] and in a few jurisdictions there is statutory au-

34 L. Ed. 892; (D. C. Wash.) Brent v. Chas. H. Lilly Co., 202 F. 335.

Ala. Bynum v. Southern Pump & Pipe Co., 63 Ala. 462.

Colo. Taylor v. Randall, 3 Colo. 399.

Dak. Cheatham v. Wilber, 1 Dak. 335, 46 N. W. 580.

Fla. Weightnovel v. State, 35 So. 856, 46 Fla. 1; Easterlin v. State, 31 So. 350, 43 Fla. 565; Morrison v. State, 28 So. 97, 42 Fla. 149.

Idaho. State v. Hurst, 39 P. 554, 4 Idaho, 345.

Ind. Neff v. Masters, 89 N. E. 846, 173 Ind. 196; Vaughn v. Ferrall, 57 Ind. 182; Wood v. McClure, 7 Ind. 155; Roberts v. Higgins, 5 Ind. 542; Jones v. Van Patten, 3 Ind. 107.

La. State v. Mitchell, 53 So. 561, 127 La. 270; State v. Bush, 41 So. 793, 117 La. 463; Vaughan v. Vaughan, 3 Mart. (O. S.) 215.

Mass. Nagle v. Laxton, 77 N. E. 719, 191 Mass. 402; Nixon v. Hammond, 12 Cush. 285.

Minn. Turritin v. Chicago, St. P., M. & O. Ry. Co., 104 N. W. 225, 95 Minn. 408; Barker v. Todd, 37 Minn. 370, 34 N. W. 895.

Miss. Anderson v. Hill, 12 Smedes & M. 679, 51 Am. Dec. 130.

Mo. Houston v. Lane, 39 Mo. 495; Devlin v. Clark, 31 Mo. 22; Mattingly v. Moranville, 11 Mo. 604; Randolph v. Alsey, 8 Mo. 656.

Neb. Bradstreet v. Grand Island Banking Co., 131 N. W. 956, 89 Neb. 590; Watson v. Roode, 30 Neb. 264, 46 N. W. 491.

N. H. Willard v. Stevens, 24 N. H. 271.

N. Y. People v. Spohr, 100 N. E. 444, 206 N. Y. 516; Banker v. Fisher, 55 Hun, 605, 7 N. Y. S. 732; De Leon v. Echeverria, 45 N. Y. Super. Ct. 240; Koster v. Noonan, 8 Daly, 231.

N. C. Barefoot v. Lee, 83 S. E. 247, 168 N. C. 89; Phifer v. Commissioners of Cabarrus County, 72 S. E. 852, 157 N. C. 150; State v. Hart, 116 N. C. 976, 20 S. E. 1014; State v. Nicholson, 85 N. C. 548; State v. Caveness, 78 N. C. 484.

R. I. Meyers v. Briggs, 11 R. I. 180; Sarle v. Arnold, 7 R. I. 582.

S. C. Warren v. Lagrone, 12 S. C. 45.

Tex. Hall v. Stancell, 3 Tex. 400.

Utah. People v. Thiede, 11 Utah, 241, 39 P. 837.

Va. Newport News & O. P. Ry. & Electric Co. v. Bradford, 37 S. E. 807, 99 Va. 117; Collins v. George, 46 S. E. 684, 102 Va. 509.

W. Va. Carder v. Bank of West Virginia, 34 W. Va. 38, 11 S. E. 716; Wustland v. Porterfield, 9 W. Va. 438.

Wis. Thrasher v. Postel, 79 Wis. 503, 48 N. W. 600; Nicks v. Town of Marshall, 24 Wis. 139.

In Massachusetts, the rule formerly was that exceptions to the instructions to the jury in the court of common pleas might be first alleged after verdict returned. Inhabitants of Buckland v. Inhabitants of Charlemont, 3 Pick. 173. But see Train v. Collins, 2 Pick. 145.

[28] **N. Y.** Hunt v. Becker, 160 N. Y. S. 45, 173 App. Civ. 9; Broadway Trust Co. v. Fry, 83 N. Y. S. 103, 40 Misc. Rep. 680; Polykranas v. Krausz, 77 N. Y. S. 46, 73 App. Div. 583; Panama R. Co. v. Johnson, 58 Hun, 557, 12 N. Y. S. 499.

Wash. Radburn v. Fir Tree Lumber Co., 145 P. 632, 83 Wash. 643; State v. Neis, 123 P. 1022, 68 Wash. 599; State v. Vance, 70 P. 34, 29 Wash. 435.

W. Va. Nadenbousch v. Sharer, 2 W. Va. 285.

Wis. Gehl v. Milwaukee Produce Co., 93 N. W. 26, 116 Wis. 263.

In Michigan the rule of the text

thority for the taking of such exceptions after verdict,[29] or at any time before the entry of final judgment,[30] and in one jurisdiction

obtained under R. S. 1846, p. 161, § 62. Doyle v. Stevens, 4 Mich. 87.

Discretion of court. The court may, in the exercise of its discretion, allow exceptions to instructions to the jury, although they were not taken until after the jury had withdrawn to consider of their verdict. St. John v. Kidd, 26 Cal. 263.

Requirement that exceptions be taken, if practicable, before the return of the verdict. Rule 58 of the Circuit Court for the District of Montana, which permits exceptions to the charge of the court or to the refusal of instructions requested to be taken after the jury have retired, but, if practicable, before the verdict has been returned, was intended to permit such course to be followed, where it would be in the interest of justice by avoiding the confusion of the jury or where further instructions were given in the absence of counsel, and not to permit exceptions generally to be taken after the close of the trial contrary to the settled rule of the federal courts; and where the judge, after instructing the jury but before sending them out, retired to his room with counsel and there heard and allowed the exceptions, the rule does not require him to afterward entertain or allow further exceptions. Montana Min. Co. v. St. Louis Min. & Mill. Co., 147 F. 897, 78 C. C. A. 33, judgment reversed 27 S. Ct. 254, 204 U. S. 204, 51 L. Ed. 444.

Failure to reduce to writing. Exceptions to instructions because given orally must be taken at the time notwithstanding the statutory provision that exceptions to instructions may be taken at any time before the motion for a new trial. Taylor v. Kidd, 129 P. 406, 72 Wash. 18.

[29] **Iowa.** State v. Smith, 180 N. W. 4; Patterson v. Chicago, M. & St. P. Ry. Co., 70 Iowa, 593, 33 N. W. 228; Parker v. Middleton, 65 Iowa, 200, 21 N. W. 562; Deere v. Needles, 65 Iowa, 101, 21 N. W. 203; Bailey v. Anderson, 61 Iowa, 749, 16 N. W. 134.

Pa. Sikorski v. Philadelphia & R. Ry. Co., 103 A. 618, 260 Pa. 243; Commonwealth v. Shobert, 49 Pa. Super. Ct. 371; Same v. Debussey, Id.; Commonwealth v. Lynch, 49 Pa. Super. Ct. 370; Commonwealth v. Sweeney, Id.; Commonwealth v. Duffy, 49 Pa. Super. Ct. 344.

Wash. State v. Peeples, 129 P. 108, 71 Wash. 451.

In Iowa, section 3705a of the 1913 Supplement to the Code, which specifically required that all objections or exceptions must be made before the reading of the instructions to the jury, and on which section the decisions in Freeby v. Town of Sibley, 167 N. W. 770, 183 Iowa, 827, and Seitsinger v. Iowa City Electric Ry. Co., 165 N. W. 205, 182 Iowa, 739, are based, was repealed by Acts 87th Gen. Assem. c. 24. Haman v. Preston, 173 N. W. 894, 186 Iowa, 1292.

In North Carolina exceptions for omission to charge must be before verdict, though for error in the charge they may be taken within 10 days after adjournment. State v. Harris, 26 S. E. 774, 120 N. C. 577.

In Pennsylvania, the former practice required that the attention of the court should be called to errors in its charge before the retirement of the jury. McGinley v. Philadelphia & R. Ry. Co., 101 A. 825, 257 Pa. 519; First Nat. Bank of Hanover v. Delone, 98 A. 1042, 254 Pa. 409; Tolson v. Philadelphia Rapid Transit Co., 93 A. 1017, 248 Pa. 227; Commonwealth v. Minney, 65 A. 31, 216 Pa. 149, 116 Am. St. Rep. 763; Commonwealth v. Haskell, 2 Brewst. 491; Commonwealth v. Taylor, 65 Pa. Super. Ct. 113; Thompson v. W. P. Zartman Lumber Co., 55 Pa. Super. Ct. 302; Harter v. Whitebread, 38 Pa. Super. Ct. 10.

Extension of time. The giving of time within which to file a motion for a new trial, and in arrest of judgment, does not extend the time for filing exceptions to instructions. Leach v. Hill, 97 Iowa, 81, 66 N. W. 69; Henry v. Henry (Iowa) 179 N. W. 856.

[30] Keck v. Bushway, 90 N. E. 196 242 Ill. 441; Collins Ice Cream Co. v. Stephens, 59 N. E. 524, 189 Ill. 200;

an error upon the face of the charge may be availed of by an exception entered within a specified time after adjournment for the term.[31]

§ 511. Extension of time

Trial courts should give reasonable opportunity to counsel to reserve exceptions to any instructions which they deem injurious to the rights of their clients,[32] and in some jurisdictions the court has power, on good cause shown, to extend the time within which exceptions to a charge may be taken, either before or after the time limited therefor has elapsed.[33] Such a power should not be exercised to condone an unreasonable delay in preparing exceptions,[34] or, under some of the statutes, in the absence of a showing of excusable neglect.[35]

C. Mode of Making Objections and Manner of Taking and Noting Exceptions

§ 512. Mode of making objections in general

A party complaining of an instruction should first state his particular objection to it when it is given, and if such objection is overruled an exception should then be reserved.[36] An exception once properly taken to an instruction is not waived by the failure of the party so excepting to object to a subsequent instruction embodying the same principle.[37] In some jurisdictions a request by a litigant for a special charge may fulfill the function of an exception to the main charge because of its failure to cover the subject of the special request.[38] Indeed, it is held that the proper remedy

State v. Hofer, 164 N. W. 79, 39 S. D. 281; Uhe v. Chicago, M. & St. P. Ry. Co., 4 S. D. 505, 57 N. W. 484.

Application of rule. In South Dakota, under the statute providing that "exceptions to the giving or refusing any instruction, or to its modification or change, may be taken at any time before the entry of final judgment," there is no distinction between instructions given at the request of counsel and those given by the court of its own motion. Uhe v. Chicago, M. & St. P. Ry. Co., 4 S. D. 505, 57 N. W. 484.

[31] H. G. Williams & Co. v. Harris, 49 S. E. 954, 137 N. C. 460.

Failure to reduce to writing. An objection to a failure to put a charge in writing is waived by not excepting before verdict, when the mistake, if any, can be corrected. Phillips v. Wilmington & W. R. Co., 41 S. E. 805, 130 N. C. 582.

[32] Brewer v. State, 165 P. 634, 13 Okl. Cr. 514; Fowler v. State, 126 P. 831, 8 Okl. Cr. 130.

[33] Lindblom v. Sonstelie, 86 N. W. 357, 10 N. D. 140.

[34] State v. Lucker, 40 S. C. 549, 18 S. E. 797.

[35] State v. Brown, 165 N. W. 987, 39 S. D. 567.

[36] Sheets v. Iowa State Ins. Co., 126 S. W. 413, 226 Mo. 613; Ross v. Saylor, 104 P. 864, 39 Mont. 559.

[37] Baltimore & O. R. Co. v. Lee, 55 S. E. 1, 106 Va. 32.

[38] Ft. Worth & D. C. Ry. Co. v. Alcorn (Tex. Civ. App.) 178 S. W. 833.

for an omission in an instruction is not an exception to the instruction given, but a request to the court to give one supplying or covering the omission and the saving of a proper exception to a refusal of such request,[39] and a party who has excepted to the refusal of the court to grant a request properly declaring a rule of law is not required to again except to a subsequent instruction of the court declaring the law to be otherwise than that contained in the request.[40]

Where, however, a request for an instruction is refused, and a modified or independent proposition is given instead, the party who considers himself aggrieved must except to the refusal to charge as requested and also take an independent exception to the charge as given.[41] A party objecting to an instruction which has been given on his own request should accompany his objection by a withdrawal of such request.[42]

§ 513. General requirements with respect to manner of taking and noting exceptions

At some time exceptions to the charge of the court must be reduced to writing, together with so much of the charge as is necessary to explain them.[43] If exceptions are taken orally under a statute so permitting, they must be noted on the minutes of the court.[44]

That counsel indicates to the court that he believes it is about to make an erroneous ruling on instructions does not constitute a sufficient exception to the ruling when made.[45] In some jurisdictions the points of exceptions to instructions should be designated while the jury are at the bar, and it is improper practice to permit formal exceptions to be then noted and the specification of the objection to be supplied in the record later.[46]

Exceptions to instructions may be reserved by bill of exceptions,[47] and under some statutory provisions a party taking an exception to an instruction must preserve it by a bill of exceptions signed by the trial judge.[48]

[39] Taggart v. McKinsey, 85 Ind. 392.

[40] Long-Bell Lumber Co. v. Stump (C. C. A. Ark.) 86 F. 574, 30 C. C. A. 260; Evans v. Clark, 40 S. W. 771, 1 Ind. T. 216.

[41] Brozek v. Steinway Ry. Co. of Long Island City, 55 N. E. 395, 161 N. Y. 63, affirming judgment 48 N. Y. S. 345, 23 App. Div. 623; 48 N. Y. S. 1101, 23 App. Div. 626.

[42] Texas & P. Ry. Co. v. Williams (Tex. Civ. App.) 196 S. W. 230.

[43] Territory v. O'Brien, 7 Mont. 38, 14 P. 631; Monroe v. Elburt, 1 Neb. 174.

[44] Roach v. Cumberland Bank, 111 N. E. 320, 60 Ind. App. 547.

[45] Gerber v. Ætna Indemnity Co., 112 P. 272, 61 Wash. 184.

[46] Mountain Copper Co. v. Van Buren (C. C. A. Cal.) 133 F. 1, 66 C. C. A. 151.

[47] Landers v. Beck, 92 Ind. 49.

[48] Owens v. Missouri Pac. Ry. Co., 67 Tex. 679, 4 S. W. 593.

§ 514. Noting exceptions on margin of instructions

In a considerable number of jurisdictions, however, an exception to an instruction is sufficiently preserved by a notation by the trial court on the margin of such instruction of the fact of such exception.[49] In some jurisdictions there are statutory provisions dispensing with the filing of a formal bill of exceptions, and permitting a party to preserve his exceptions to the giving or refusal of instructions by writing, at the close of each instruction, "Given and excepted to" or "Refused and excepted to."[50]

Such a provision is not satisfied by an omnibus exception to a number of instructions,[51] and such a memorandum under some of these provisions is required to be signed by the party or his attorney, or by the trial judge, and dated.[52] In one jurisdiction a signing of such notation by either the party or his attorney, or the trial judge, is sufficient,[53] and it has been held that the failure of the trial judge to sign an instruction so excepted to cannot prejudice the rights of an appellant.[54] Where such a memorandum is signed by the attorneys of a party, however, the court should be made acquainted with what has been done.[55]

§ 515. Knowledge of court or opposing party

A mere statement by counsel to the official reporter that he wishes it understood that he saves an exception to the charge of the

[49] Clement v. Drybread, 78 N. W. 235, 108 Iowa, 701; Bennett v. McDonald, 72 N. W. 268, 52 Neb. 278.

[50] Muncie & P. Traction Co. v. Black, 89 N. E. 845, 173 Ind. 142; Indiana, I. & I. R. Co. v. Bundy, 53 N. E. 175, 152 Ind. 590; Lower v. Franks, 115 Ind. 334, 17 N. E. 630; Wade v. Guppinger, 60 Ind. 376.

[51] Inland Steel Co. v. Smith, 75 N. E. 852, 39 Ind. App. 636, judgment affirmed 80 N. E. 538, 168 Ind. 245; Sherlock v. First Nat. Bank of Bloomington, 53 Ind. 73; Ludwig v. Blackshere, 71 N. W. 356, 102 Iowa, 366.

[52] **Ind.** Retseck v. Harbart, 96 N. E. 386, 176 Ind. 441; Neff v. Masters, 89 N. E. 846, 173 Ind. 196; Muncie & P. Traction Co. v. Black, 89 N. E. 845, 173 Ind. 142; Grand Rapids & I. Ry. Co. v. King, 83 N. E. 778, 41 Ind. App. 701; Inland Steel Co. v. Smith, 80 N. E. 538, 168 Ind. 245, affirming judgment 75 N. E. 852, 39 Ind. App. 636; Malott v. Hawkins, 63 N. E. 308, 159 Ind. 127; Ayres v. Blevins, 62 N. E. 305, 28 Ind. App. 101; Roose v. Roose, 145 Ind. 162, 44 N. E. 1; Wade v. Guppinger, 60 Ind. 376; Ledley v. State, 4 Ind. 580.

Md. Central Ry. Co. of Baltimore v. Coleman, 80 Md. 328, 30 A. 918.

Ratification of memorandum without actual signature. Where counsel, when instructions were given, indicated in open court their desire to except thereto, and afterwards themselves noted their exceptions by a memorandum on the margin of the instructions, it was held that the court, in overruling a motion to strike from the record such memorandum, ratified the notation, and, such notation being in accordance with the facts, there was no error in the ruling. Blumer v. Bennett, 44 Neb. 873, 63 N. W. 14.

[53] Gwinn v. Hobbs (Ind. App.) 118 N. E. 155.

[54] Gibbs v. Wall, 10 Colo. 153, 14 P. 216.

[55] Hawley v. State, 69 Ind. 98.

court does not amount to an exception.[56] The requirement found in some statutes that exceptions to instructions be filed is probably for the purpose of bringing them to the attention of the court,[57] and under a statute requiring that exceptions to instructions be stated to the court, specifying the parts of the charge excepted to, and that they be, by him or by the clerk, noted in the minutes or embodied in the record, exceptions which are merely filed, and never called to the attention of the court, are not available on appeal.[58]

Exceptions to instructions are sufficient, although the trial judge does not hear them, if they are dictated by the attorneys in his presence in open court and he has opportunity to hear them.[59]

In some jurisdictions a party is not required to submit to the opposing counsel his objections to the charges given,[60] but in other jurisdictions it has been held that, since a party is entitled to full notice of all the proceedings in the case, the taking of exceptions to instructions outside of the court room and without the knowledge of the adverse party, even if done by the consent of the court, is as much a wrong to such adverse party as it would be to the court, if its consent had not been previously obtained.[61]

§ 516. Necessity of formal exception

A formal exception to rulings on instructions may be unnecessary, where the court states, on making such rulings, that it grants an exception to the party complaining thereof.[62] By virtue of a custom or statutory provision the rulings of the court in giving or refusing instructions may be deemed excepted to although no exceptions were actually taken,[63] but in absence of such a custom or statute the mere agreement of counsel cannot have such an effect.[64] The mere handing to the trial judge of written requests for

[56] Coleman v. Gilmore, 49 Cal. 340.

[57] Territory v. O'Brien, 14 P. 631, 7 Mont. 38.

[58] Coffey v. Seattle Electric Co., 109 P. 202, 59 Wash. 686.

[59] Ongaro v. Twohy, 94 P. 916, 49 Wash. 93.

[60] Atchison, T. & S. F. Ry. Co. v. Smith (Tex. Civ. App.) 190 S. W. 761.

[61] Ober v. Schenck, 65 P. 1073, 23 Utah, 614.

[62] Mitchell v. Turner, 149 N. Y. 39, 43 N. E. 403.

[63] Watson v. Dickens, 12 Smedes & M. (Miss.) 608; Union Loan, Storage & Mercantile Co. v. Farbstein, 127 S. W. 656, 148 Mo. App. 216; State v. Reilly, 141 N. W. 720, 25 N. D. 339; Missouri Pac. Ry. Co. v. Rabb, 3 Willson, Civ. Cas. Ct. App. § 37.

Effect of election to file exceptions. In North Dakota, a party may, if he sees fit, elect to file exceptions with the clerk of court to the instructions given to the jury, and if he does so elect he must be governed by such election and will be limited to the exceptions which he has filed. State v. Campbell, 72 N. W. 935, 7 N. D. 58.

[64] Herman v. Jeffries, 4 Mont. 513, 1 P. 11.

instructions does not necessarily imply that if the requests are not granted an exception is saved.[65]

D. Sufficiency of Objections or Exceptions with Respect to Their Substance

§ 517. Oral charges

An exception to a charge on the ground that it is oral must be taken by objecting to the manner in which it is given and not to the matter thereof.[66] Where oral instructions are given as a continuous and connected charge, it is not proper to treat each paragraph thereof as a separate instruction for the purpose of objection.[67]

An exception to an oral charge is sufficiently saved, where it is excepted to orally and the exceptions are taken by the stenographer and certified in the case made.[68] In one jurisdiction it is held that there is no practice allowing an exception taken by description of a subject treated by the court in an oral charge, without precisely designating the statement of the court objected to.[69]

§ 518. Joint exceptions

A joint exception by two defendants to the giving of certain instructions, which are incorrect as to only one of the defendants, constitutes no basis for a reversal of a judgment rendered against them.[70]

E. Rule That Exceptions to Instructions or the Refusal Thereof Should be Specific

§ 519. In general

While in some jurisdictions a general exception to the charge of the court is authorized,[71] and is sufficient without pointing out

[65] Leyland v. Pingree, 134 Mass. 367; South Carolina R. Co. v. Wilmington, C. & A. R. Co., 7 S. C. 410.

[66] Moses v. Loomis, 55 Ill. App. 342.

[67] Harmon v. Callahan, 187 Ill. App. 312.

[68] Hurst v. Hill, 122 P. 513, 32 Okl. 532.

[69] Birmingham Ry., Light & Power Co. v. Friedman, 65 So. 939, 187 Ala. 562.

[70] Marshall v. Lewark, 117 Ind. 377, 20 N. E. 253; Jones v. Gould, 103 N. E. 720, 209 N. Y. 419, reversing judgment 136 N. Y. S. 600, 152 App. Div. 881.

[71] Williams v. Commonwealth, 80 Ky. 313, 4 Ky. Law Rep. 3; City of Cincinnati v. Anderson, 19 Ohio Cir. Ct. R. 603, 10 O. C. D. 522.

Failure to require specific objection. A general exception is sufficient when the charge is erroneous and the party is not asked to more specifically state his exception. Strader v. Marietta & C. Ry. Co., 13 Ohio Dec. 895, 2 Cin. Super. Ct. Rep'r, 268.

In Iowa, the rule prior to the Re-

in detail the specific instructions challenged,[72] the practice of taking general and obscure exceptions to the charge at the moment, in order to cover the case and enable counsel, on subsequent critical examination, to raise points which have never been suggested at all to the mind of the trial judge, is objectionable on many grounds,[73] and the general rule in most jurisdictions is that an exception to the instructions as an entirety is not tenable,[74] but that, on the contrary, exceptions to the charge of the court must point out some definite or specific defect,[75] this rule requiring, in

vision was that a general exception taken to the whole of the judge's charge entitled the excepting party to present for review an erroneous position in any portion of the charge, and this rule governs in all actions begun before the Revision took effect. Wilhelmi v. Leonard, 13 Iowa, 330.

[72] Ervin v. St. Louis, I. M. & S. Ry. Co., 139 S. W. 498, 158 Mo. App. 1.

Even in this jurisdiction, it is said that the practice so much indulged in of using a general objection as a cover for a trap to be sprung in the appellate court should not be countenanced in cases where the trial court has endeavored to guard against error by calling for specific objections. De Ford v. Johnson, 133 S. W. 393, 152 Mo. App. 209.

[73] Turner v. People, 33 Mich. 363.

[74] **U. S.** (C. C. A. N. C.) Newman v. Virginia, T. & C. Steel & Iron Co., 80 F. 228, 25 C. C. A. 382; (C. C. A. Ohio) American Issue Pub. Co. v. Sloan, 248 F. 251, 160 C. C. A. 329.

Cal. Love v. Anchor Raisin Vineyard Co., 45 P. 1044, 114 Cal. xvi.

D. C. Ryan v. Washington & G. R. Co., 8 App. D. C. 542.

Ill. St. Louis & S. F. R. Co. v. Puterbaugh, 117 Ill. App. 569; Continental Investment & Loan Soc. v. Schubnell, 63 Ill. App. 379.

Ind. Kelly v. John, 13 Ind. App. 579, 41 N. E. 1069.

Mass. Savage v. Marlborough St. Ry. Co., 71 N. E. 531, 186 Mass. 203.

Neb. Penn v. Trompen, 100 N. W. 312, 72 Neb. 273; Barton v. Shull, 97 N. W. 292, 70 Neb. 324; American Fire Ins. Co. v. Landfare, 76 N. W. 1068, 56 Neb. 482.

N. H. Guertin v. Town of Hudson, 53 A. 736, 71 N. H. 505; Harris v. Smith, 52 A. 854, 71 N. H. 330.

N. Y. Ebenreiter v. Dahlman, 42 N. Y. S. 867, 19 Misc. Rep. 9.

N. C. Roberts v. Baldwin, 71 S. E. 319, 155 N. C. 276; State v. Melton, 26 S. E. 933, 120 N. C. 591; Burnett v. Wilmington, N. & N. Ry. Co., 26 S. E. 819, 120 N. C. 517; Andrews v. Postal Tel. Co., 25 S. E. 955, 119 N. C. 403.

S. C. Gable v. Rauch, 27 S. E. 555, 50 S. C. 95.

Vt. Luce v. Hassam, 58 A. 725, 76 Vt. 450; Gregg v. Willis, 45 A. 229, 71 Vt. 313.

Wis. Lee v. Hammond, 90 N. W. 1073, 114 Wis. 550.

[75] **U. S.** (D. C. Cal.) United States v. Hammond, 226 F. 849; (C. C. A. N. Y.) Gilson v. United States, 258 F. 588, 169 C. C. A. 528, certiorari denied 40 S. Ct. 119, 251 U. S. 555, 64 L. Ed. 412.

Ark. Missouri Pac. R. Co. v. Block, 218 S. W. 682, 142 Ark. 127, certiorari denied 40 S. Ct. 586, 253 U. S. 493, 64 L. Ed. 1029; Rogers v. Robertson, 218 S. W. 206, 142 Ark. 210; St. Louis Southwestern Ry. Co. v. Wyman, 178 S. W. 423, 119 Ark. 530; Bain v. Ft. Smith Light & Traction Co., 172 S. W. 843, 116 Ark. 125, L. R. A. 1915D, 1021; Rittenhouse v. Bell, 153 S. W. 1111, 106 Ark. 315.

Colo. Meek v. Smith, 149 P. 627, 59 Colo. 461; Willard v. Williams, 50 P. 207, 10 Colo. App. 140.

D. C. District of Columbia v. Duryee, 29 App. D. C. 327, 10 Ann. Cas. 675.

Iowa. King v. Chicago, R. I. & P. Ry. Co., 172 N. W. 268, 185 Iowa, 1227.

Mass. Chestnut v. Sawyer, 126 N. E. 273, 235 Mass. 46; Sullivan v. Sheehan, 173 Mass. 361, 53 N. E. 902; Mc-

Kee v. Tourtellotte, 167 Mass. 69, 44 N. E. 1071, 48 L. R. A. 542; Hopcraft v. Kittredge, 162 Mass. 1, 37 N. E. 768.

Mich. Geary v. People, 22 Mich. 220.

Minn. Finance Co. of Pennsylvania v. Old Pittsburgh Coal Co., 65 Minn. 442, 68 N. W. 70.

Nev. Weck v. Reno Traction Co., 149 P. 65, 38 Nev. 285.

N. J. Addis v. Rushmore, 65 A. 1036, 74 N. J. Law, 649; Smith v. Atlantic City R. Co., 65 A. 1000, 74 N. J. Law, 452.

N. M. Probst v. Trustees of Board of Domestic Missions, 3 N. M. (Johns.) 237, 5 P. 702.

N. Y. Jones v. Gould, 103 N. E. 720, 209 N. Y. 419, reversing judgment 136 N. Y. S. 600, 152 App. Div. 881; Ellis v. People, 21 How. Prac. 356.

N. D. Russell v. Olson, 133 N. W. 1030, 22 N. D. 410, 37 L. R. A. (N. S.) 1217, Ann. Cas. 1914B, 1069; Pease v. Magill, 115 N. W. 260, 17 N. D. 166.

Okl. Higgins v. Street, 92 P. 153, 19 Okl. 45, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086.

Pa. Sgier v. Philadelphia & R. Ry. Co., 103 A. 730, 260 Pa. 343.

R. I. Ralph v. Taylor, 82 A. 279, 33 R. I. 503, reargument denied 82 A. 495.

S. C. Township Com'rs of St. Andrews Parish v. Charleston Min. & Mfg. Co., 57 S. E. 201, 76 S. C. 382; Pearson v. Spartanburg County, 29 S. E. 193, 51 S. C. 480.

S. D. Wood v. Dodge, 120 N. W. 774, 23 S. D. 95.

Wis. Robinson v. Dow, 145 N. W. 652, 155 Wis. 605.

In Pennsylvania, it is held that, while the statute requires the reasons for a general exception to a charge to be given, it does not demand minute particularization. Sikorski v. Philadelphia & R. Ry. Co., 103 A. 618, 260 Pa. 243.

Illustrations of objections or exceptions held too general and indefinite to be available on appeal. A general exception to one sentence in a charge of ten paragraphs to a jury. Brooks v. Dutcher, 24 Neb. 300, 38 N. W. 780. An exception "to so much of" a long and elaborate charge "as requires the evidence should show there was an intention to deceive." Phœnix Assur. Co. v. Lucker (C. C. A. S. C.) 77 F. 243, 23 C. C. A. 139. An objection to instructions as having been given on a certain theory, and that "some of them fall far short of stating the law, even upon that theory, fully and correctly." Baltimore & O. S. W. Ry. Co. v. Spaulding, 52 N. E. 410, 21 Ind. App. 323. An exception "to all of the charges and to the special request asked by defendant for the reason that they are liable to mislead the jury, and for the reason that the jury in its verdict would pass upon these questions." Alt v. Chicago & N. W. Ry. Co., 5 S. D. 20, 57 N. W. 1126. An objection that a charge fails to submit the real issue. Thomas v. Parker, 69 Ga. 283. An exception "to the definition of ordinary care, and also in regard to the admissions," in the charge of the court in an action for negligence. Elmborg v. St. Paul City Ry. Co., 51 Minn. 70, 52 N. W. 969. An exception that the court erred in not confining the jury in their finding to the special matters of negligence set out and relied on by plaintiff, without showing how the court failed in that regard. Central R. R. v. Freeman, 75 Ga. 331. A general objection to each and all the instructions given, on a trial, that they are not law, or were misleading to the jury. Gum v. Murray, 6 Mont. 10, 9 P. 447. An exception that "the charge of the court, as a whole, is not a full and fair presentation of the law of the case." Chambers v. Walker, 80 Ga. 642, 6 S. E. 165. An exception, "in misdirecting the jury as to what would constitute the proximate cause of an injury in any given case." Tucker v. Charleston & W. C. Ry. Co., 28 S. E. 943, 51 S. C. 306. An exception that the court erred in omitting to correct any erroneous impressions made on the minds of the jury by the charge so widely at variance with defendant's requests as to be impossible of reconcilement therewith. Crosswell v. Connecticut Indemnity Ass'n, 29 S. E. 236, 51 S. C. 469. An exception, that "his honor erred in commenting upon the facts in connection

with the case in his charge." Hayes v. Sease, 29 S. E. 259, 51 S. C. 534. An exception to an instruction in that it charged, as the law applicable to the case, principles of law in regard to possession and boundaries which are correct in an action between grantor and grantee, but not where there is no dispute between them, and said issues are raised by a stranger who has no legal title to any of the land. Connor v. Johnson, 30 S. E. 833, 53 S. C. 90. Exceptions alleging error in giving or refusing certain numbered requests for instructions, or "in charging on the facts" or in not setting a verdict aside. Walters v. Laurens Cotton Mills, 31 S. E. 1, 53 S. C. 155. An objection that certain instructions given for plaintiff were on the wrong theory, and that defendants' which were refused should have been given. Ilgenfritz v. Missouri Pac. Ry. Co., 155 S. W. 854, 169 Mo. App. 652. An exception to the last half of a charge: "The jury will determine the amount of land actually taken and fenced in, and the statements made by the agents of the railroad company in the presence of the plaintiff are competent to prove what is actually taken." Bigelow v. West Wisconsin Ry. Co., 27 Wis. 478. Where, in an action for libel, the court charged that several parts of the publication were libelous per se, and some of the parts so pointed out were confessedly so, an exception "to the portions of the charge wherein it is stated that certain parts of the publication are libelous per se" is too broad, and therefore bad. Cunningham v. Underwood (C. C. A. Tenn.) 116 F. 803, 53 C. C. A. 99. Where, in a personal injury case, an instruction stated three distinct phases of the case relating to the measure of plaintiff's recovery, an exception that the charge "does not properly state the measure of plaintiff's damages or recovery, under the allegations of the complaint," is insufficient, for indefiniteness. McDonough v. Great Northern Ry. Co., 46 P. 334, 15 Wash. 244. Where, in an action for personal injuries, the court instructs the jury that plaintiff's expenses for medical treatment should be allowed, and a general exception is taken to such instruction as a whole, it being claimed on appeal that there was no evidence that he expended anything for such treatment, the exception will not be sustained, because not sufficiently specific at the time of taking. Hulehan v. Green Bay, W. & St. P. R. Co., 68 Wis. 520, 32 N. W. 529. In an action for malicious prosecution based on the institution of a suit for false representations as to the existence of a partnership between plaintiffs, an exception to an instruction as to probable cause "that if the defendant made false representations to his counsel, then he would not be protected, if counsel advised him that he had a good suit," held too general, since the false representations must have been as to material facts, and must have been considered and relied upon by counsel in giving advice as to the institution of the suit. Bonazzi v. Fortney, 110 A. 439, 94 Vt. 263.

Objections to instruction on maxim of "falsus in uno," etc. Where the court charged that, if the jury found that any witness had sworn falsely on any material fact in the case, his testimony might be disregarded unless corroborated by other reliable witnesses, a general exception is not sufficient to call the attention of the court to the fact that before the testimony could be rejected the jury must find that the witness had knowingly or willfully sworn falsely. Dallemand v. Janney, 51 Minn. 514, 53 N. W. 803.

Exceptions held sufficiently specific to raise particular questions. An exception to an instruction, on the ground that it assumes facts not proved in the case, need not point out specifically wherein it assumes such fact. Davis v. Strohm, 17 Iowa, 421. In an action to recover for the death of plaintiff's son, an exception to the portions of the general charge on the measure of damages as contrary to law is sufficiently specific to raise the question of the correctness of the charge on one element of damages, since all the elements together constitute the measure of damages, and, if one element was wrongly stated, the measure was a defective one. Wales v. Pacific Elec-

tric Motor Co., 62 P. 932, 130 Cal. 521. In an action for damages resulting from defendant's negligence, an exception to so much of the "charge as says that plaintiff is entitled to damages for the loss of services of his wife incurred during her sickness" alleged to have been caused by negligence, and a request to charge that plaintiff is not entitled to recover any such damages on the ground that he has failed to give any evidence showing what damages were sustained by reason of the loss of such services, fairly present the question of the sufficiency of plaintiff's evidence to entitle him to recover for the loss of the wife's services. Munk v. City of Watertown, 67 Hun, 261, 22 N. Y. S. 227. In an action for the negligent killing of a boy of tender years, an exception "to the language of the court with regard to the degree of care imposed on the boy" sufficiently points out the error in the charge stating the degree of care required of him. McDonald v. Metropolitan St. Ry. Co., 78 N. Y. S. 284, 75 App. Div. 559, rehearing denied 80 N. Y. S. 577, 80 App. Div. 233. Where a trial judge erroneously charged that a husband, in an action for injuries to his wife, might recover compensation for loss of his wife's assistance in the household duties, and, secondly, recompense for the hire of a woman to do certain work which the wife had done before her injury, an exception in the words of the charge is sufficient in the absence of a requirement by the trial court that the ground of exception be more specifically stated. Janson v. Goerke Co., 65 A. 856, 74 N. J. Law, 270. In action against railroad for damage to shipment, paragraph of written objections to charge which complained that in submitting issue of rough handling language placed higher duty on defendant than law required in not requiring finding of negligence sufficiently indicated to trial court vice in charge. Panhandle & S. F. Ry. Co. v. Wright Herndon Co. (Tex. Civ. App.) 195 S. W. 216. Where a trial judge erroneously submits to the jury the question whether defendant's negligent agent is a vice principal, or a fellow servant with plaintiff, an exception is sufficient which is taken to that paragraph of the charge treating most extensively of this subject, "because said instruction does not properly state the rule whereby it is to be determined whether an employé is a coemployé or fellow servant, said instruction going much further, as to the liability of an employer for acts of coemployés, than the law justifies," in connection with a further exception that, at the time of the alleged injury, plaintiff was a coemployé with the man whose negligence caused the injury. What Cheer Coal Co. v. Johnson (C. C. A. Iowa) 56 Fed. 810, 6 C. C. A. 148. Where the court charged that plaintiff's evidence had two aspects: First, that the switchman had left the switch properly set, but that in some way not known it had been displaced; and, second, that there was a defect in the switch rail, so that the engine would be likely to take and did take the wrong track, and the court further charged that, if the switch by some inadvertence became set for the wrong track, it would be necessary to consider whether the absence of a switch lock was negligence; the plaintiff claiming that if it had been locked the accident would not have happened, and the defendant excepted, for that there was no evidence from which the jury could determine whether the switch was in the position it was by intent, inadvertence, or the intervention of trespassers, and for that there was no evidence that through some misadventure or the trespass of some one the switch, if properly set, was changed to the wrong track, it was held that the exception was sufficiently explicit, if the charge was bad in any of the particulars specified. Place v. Grand Trunk Ry. Co., 76 A. 1110, 83 Vt. 498.

Objections or exceptions held insufficient to raise particular questions. In an action for damages sustained by plaintiff in collision between his horse and buggy and defendant's motor truck, general objection to instruction that, if the driver of the truck failed to exercise or-

some jurisdictions, that the grounds of the objection be stated,[76]

dinary care. defendant was guilty of negligence, was not sufficient to call trial court's attention to objection that instruction might be construed as intimating that there was negligence as a matter of law. Bennett v. Snyder (Ark.) 227 S. W. 402. On an issue as to defendant's adverse possession, an instruction that adverse possession is to be taken strictly, and that every presumption is in favor of possession subject to the title of the true owner, was not obnoxious to a general objection, but the defect should have been pointed out by specific objections. Fox v. Spears, 93 S. W. 560, 78 Ark. 71. The instruction that it was defendant's duty, in constructing its road, to use ordinary care to provide proper openings or culverts for escape of all waters to cause the water to overflow the crossing its roadbed by means of natural drains and depressions so as not lands of upper proprietors, which by such care could have been guarded against; and if defendant failed to provide such openings, and by reason thereof plaintiff's lands were overflowed, and his crops injured, defendant was negligent, and verdict should be for plaintiff—considered as a whole, shows an intent to charge that, if defendant failed to use ordinary care to provide sufficient openings for escape of the water, and plaintiff's lands were overflowed and his crop injured, he could recover, so that specific objection, pointing out the failure to do so by proper words, was necessary. Ames Shovel & Tool Co. v. Anderson, 118 S. W. 1013, 90 Ark. 231. A general objection to an instruction defining the measure of damages, in an action for personal injuries, does not reach the objection that the court erred in including as an element of damage pecuniary loss, in the absence of evidence of such damage. Ft. Smith Light & Traction Co. v. Carr, 93 S. W. 990, 78 Ark. 279. A general objection to an instruction, requiring that carriers "must be extremely careful" to avoid injuring passengers, was insufficient to call to the trial court's attention the contention that the words quoted were incorrect. Midland Valley R. Co. v. Hamilton, 104 S. W. 540, 84 Ark. 81. Where in slander plaintiff proved the use of the words alleged in the complaint, but some of the witnesses testified to the use of words substantially different, though amounting to the charge complained of, a general objection to an instruction, authorizing a verdict for plaintiff if defendant falsely uttered words which in their common acceptation amounted to the slander complained of, was not sufficient, but a specific objection calling attention to the failure to limit the application to substantially the words of the complaint was necessary. Townsley v. Yentsch, 135 S. W. 882, 98 Ark. 312. In action against city for injuries from fall on icy crosswalk, where court in the same instruction stated city's duty with relation to walks and crosswalks, an objection that the instructions did not completely instruct as to the respective duties of the city and the pedestrians on the matter of street crossings held not sufficiently specific to advise court that the city was contending that there is a difference between city's duty with respect to sidewalks and its duty with respect to street crossings. Blackmore v. City of Council Bluffs (Iowa) 176 N. W. 369.

[76] **U. S.** (C. C. A. Wash.) Pacific Telephone & Telegraph Co. v. Hoffman, 208 F. 221, 125 C. C. A. 421.

Ind. City of Aurora v. Cobb, 21 Ind. 492.

Iowa. Ludwig v. Blackshere, 71 N. W. 356, 102 Iowa, 366; Brantz v. Marcus, 73 Iowa, 64, 35 N. W. 115; Patterson v. Chicago, M. & St. P. Ry. Co., 70 Iowa, 593, 33 N. W. 228; Benson v. Lundy, 52 Iowa, 265, 3 N. W. 149; Miller v. Gardner, 49 Iowa, 234; Eyser v. Weissgerber, 2 Iowa, 463; Millard v. Singer, 2 G. Greene (Iowa) 144.

Mass. Emmons v. Alvord, 59 N. E. 126, 177 Mass. 466.

N. H. Emery v. Boston & M. R. R., 30 A. 367, 67 N. H. 434.

N. Y. Haas v. Brown, 47 N. Y. S. 606, 21 Misc. Rep. 434, affirming judg-

and ordinarily the particular part of the charge of which complaint is made should be set out or pointed out,[77] and it is held that such rule, being mainly established for the protection of the prevailing

ment (Civ. Ct. N. Y.) 46 N. Y. S. 540. 20 Misc. Rep. 672; Goldman v. Abrahams, 9 Daly, 223.

N. C. Joines v. Johnson, 45 S. E. 828, 133 N. C. 487; Hampton v. Norfolk & W. R. Co., 27 S. E. 96, 120 N. C. 534, 35 L. R. A. 808.

Ohio. Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; Pittsburgh, Ft. W. & C. Ry. v. Probst, 30 Ohio St. 104.

S. C. Tinsley v. Western Union Telegraph Co., 51 S. E. 913, 72 S. C. 350; Carter & Co. v. Kaufman, 45 S. E. 1017, 67 S. C. 456; Gallman v. Union Hardwood Mfg. Co., 43 S. E. 524, 65 S. C. 192.

See, also, post, § 526, note 62.

In Iowa, the grounds of objection need not be stated, where the exceptions are taken at the time of giving instructions. H. B. Hardenburg & Co. v. Roberts, 125 N. W. 818, 146 Iowa, 696.

In New York, it has been held that an exception to an instruction which points out the language complained of by repeating the identical words is sufficient without stating the reason why the charge is considered erroneous. Davenport v. Prentice, 110 N. Y. S. 1056, 126 App. Div. 451.

In Utah, it is provided by statute that no reason need be given for exceptions taken to instructions. Everts v. Worrell, 197 P. 1043.

[77] **U. S.** (C. C. A. Iowa) Chicago Great Western Ry. Co. v. McDonough, 161 F. 657, 88 C. C. A. 517; (C. C. A. Ky.) Hindman v. First Nat. Bank, 112 F. 931, 50 C. C. A. 623, 57 L. R. A. 108.

Ala. Birmingham Ry., Light & Power Co. v. Cockrum, 60 So. 304, 179 Ala. 372.

Conn. State v. Tripp, 81 A. 247, 84 Conn. 640.

D. C. Traver v. Smolik, 43 App. D. C. 150.

Ga. Fordham v. State, 37 S. E. 391, 112 Ga. 228.

Iowa. Willis v. Schertz, 175 N. W. 321, 188 Iowa, 712.

Me. Field v. Lang, 36 A. 984, 89 Me. 454; Atkins v. Field, 36 A. 375, 89 Me. 281, 56 Am. St. Rep. 424.

Minn. Nelson v. Chicago, M. & St. P. Ry. Co., 165 N. W. 866, 139 Minn. 52.

N. J. Smith v. Atlantic City R. Co., 65 A. 1000, 74 N. J. Law, 452.

N. Y. Rheinfeldt v. Dahlman, 43 N. Y. S. 281, 19 Misc. Rep. 162.

Ohio. Adams v. State, 29 Ohio St. 412.

Or. Reimers v. Pierson, 113 P. 436, 58 Or. 86.

Vt. In re Healy's Will, 109 A. 19, 94 Vt. 128.

Objections to oral charge. Exception merely describing subject treated by court in an oral charge is bad, and hence exception merely designating beginning parts of oral charge excepted to is insufficient. Ex parte Cowart, 77 So. 349, 201 Ala. 55, reversing judgment Cowart v. State, 75 So. 711, 16 Ala. App. 119.

An exception to a charge is sufficiently specific, when it distinctly points out the particular parts to which it is directed. Scott v. Astoria R. Co., 72 P. 594, 43 Or. 26, 62 L. R. A. 543, 99 Am. St. Rep. 710.

Illustrations of sufficient exceptions. An exception "to that part of your honor's charge in which you submit to the jury whether the direction of [the foreman] to put his ladder upon the track relieved plaintiff from contributory negligence" is sufficiently definite to cover whatever the court said in submitting the question referred to to the jury. Date v. New York Glucose Co., 93 N. Y. S. 249, 104 App. Div. 207. An exception to instructions between certain numbers given, and to each of them, is sufficiently specific, when the objection is made at the time the instructions are given. Mann v. Sioux City & P. R. Co., 46 Iowa, 637. An exception that "the plaintiff moved for

party and being in furtherance of justice, cannot be abrogated by the practice of any trial court.[78]

One of the purposes of such rule being to give the court an opportunity, if convinced of error in its charge, to correct it,[79] the test of the sufficiency of an exception is whether it fairly directs the attention of the court to the claimed error.[80] An objection to a charge should be as definite as an assignment of error to it is required to be.[81]

§ 520. Specific applications of rule

Under this rule a general exception to an entire charge and to each and every part thereof cannot be sustained,[82] unless the whole

instructions Nos. 1, 2, and 3, which were given, to which defendant excepted, and still excepts," is sufficient. Poston v. Smith's Ex'r, 8 Bush (Ky.) 589.

[78] Eldred v. Oconto County, 33 Wis. 133.

[79] Birmingham Ry., Light & Power Co. v. Jackson, 73 So. 627, 198 Ala. 378; Schneider v. Winkler, 70 A. 731, 74 N. J. Law, 71.

[80] In re Chisholm's Will, 108 A. 393, 93 Vt. 453; Jenks v. State, 17 Wis. 665.

[81] Cleburne St. Ry. Co. v. Barnes (Tex. Civ. App.) 168 S. W. 991.

[82] **U. S.** Holder v. U. S., 150 U. S. 91, 14 S. Ct. 10, 37 L. Ed. 1010; Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961; Block v. Darling, 140 U. S. 234, 11 S. Ct. 832, 35 L. Ed. 476; Burton v. West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215; Washington & G. R. Co. v. Varnell, 98 U. S. 479, 25 L. Ed. 233; Stimpson v. Westchester R. Co., 4 How. 380, 11 L. Ed. 1020; (C. C. A. Ill.) Cleveland, C., C. & St. L. Ry. Co. v. Zider, 61 F. 908, 10 C. C. A. 151; (C. C. A. N. Y.) Park Bros. & Co. v. Bushnell, 60 F. 583, 9 C. C. A. 138; (C. C. A. Va.) Thom v. Pittard, 62 F. 232, 10 C. C. A. 352.

Ala. Stevenson v. Moody, 83 Ala. 418, 3 So. 695; South & North Alabama R. Co. v. McLendon, 63 Ala. 266.

Ark. Lambeth v. Ponder, 33 Ark. 707.

Cal. Bernstein v. Downs, 112 Cal. 197, 44 P. 557; Cavallaro v. Texas & P. R. Co., 110 Cal. 348, 42 P. 918, 52 Am. St. Rep. 94; Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 P. 929; Moore v. Moore, 4 Cal. Unrep. 190, 34 P. 90; Gillaspie v. Hagans, 90 Cal. 90, 27 P. 34; Cockrill v. Hall, 76 Cal. 192, 18 P. 318; Dixon v. Allen, 69 Cal. 527, 11 P. 179; Brown v. Kentfield, 50 Cal. 129; Sill v. Reese, 47 Cal. 294; Shea v. Petrero & B. V. R. Co., 44 Cal. 414; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

Colo. Holman v. Boston Land & Security Co., 8 Colo. App. 282, 45 P. 519; Jacobs v. Mitchell, 2 Colo. App. 456, 31 P. 235; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 P. 21; Edwards v. Smith, 16 Colo. 529, 27 P. 809; Wray v. Carpenter, 16 Colo. 271, 27 P. 248, 25 Am. St. Rep. 265; McFeters v. Pierson, 15 Colo. 201, 24 P. 1076, 22 Am. St. Rep. 388; Keith v. Wells, 14 Colo. 321, 23 P. 991; Wooton v. Seigel, 5 Colo. 424; Coon v. Rigden, 4 Colo. 275.

Dak. McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667.

Ga. Rogers v. Rogers, 74 Ga. 598; Rogers v. Tillman, 72 Ga. 479; Saulsbury v. Wimberly, 60 Ga. 78; Harris v. Harris, 53 Ga. 678; Smith v. Atwood, 14 Ga. 402.

Idaho. Black v. City of Lewiston, 2 Idaho (Hasb.) 276, 13 P. 80.

Ill. Razor v. Razor, 142 Ill. 375, 31 N. E. 678; Mather Electric Co. v. Matthews, 47 Ill. App. 557; Cincin-

charge is erroneous, or is erroneous in its general scope or mean-

nati, L. & C. R. Co. v. Ducharme, 4 Ill. App. 178.

Ind. Baker v. McGinniss, 22 Ind. 257; City of Aurora v. Cobb, 21 Ind. 492; Hawk v. Crago, 12 Ind. 369; Branham v. State, 11 Ind. 553; State v. Bartlett, 9 Ind. 569.

Iowa. Leach v. Hill, 97 Iowa, 81, 66 N. W. 69; Byford v. Girton, 90 Iowa, 661, 57 N. W. 588; Reeves v. Harrington, 85 Iowa, 741, 52 N. W. 517; Patterson v. Chicago, M. & St. P. Ry. Co., 70 Iowa, 593, 33 N. W. 228; Stevens v. Taylor, 58 Iowa, 664, 12 N. W. 625; Benson v. Lundy, 52 Iowa, 265, 3 N. W. 149; Pitman v. Molsberry, 49 Iowa, 339; King v. Lyman, 46 Iowa, 703; Moore v. Gilbert, 46 Iowa, 508; Davenport Gaslight & Coke Co. v. City of Davenport, 13 Iowa, 229; Abbott v. Striblen, 6 Iowa, 191.

Kan. Fleming v. L. D. Latham & Co., 48 Kan. 773, 30 P. 166; Ryan v. Madden, 46 Kan. 245, 26 P. 679; Young v. Youngman, 45 Kan. 65, 25 P. 209; Haak v. Struve, 38 Kan. 326, 16 P. 686; State v. Wilgus, 32 Kan. 126, 4 P. 218; Fullenwider v. Ewing, 25 Kan. 69; City of Atchison v. King, 9 Kan. 550.

Me. State v. Pike. 65 Me. 111.

Mass. Chenery v. Fitchburg R. Co., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; Hunting v. Downer, 151 Mass. 275, 23 N. E. 832; Rock v. Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401; Curry v. Porter, 125 Mass. 94.

Mich. McAllister v. Engle, 52 Mich. 56, 17 N. W. 694; Pray v. Cadwell, 50 Mich. 222, 15 N. W. 92; Geary v. People, 22 Mich. 220.

Minn. Steffenson v. Chicago, M. & St. P. Ry. Co., 51 Minn. 531, 53 N. W. 800; Cole v. Curtis, 16 Minn. 182 (Gil. 161); Foster v. Berkey, 8 Minn. 351 (Gil. 310).

Mont. McKinstry v. Clark, 4 Mont. 370, 1 P. 759.

Neb. City of Omaha v. McGavock, 47 Neb. 313, 66 N. W. 415; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928; First Nat. Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568; Walker v. Turner, 27 Neb. 103, 42 N. W. 918; Brooks v. Dutcher, 24 Neb. 300, 38 N. W. 780; Hotel Ass'n of Omaha v. Walters, 23 Neb. 280, 36 N. W. 561; Brooks v. Dutcher, 22 Neb. 644, 36 N. W. 128.

N. H. Reynolds v. Boston & M. R. Co., 43 N. H. 580.

N. J. Oliver v. Phelps, 21 N. J. Law, 597; Potts v. Clarke, 20 N. J. Law, 536.

N. Y. Mann v. City of Brooklyn, 63 Hun. 627, 17 N. Y. S. 643; People v. McKenna, 58 Hun, 609, 12 N. Y. S. 493; Newlin v. Lyon, 49 N. Y. 661; Requa v. City of Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Oldfield v. New York & H. R. Co., 14 N. Y. 310; Caldwell v. Murphy, 11 N. Y. 416; Jones v. Osgood, 6 N. Y. 233; Robinson v. New York & E. R. Co., 27 Barb. 512; McBurney v. Cutler, 18 Barb. 203; Carland v. Day, 4 E. D. Smith, 251; Simpson v. Downing. 23 Wend. 316.

N. C. Kendrick v. Dellinger, 117 N. C. 491, 23 S. E. 438; Antietam Paper Co. v. Chronicle Pub. Co., 115 N. C. 147, 20 S. E. 367; Shober v. Wheeler, 113 N. C. 370, 18 S. E. 328; Davis v. Duval, 112 N. C. 833, 17 S. E. 528; Hemphill v. Morrison, 112 N. C. 756, 17 S. E. 535; Ward v. Albemarle & R. R. Co., 112 N. C. 168, 16 S. E. 921; Hinson v. Powell, 109 N. C. 534, 14 S. E. 301; Bottoms v. Seaboard & R. R. Co., 109 N. C. 72, 13 S. E. 738; Bost v. Bost, 87 N. C. 477.

Ohio. Consolidated Coal & Mining Co. v. Clay's Adm'r, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; Everett v. Sumner, 32 Ohio St. 562; Western Ins. Co. v. Tobin, 32 Ohio St. 77; Pittsburg, Ft. W. & C. Ry. v. Probst, 30 Ohio St. 104; Marietta & C. R. Co. v. Strader, 29 Ohio St. 448; Butchers' Melting Ass'n v. Commercial Bank, 2 Disn. 46, 13 Ohio Dec. 29; Weber v. Wiggins, 11 Ohio Cir. Ct. R. 18, 1 O. C. D. 84.

S. C. Davis v. Elmore, 40 S. C. 533, 19 S. E. 204; Dobson v. Cothran, 34 S. C. 518, 13 S. E. 679; Norton v. Livingston, 14 S. C. 177.

Vt. Goodwin v. Perkins, 39 Vt. 598.

Wash. Carroll v. Washington Water Power Co., 105 P. 1026, 56 Wash. 467; Cunningham v. Seattle

ing,[83] and a general exception to instructions, several in number and separate and distinct, given at the request of the other party, is insufficient,[84] and each instruction should be objected to separately by number.[85]

All defects of form must be met by a specific objection,[86] and a general objection to an instruction is not sufficient to point out an ambiguity therein,[87] nor to call the attention of the court to its inconsistency with other instructions given [88] nor to a misstatement of fact therein,[89] nor to the fact that a word used therein should be defined,[90] nor to the point that an instruction is confusing or misleading,[91] nor to the objection that an instruction erroneously assumed as a fact a matter in dispute,[92] nor to the fact that an in-

Electric Ry. & Power Co., 3 Wash. 471, 28 P. 745.

Wis. Luedtke v. Jeffery, 89 Wis. 136, 61 N. W. 292; Smith v. Coleman, 77 Wis. 343, 46 N. W. 664; Meno v. Hoeffel, 46 Wis. 282, 1 N. W. 31; Sabine v. Fisher, 37 Wis. 376; Strachan v. Muxlow, 31 Wis. 207; Tomlinson v. Wallace, 16 Wis. 224.

General exception combined with special exception. An exception to the charge, and to each and every part thereof, and to the whole thereof, and also to a particular, specified portion of such charge, is inoperative except as to the part specifically described. Yates v. Bachley, 33 Wis. 185.

[83] Hentig v. Kansas Loan & Trust Co., 28 Kan. 617; Wheeler v. Joy, 15 Kan. 389.

[84] Bard v. Elston, 31 Kan. 274, 1 P. 565.

[85] State v. Bartlett, 9 Ind. 569; Woods v. Berry, 7 Mont. 195, 14 P. 758; McKinstry v. Clark, 4 Mont. 370, 1 P. 759.

Oral instructions. Where the jury is instructed orally in accordance with the statute, the various portions of the charge being given unnumbered, such portions must be particularized by number before valid exceptions may be taken thereto. Strong v. Ross, 75 N. E. 291, 36 Ind. App. 174.

[86] **Ark.** Dierks Lumber & Coal Co. v. Coffman Bros., 132 S. W. 654, 96 Ark. 505; Ft. Smith & W. Ry. Co. v. Messek, 131 S. W. 686, 96 Ark. 243, rehearing denied, 131 S. W. 966, 96 Ark. 243; St. Louis, I. M. & S. Ry. Co. v. Walker, 125 S. W. 135, 93 Ark. 457; Hamburg Bank v. George & Butler, 123 S. W. 654, 92 Ark. 472; Arkansas Midland R. Co. v. Rambo, 117 S. W. 784, 90 Ark. 108; Sloan v. Little Rock Ry. & Electric Co., 117 S. W. 551, 89 Ark. 574; McElvaney v. Smith, 88 S. W. 981, 76 Ark. 468, 6 Ann. Cas. 458; St. Louis, I. M. & S. Ry. Co. v. Norton, 73 S. W. 1095, 71 Ark. 314; Williams v. State, 50 S. W. 517, 66 Ark. 264.

N. Y. Saugerties Bank v. Mack, 54 N. Y. S. 950, 35 App. Div. 398.

[87] **Ark.** New Coronado Coal Co. v. Jasper, 222 S. W. 22, 144 Ark. 58; Huckaby v. St. Louis, I. M. & S. Ry. Co., 177 S. W. 923, 119 Ark. 179; Garretson-Greeson Lumber Co. v. Goza, 172 S. W. 825, 116 Ark. 277; St. Louis, I. M. & S. Ry. Co. v. Prince, 142 S. W. 499, 101 Ark. 315; St. Louis, I. M. & S. Ry. Co. v. Dunn & Stewart, 127 S. W. 464, 94 Ark. 407; Aluminum Co. of North America v. Ramsey, 117 S. W. 568, 89 Ark. 522.

[88] Matthews v. Clough, 49 A. 637, 70 N. H. 600.

[89] Walker v. Collins (C. C. A. Kan.) 59 Fed. 70, 8 C. C. A. 1.

[90] Mt. Nebo Anthracite Coal Co. v. Williamson, 84 S. W. 779, 73 Ark. 530; St. Louis, I. M. & S. Ry. Co. v. Barnett, 45 S. W. 550, 65 Ark. 255; Kirby v. Lower, 124 S. W. 34, 139 Mo. App. 677.

[91] C. C. Emerson & Co. v. Stevens Grocer Co., 151 S. W. 1003, 105 Ark. 575; Gilroy v. Loftus, 48 N. Y. S. 532, 22 Misc. Rep. 105.

[92] St. Louis S. W. Ry. Co. v. McLaughlin, 196 S. W. 460, 129 Ark. 377.

struction correctly stating the law is not applicable to the evidence,[93] nor to the use of a particular word or phrase not inappropriate to express the idea intended to be conveyed,[94] nor to any particular omission not amounting to a misdirection,[95] and an objection to the failure to number instructions must be taken on that specific ground.[96]

An objection merely to the giving of an instruction only goes to the substance thereof,[97] and is not sufficient to raise the point on appeal that it was not reduced to writing,[98] or that it was given after the jury had partly considered the case.[99]

Objections merely that a charge is argumentative,[1] or not sufficiently specific,[2] or that a charge is abstract,[3] or misleading,[4] are too general, unless there is reason for supposing that the jury has actually and prejudicially been misled,[5] and so is an objection to an entire charge on the ground that it contains a misstatement of the testimony,[6] or that an instruction intimates the opinion of the court upon the facts in the case.[7]

[93] Quetermous v. Hatfield, 54 Ark. 16, 14 S. W. 1096; Graham v. State, 53 S. E. 816, 125 Ga. 48; Central of Georgia Ry. Co. v. Bond, 36 S. E. 299, 111 Ga. 13.

[94] Bocquin v. Theurer, 202 S. W. 845, 133 Ark. 448; Commonwealth v. Tolman, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, 14 Am. St. Rep. 414; Evans v. St. Paul & S. C. R. Co., 30 Minn. 489, 16 N. W. 271.

[95] Armour v. Pecker, 123 Mass. 143; Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51).

[96] Herzog v. Campbell, 47 Neb. 370, 66 N. W. 424; Smith v. State, 4 Neb. 277.

[97] Omaha & F. Land & Trust Co. v. Hansen, 32 Neb. 449, 49 N. W. 456.

[98] Giddings v. McCumber, 51 Ill. App. 373; Gaynor v. Pease Furnace Co., 51 Ill. App. 292.

Exceptions to all of instructions and to each of them. Where the court was requested by defendant to charge the jury in writing, but, disregarding the request, gave with certain written instructions verbal explanations thereof and verbal instructions, and no objection was made at the time, but after the bailiff had been sworn to take charge of the jury, and before the jury retired, defendant's attorney stated that he excepted to the instructions, and, when asked to specify which instructions he excepted to stated that he excepted to them all, and that all included each, it was held that the exception was sufficiently specific to raise the question of the giving of the verbal instructions in disregard of defendant's request. Sutherland v. Venard, 34 Ind. 390.

[99] City of Topeka v. Heitman, 47 Kan. 739, 28 P. 1096.

[1] Goldstein v. Smiley, 48 N. E. 208, 168 Ill. 438, affirming judgment 68 Ill. App. 49; Owen v. Brown, 41 A. 1025, 70 Vt. 521.

[2] Chinn v. Ferro-Concrete Const. Co., 132 N. Y. S. 850, 148 App. Div. 368.

[3] Holman v. Herscher (Tex.) 16 S. W. 984.

[4] Smith v. Birmingham Ry., Light & Power Co., 41 So. 307, 147 Ala. 702; Hunt v. Atlantic Coast Lumber Corporation, 85 S. E. 229, 101 S. C. 64.

[5] Holm v. Sandberg, 32 Minn. 427, 21 N. W. 416.

[6] Keystone Lumber & Salt Mfg. Co. v. Dole, 43 Mich. 370, 5 N. W. 412.

[7] Carpenter v. American Acc. Co., 46 S. C. 541, 24 S. E. 500; Greene v. Duncan, 37 S. C. 239, 15 S. E. 956.

§ 521. Application of rule in criminal cases

The above rule with respect to the necessity that exceptions to instructions be specific and definitely point out the error complained of, although having some relaxation in criminal cases, where it is apparent that the charge given is not applicable and tends to mislead the jury,[8] is generally observed in criminal prosecutions.[9]

[8] Dodge v. People, 4 Neb. 220.

[9] **Ala.** Hardin v. State, 63 Ala. 38; Jacobson v. State, 55 Ala. 151; Irvin v. State, 50 Ala. 181; Cohen v. State, 50 Ala. 108.

Ark. Burgess v. State, 158 S. W. 774, 108 Ark. 508; Jackson v. State, 126 S. W. 843, 94 Ark. 169; Bell v. State, 125 S. W. 1020, 93 Ark. 600; Burnett v. State, 96 S. W. 1007, 80 Ark. 225.

Fla. Carter v. State, 20 Fla. 754.

Ga. Webb v. State, 69 S. E. 601, 8 Ga. App. 430; Wiley v. State, 59 S. E. 438, 3 Ga. App. 120; Wilson v. State. 69 Ga. 224; Wood v. State, 68 Ga. 296.

Mass. Commonwealth v. Meserve, 154 Mass. 64, 27 N. E. 997.

N. C. State v. Herren, 94 S. E. 698, 175 N. C. 754; State v. Downs, 118 N. C. 1242, 24 S. E. 531.

Ohio. Adams v. State, 25 Ohio St. 584.

Tex. Walker v. State, 151 S. W. 822, 68 Tex. Cr. R. 346; Barrett v. State (Cr. App.) 69 S. W. 144; Thompson v. State, 32 Tex. Cr. R. 265, 22 S. W. 979; Goodson v. Same (Cr. App.) 22 S. W. 20; Cordway v. Same, 25 Tex. App. 405, 8 S. W. 670; Williams v. State, 22 Tex. App. 497, 4 S. W. 64.

Utah. People v. Hart, 10 Utah, 204, 37 P. 330.

Illustrations of exceptions held too general. An objection that a charge "was not a correct statement of the law in reference to the matters dealt with." Reed v. State, 168 S. W. 541, 74 Tex. Cr. R. 242. An objection to the charge of the court because it is insufficient. Simons v. State (Tex. Cr. App.) 34 S. W. 619. An exception to the entire charge of the court, on the ground that it is "on some material points contrary to law, and failed to charge the law applicable to the facts, and was calculated to mislead the jury." Wood v. State, 68 Ga. 296. A general exception "to all those things and specifically to the whole charge on the ground that it did not fairly present the facts in the case." State v. Wagner (R. I.) 86 A. 147. An exception that the court erred in defining "malice," without pointing out wherein the error lies. People v. Thiede, 11 Utah, 241, 39 P. 837. An exception that the court erred in charging as it did on the issue of provocation by mere words, when on the testimony there was no such issue in the case, and thereby misleading the jury. State v. Crosby, 70 S. E. 440, 88 S. C. 98. An exception to the trial court's definition of a "'reasonable doubt,' setting forth that it failed to define what constitutes a reasonable doubt in a sufficiently clear and distinct manner." State v. Davenport, 38 S. C. 348, 17 S. E. 37. An exception to each and every clause of the court's charge, because it is upon the weight of the evidence, without specifying in what way it is upon the weight of the evidence, or what charge is on the weight of the evidence. McDougal v. State (Tex. Cr. App.) 103 S. W. 847. Where a bill of exceptions is reserved to a charge as an entirety, "because it did not instruct the jury fully on the law governing his case on the facts proved," the exception is too general to be considered by this court. Quintana v. State, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730. Where defendant thinks an instruction liable to be misconstrued, an exception by his counsel that it is "calculated to do their client an injury" is too general. State v. Tibbs, 48 La. Ann. 1278, 20 So. 735. Where a charge consists of several sentences, a general exception "to the latter portion of said charge" will not be considered on appeal. Stroud v. State, 55 Ala. 77. An exception "to so much of the charge as commences with the words 'if the jury believe,' on the fourth line from the bottom of the

Thus an exception to a charge "as given," [10] or to the action of the court in giving "said instructions and each of them," is too general.[11] So an exception to a charge involving a number of points that it is contrary to law,[12] or an exception that on the whole charge the court presented the case in a manner to prejudice the defendant, is too general,[13] and a general exception to the charge is insufficient to raise the point that a part of the charge requires the jury to consider outside matters not proven at the trial.[14]

preceding page." Stroud v. State, 55 Ala. 77. A general objection to an instruction as a whole was insufficient to raise an objection to a clause that the jury was not at liberty to "doubt as jurors if they believed as men." Thomas v. State, 86 S. W. 404, 74 Ark. 431. An exception to the contents of a written charge is insufficient to present a question as to an oral statement made in connection with the charge. Peelle v. State, 68 N. E. 682, 161 Ind. 378. An objection that the court's charge was not sufficiently clear in reference to the weight to be given dying statements does not specify plainly the alleged error, in that it fails to set out in what respect the charge was not clear or accurate. Boynton v. State, 41 S. E. 995, 115 Ga. 587. In a prosecution for homicide, an objection to the giving of certain instructions, made solely on the ground that they did not entirely cover all the facts of the case under the law, and as not being complete and sufficient under the law, was insufficient, where on such objection being made, the trial court requested counsel to state which questions, if any, were not covered by the instructions given, to which counsel made no reply. State v. West, 100 S. W. 478, 202 Mo. 128. The charge which the court gave on the law relating to good character being in substance correct, the exception to the same, presenting the objection that it "was general, and not specific as to the law of good character, and did not give to the jury the law in relation thereto," was itself defective, in that it failed to point out in what respect the charge was incomplete, or what it required to render it sufficiently full and specific. Barber v. State, 37 S. E. 885, 112 Ga. 584.

Illustrations of exceptions held sufficiently specific. An exception, taken at the time of the delivery of the charge of the court, "to all the remarks of the court in reference to the impeachment of" a witness named, and "to that part of the charge in regard to the evidence of" such witness. Brown v. United States, 17 S. Ct. 33, 164 U. S. 221, 41 L. Ed. 410. An exception to "that part of the charge in stating the effect of good character," made to a paragraph which treats only of the proper effect of evidence of good character. Edgington v. United States, 17 S. Ct. 72, 164 U. S. 361, 41 L. Ed. 467. The following objection: "Comes now the defendants and object to all of the instructions in this case by the court and except to the same, and especially except to the court in not instructing on all the law in the case and not instructing on the different degrees of larceny"—is sufficient to call the court's attention to its failure to embrace in the instructions, in the event the jury should find defendants not guilty of burglary, the subject of larceny from a dwelling house. State v. Nicholas, 121 S. W. 12, 222 Mo. 425.

[10] State v. Moore, 26 S. E. 697, 120 N. C. 570; State v. Parker, 106 N. C. 711, 11 S. E. 517; State v. Frizell, 111 N. C. 722, 16 S. E. 409.

[11] Gardner v. United States (C. C. A. Mo.) 230 F. 575, 144 C. C. A. 629.

[12] Smith v. State, 67 Ga. 769; State v. Orfanakis, 159 P. 674, 22 N. M. 107.

[13] State v. Varner, 115 N. C. 744, 20 S. E. 518.

[14] Shelp v. United States (C. C. A. Alaska) 81 F. 694, 26 C. C. A. 570.

§ 522. Exceptions to instructions correct in part

Unless the errors of the court in charging the jury are manifestly grave or of a fundamental character,[15] the rule is, both in civil [16] and in criminal cases,[17] that a general exception to a charge

[15] Walker v. Windsor Nat. Bank (C. C. A. N. H.) 56 F. 76, 5 C. C. A. 421; Robinson v. State (Ark.) 231 S. W. 2.

[16] **U. S.** Norfolk & W. R. Co. v. Earnest, 33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; Newport News & M. V. Co. v. Pace, 158 U. S. 36, 15 S. Ct. 743, 39 L. Ed. 887; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624; (C. C. A. Alaska) Lindblom v. Fallett, 145 F. 805, 76 C. C. A. 369; (C. C. A. Ark.) St. Louis, I. M. & S. Ry. Co. v. Spencer, 71 F. 93, 18 C. C. A. 114; (C. C. A. Colo.) New Dunderberg Min. Co. v. Old, 97 F. 150, 38 C. C. A. 89; Price v. Pankhurst, 53 Fed. 312, 3 C. C. A. 551; (C. C. A. Ill.) Vider v. O'Brien, 62 Fed. 326, 10 C. C. A. 385; Masonic Ben. Ass'n of Central Illinois v. Lyman, 60 F. 498, 9 C. C. A. 104; (C. C. A. Ind. T.) Gulf, C. & S. F. Ry. Co v. Johnson, 54 F. 474, 4 C. C. A. 447; McClellan v. Pyeatt, 50 Fed. 686, 1 C. C. A. 613; (C. C. A. La.) Kansas City Southern Ry. Co. v. Prunty, 133 F. 13, 66 C. C. A. 163; (C. C. A. Neb.) Union Pac. R. Co. v Thomas, 152 F. 365, 81 C. C. A. 491; Western Assur. Co. of Toronto v. Polk, 104 F. 649, 44 C. C. A. 104; (C. C. A. Ohio) Pennsylvania Co. v. Whitney, 169 F. 572, 95 C. C. A. 70; (C. C. A. Vt.) Giddings v. Freedley, 128 F. 355, 63 C. C. A. 85, 65 L. R. A. 327, affirming judgment Friedly v. Giddings (C. C.) 119 F. 438.

Ala. Gilley v. Denman, 64 So. 97, 185 Ala. 561; Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357; Shirley v. Ezell, 60 So. 905, 180 Ala. 352; Sulser v. Sayre, 58 So. 758, 4 Ala. App. 452; Postal Tel. Cable Co. v. Hulsey, 31 So. 527, 132 Ala. 444; Postal Tel. Cable Co. v. Hulsey, 22 So. 854, 115 Ala. 193; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 So. 46; Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 So. 130; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 So. 145; Bell v. Kendall, 93 Ala. 489, 8 So. 492; Nelson v. Warren, 93 Ala. 408, 8 So. 413; Kirby v. State, 89 Ala. 63, 8 So. 110; Adams v. State, 87 Ala. 89, 6 So. 270; Kilpatrick v. Pickens County, 66 Ala. 422; City of Birmingham v. Rumsey, 63 Ala. 352; Chapman v. Holding, 60 Ala. 522.

Ark. Kansas City Southern Ry. Co. v. Belknap, 98 S. W. 366, 80 Ark. 587; Walnut Ridge Mercantile Co. v. Cohn, 96 S. W. 413, 79 Ark. 338; Young v. Stevenson, 86 S. W. 1000, 75 Ark. 181; Dunnington v. Frick Co., 60 Ark. 250, 30 S. W. 212; Oxley Stave Co. v. Staggs, 59 Ark. 370, 27 S. W. 241; Atkins v. Swope, 38 Ark. 528; Murphy v. Lemay, 32 Ark. 223; Crisman v. McDonald, 28 Ark. 8.

Colo. Adams Exp. Co. v. Aldridge, 77 P. 6, 20 Colo. App. 74; Schollay v. Moffitt-West Drug Co., 67 P. 182, 17 Colo. App. 126; Kansas Pac. Ry. Co. v. Ward, 4 Colo. 30.

D. C. Chapman v. Capital Traction Co., 37 App. D. C. 479; McDermott v. Severe, 25 App. D. C. 276, judgment affirmed 26 S. Ct. 709, 202 U. S. 600, 50 L. Ed. 1162; Birmingham v. Pettit, 21 D. C. 209; Mackey v. Baltimore & P. R. Co., 19 D. C. 282.

Fla. Post v. Bird, 28 Fla. 1, 9 So. 888; Baker v. Chatfield, 23 Fla. 540, 2 So. 822; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19; Burroughs v. State, 17 Fla. 643; John D. C. v. State, 16 Fla. 554.

Ga. Higdon v. Williamson, 78 S. E. 767, 140 Ga. 187; Boswell v. Gillen, 62 S. E. 187, 131 Ga. 310; Foote v. Kelley, 55 S. E. 1045, 126 Ga. 799; Collins v. Spence, 84 Ga. 503, 11 S. E. 502; Verdery v. Savannah, F. & W. Ry. Co., 82 Ga. 675, 9 S. E. 1133; Grace v. Martin, 83 Ga. 245, 9 S. E. 841; Blackman v. State, 78 Ga. 592, 3 S. E. 418; Fisher v. State, 73 Ga. 595; Weaver v. Nixon, 69 Ga. 699; Hambric v. State, 68 Ga. 836; Fuller v. City of Atlanta, 66 Ga. 80; Bruns-

[17] See note 17 on page 957.

or to a part thereof containing more than one proposition is of no

wick & A. R. R. v. Toomer, 61 Ga. 253; Reedy v. Brunner, 60 Ga. 107; Thompson v. Feagin, 60 Ga. 82.

Ill. Hayward v. Catton, 1 Ill. App. 577.

Ind. Cathcart v. Brewer (App.) 123 N. E. 358; Hablich v. University Park Bldg. Co., 97 N. E. 539, 177 Ind. 193; Inland Steel Co. v. Smith, 80 N. E. 538, 168 Ind. 245, affirming judgment 75 N. E. 852, 39 Ind. App. 636; Jones v. Peters, 62 N. E. 1019, 28 Ind. App. 383; State v. Ray, 45 N. E. 693, 140 Ind. 500; Moore v. Orr, 10 Ind. App. 89, 37 N. E. 554; Buchart v. Ell, 9 Ind. App. 353, 36 N. E. 762; State v. Gregory, 132 Ind. 387, 31 N. E. 952; Elliott v. Woodward, 18 Ind. 183; Garrigus v. Burnett, 9 Ind. 528; Jolly v. Terre Haute Drawbridge Co., 9 Ind. 417.

Iowa. Rowen v. Sommers, 101 Iowa, 734, 66 N. W. 897; Hallenbeck v. Garst, 96 Iowa, 509, 65 N. W. 417; Ruter v. Foy, 46 Iowa, 132; Brown v. Scott County, 36 Iowa, 140; Mershon v. National Ins. Co., 34 Iowa, 87; McCaleb v. Smith, 24 Iowa, 591.

Kan. Standard Life & Accident Ins. Co. v. Davis, 53 P. 856, 59 Kan. 521; Carter v. Carter, 50 P. 948, 6 Kan. App. 923; Crosby v. Wilson, 53 Kan. 565, 36 P. 985; Myer v. Moon, 45 Kan. 580, 26 P. 40; Sumner v. Blair, 9 Kan. 521.

Me. State v. Flaherty, 5 A. 563; Webber v. Dunn, 71 Me. 331; Crosby v. Maine Central R. Co., 69 Me. 418; Harriman v. Sanger, 67 Me. 442; Macintosh v. Bartlett, 67 Me. 130.

Mass. Bartow v. Parsons Pulp & Paper Co., 94 N. E. 312, 208 Mass. 232.

Mich. Prescott v. Patterson, 49 Mich. 622, 14 N. W. 571; Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239, 1 N. W. 1035; Tupper v. Kilduff, 26 Mich. 394; Danielson v. Dyckman, 26 Mich. 169.

Minn. Main v. Olen, 47 Minn. 89, 49 N. W. 523; Russell v. St. Paul, M. & M. Ry. Co., 33 Minn. 210, 22 N. W. 379; Rheiner v. Stillwater St. Ry. & Transp. Co., 31 Minn. 193, 17 N. W. 279; Ferson v. Wilcox, 19 Minn. 449 (Gil. 388); Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51).

Mont. Simonton v. Kelly, 1 Mont. 363.

Neb. Mattern v. McCarty, 102 N. W. 468, 73 Neb. 228; Runquist v. Anderson, 90 N. W. 760, 64 Neb. 755; Axthelm v. Chicago, R. I. & P. R. Co., 89 N. W. 313, 2 Neb. (Unof.) 444; Green v. Tierney, 87 N. W. 331, 62 Neb. 561; Pease Piano Co. v. Camerson, 76 N. W. 1053, 56 Neb. 561; Bennett v. McDonald, 72 N. W. 268, 52 Neb. 278; Adams-Smith Co. v. Hayward, 71 N. W. 949, 52 Neb. 79; Home Fire Ins. Co. v. Phelphs, 71 N. W. 303, 51 Neb. 623; Union Pac. Ry. Co. v. Montgomery, 68 N. W. 619, 49 Neb. 429; Blue Valley Lumber Co. v. Smith, 48 Neb. 293, 67 N. W. 159; Redman v. Voss, 46 Neb. 512, 64 N. W. 1094; Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. 740.

N. J. Thibodeau v. Hamley, 112 A. 320.

N. M. Hagin v. Collins, 110 P. 840, 15 N. M. 621.

N. Y. Brozek v. Steinway Ry. Co. of Long Island City, 55 N. E. 395, 161 N. Y. 63, affirming judgment 48 N. Y. S. 345, 23 App. Div. 623, and 48 N. Y. S. 1101, 23 App. Div. 626; Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861, affirming (Sup. 1889) 5 N. Y. S. 895, 53 Hun, 629; Burdick v. Freeman, 120 N. Y. 420, 24 N. E. 949; Ensign v. Hooker, 6 App. Div. 425, 39 N. Y. S. 543; Gundlin v. Hamburg-American Packet Co. (Com. Pl. N. Y.) 8 Misc. Rep. 291, 28 N. Y. S. 572; Wallace v. Williams, 59 Hun, 628, 14 N. Y. S. 180; Abenheim v. Samuel, 49 Hun, 607, 1 N. Y. S. 868; Stone v. Western Transp. Co., 38 N. Y. 240; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Barker v. Savage, 31 N. Y. Super. Ct. 288; City of Detroit Water Com'rs v. Burr, 35 N. Y. Super. Ct. 522.

N. C. Buchanan v. Cranberry Furnace Co., 101 S. E. 518, 178 N. C. 643; Quelch v. Futch, 94 S. E. 713, 175 N. C. 694.

Ohio. City of Toledo v. Radbone, 23 Ohio Cir. Ct. R. 268.

Okl. Denson v. Fowler, 155 P.

avail, if any of such propositions is correct. Under this rule a general exception to a long paragraph of a charge containing nu-

1184, 56 Okl. 670; Johnson v. Johnson, 143 P. 670, 43 Okl. 582; Glaser v. Glaser, 74 P. 944, 13 Okl. 389.

Or. Hahn v. Mackay, 126 P. 991, 63 Or. 100, modifying opinion on rehearing 126 P. 12, 63 Or. 100; McAlister v. Long, 54 P. 194, 33 Or. 368; Langford v. Jones, 18 Or. 307, 22 P. 1064.

Utah. Rampton v. Cole, 172 P. 477, 52 Utah, 36; Smith v. Columbus Buggy Co., 123 P. 580, 40 Utah, 580; Grow v. Utah Light & Ry. Co., 106 P. 514, 37 Utah, 41; Ryan v. Curlew Irrigation & Reservoir Co., 104 P. 218, 36 Utah, 382; Pennington v. Redman Van & Storage Co., 97 P. 115, 34 Utah, 223; Farnsworth v. Union Pac. Coal Co., 89 P. 74, 32 Utah, 112; Whipple v. Preece, 67 P. 1072, 24 Utah, 364; Beaman v. Martha Washington Min. Co., 63 P. 631, 23 Utah, 139; Wilson v. Sioux Consol. Min. Co., 52 P. 626, 16 Utah, 392; Lowe v. Salt Lake City, 13 Utah, 91, 44 P. 1050, 57 Am. St. Rep. 708; Nelson v. Brixen, 7 Utah, 454, 27 P. 578.

Vt. Barnard v. Leonard, 100 A. 876, 91 Vt. 369; Usher v. Severance, 80 A. 741, 86 Vt. 523; Needham v. Boston & M. R. Co., 74 A. 226, 82 Vt. 518; Cutler v. Skeels, 37 A. 228, 69 Vt. 154; Jones v. Ellis' Estate, 35 A. 488, 68 Vt. 544; Morrill v. Palmer, 68 Vt. 1, 33 A. 829, 33 L. R. A. 411; Dickerman v. Quincy Mut. Fire Ins. Co., 67 Vt. 609, 32 A. 489; Rowell v. Fuller's Estate, 59 Vt. 688, 10 A. 853.

Wash. Rush v. Spokane Falls & N. Ry. Co., 63 P. 500, 23 Wash. 501; Maling v. Crummey, 5 Wash. 222, 31 P. 600; Meeker v. Gardella, 1 Wash. 139, 23 P. 837.

Wis. Elwell v. Bosshard, 138 N. W. 46, 151 Wis. 46; Kersten v. Weichman, 114 N. W. 499, 135 Wis. 1; Richardson v. Babcock, 96 N. W. 554, 119 Wis. 141; Tebo v. City of Augusta, 90 Wis. 405, 63 N. W. 1045; Green v. Hanson, 89 Wis. 597, 62 N. W. 408; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Butler v. Carns, 37 Wis. 61; Hamlin v. Haight, 32 Wis. 237; Wood v. Aldrich, 25 Wis. 695; Thrasher v. Tyack, 15 Wis. 256; Milwaukee & C. R. Co. v. Hunter, 11 Wis. 160, 78 Am. Dec. 699.

Exceptions held insufficient within rule. In action against waterworks company for wrongfully cutting off plaintiff's water service, exception to instruction entitling plaintiff to damages for "humiliation, embarrassment, annoyance, and inconvenience," even though bad in so far as instruction applied to damages for humiliation or embarrassment, will not be sustained where not restricted to that portion of instruction. Birmingham Waterworks Co. v. Justice, 86 So. 389, 204 Ala. 547. Where, the jury having been instructed that if the whole of defendant's personal property was not transferred to the trustee, or if he practiced any fraud upon his creditors by which they were induced to enter into the agreement, then such agreement was void from the very beginning, an exception to the whole instruction was too indefinite to avail defendant on appeal; the second part of such instruction being correct. Musgat v. Wybro, 33 Wis. 515.

Effect of statement that party excepts to each instruction. A general exception noted at the end of a charge containing a number of instructions which embody separate and distinct propositions, though it states that the party excepts to each instruction, is not sufficiently specific to challenge the correctness of any particular instruction, and raises no question for review where any of the propositions contained in the charge are correct. Holloway v. Dunham, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165, affirming judgment Dunham v. Halloway, 41 P. 140, 3 Okl. 244.

[17] **Ala.** Addington v. State, 74 So. 846, 16 Ala. App. 10; Kirk v. State, 65 So. 195, 10 Ala. App. 216; Kirkwood v. State, 62 So. 1011, 8 Ala. App. 108, certiorari denied 63 So. 990, 184 Ala. 9; Dunn v. State, 62 So. 379, 8 Ala. App. 382; Sanders v. State, 61 So. 336, 181 Ala. 35; McGhee v. State, 59 So. 573, 178 Ala. 4; Powell

merous statements of fact will not raise the point that a particu-

v. State, 59 So. 328, 5 Ala. App. 150; Maxwell v. State, 57 So. 505, 3 Ala. App. 169; Johnson v. State, 57 So. 389, 3 Ala. App. 98; Treadwell v. State, 53 So. 290, 168 Ala. 96; Sims v. State, 41 So. 413, 146 Ala. 109; Ragsdale v. State, 32 So. 674, 134 Ala. 24; Bonner v. State, 107 Ala. 97, 18 So. 226; Dick v. State, 87 Ala. 61, 6 So. 395; Woods v. State, 76 Ala. 35, 52 Am. Rep. 315; Farley v. State, 72 Ala. 170; Dickey v. State, 68 Ala. 508; Gray v. State, 63 Ala. 60; Murphy v. State, 54 Ala. 178.

Ark. Martin v. State, 107 S. W. 380, 85 Ark. 130; Johnson v. State, 104 S. W. 929, 84 Ark. 95; Darden v. State, 84 S. W. 507, 73 Ark. 315, dismissed 26 S. Ct. 758, 200 U. S. 615, 50 L. Ed. 621.

Colo. Wilson v. People, 3 Colo. 325.

D. C. Sullivan v. District of Columbia, 20 App. D. C. 29.

Fla. Gillyard v. State, 61 So. 641, 65 Fla. 322; Bass v. State, 50 So. 531, 58 Fla. 1; Thomas v. State, 36 So. 161, 47 Fla. 99; Wood v. State, 31 Fla. 221, 12 So. 539; Smith v. State, 29 Fla. 408, 10 So. 894; Pinson v. State, 28 Fla. 735, 9 So. 706; Heron v. State, 22 Fla. 86; Willingham v. State, 21 Fla. 761.

Ga. Thomas v. State, 84 Ga. 613, 10 S. E. 1016; Brassell v. State, 64 Ga. 318.

La. State v. Anderson, 45 So. 267, 120 La. 331.

Neb. Goff v. State, 131 N. W. 213, 89 Neb. 287.

N. J. Engle v. State, 50 N. J. Law (21 Vroom) 272, 13 A. 604.

N. M. Territory v. Alarid, 106 P. 371, 15 N. M. 165; Beall v. Territory, 1 N. M. 507.

N. Y. People v. Guidici, 100 N. Y. 503, 3 N. E. 493.

N. C. State v. Bowman, 67 S. E. 1058, 152 N. C. 817; State v. Hall, 44 S. E. 553, 132 N. C. 1094.

Okl. Huff v. Territory, 85 P. 241, 15 Okl. 376.

Utah. State v. Riley, 126 P. 294, 41 Utah, 225.

Vt. State v. Shaw, 94 A. 434, 89 Vt. 121, L. R. A. 1915F, 1087; State v. Ryder, 68 A. 652, 80 Vt. 422.

Wis. Hayes v. State, 87 N. W. 1076, 112 Wis. 304; Jenks v. State, 17 Wis. 665.

Illustrations of exceptions held too general. Where, at the conclusion of the charge, accused "severally and separately excepted to each distinct part of the court's general oral charge, and especially to the charge on the weight of the evidence, and especially to the charge of setting forth the punishment of manslaughter in the first degree," it was held that such exception was a mere general exception to the charge as a whole, and was unavailing unless the charge was entirely erroneous. Untreiner v. State, 41 So. 285, 146 Ala. 26. Where, after the court had made remarks to the jury on their returning into court, including the statement that if they could not reconcile the testimony they must adopt the most plausible theory of the evidence, and they had again retired, defendant's counsel merely called attention to the fact that the court had left out the question of reasonable doubt, whereupon the court recalled the jury and repeated what he had said, and his charge in full, and added that the state must satisfy them beyond a reasonable doubt, defendant's general exception then taken cannot be treated as made to the use of the word "plausible." State v. Dewey, 51 S. E. 937, 139 N. C. 556.

Instruction on reasonable doubt. An instruction as to reasonable doubt, which, after defining such doubt as an actual doubt which a juror is conscious of after reviewing in his mind the entire case, giving consideration to all the testimony, and one which he believes would cause a reasonable man in any matter of like importance to hesitate to act, denies the notion that any mere possibility is sufficient ground for such a doubt, and adds that, in the performance of jury service, jurors should decide controversies as they would any important question in their own affairs, is good as against a general exception. Holt v. United States, 31 S. Ct. 2, 218 U. S. 245, 54

lar statement is erroneous,[18] and an objection to a long excerpt from the charge that it is not a clear statement of the law and is confusing, and does not state the principles of law applicable to the case, so that the jury can understand them, is insufficient where some of the parts of the excerpt are not subject to any of such objections.[19] So a general exception to the whole of a portion of a charge, a part of which is not open to objection on any view of the case, cannot be sustained on the theory that the balance of the charge is not within the issues,[20] and an objection that an instruction is not warranted by the evidence is not well taken, where it is pertinent to one phase of the evidence.[21]

Where, however, although only one part of an instruction is improper, the two parts are so inseparable that the whole charge is rendered bad by the error in the one part, a general exception to such instruction will be sufficient,[22] and the above rule is not applicable, where the instruction to which a general exception is taken authorizes the wrong application of that portion of it which is correct.[23] So, where an instruction, covering one general subject, if considered as a whole, fails to correctly reflect the law "applicable to the case," an exception to such an instruction is sufficient, although there may be phrases, or even sentences, in the instruction that are unobjectionable,[24] and it has been held that, where the instructions are not numbered nor divided into distinct propositions, an exception to any part of them which is erroneous may be reserved by excepting to all collectively.[25]

L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment (C. C. Wash.) United States v. Holt, 168 F. 141.

Instructions held not to contain two distinct propositions within rule. An instruction on a trial for murder, that murder in the first degree was the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson or certain other crimes named; that premeditation meant intent before the act; that premeditated design to kill meant intent to kill; that premeditation need not be for any particular length of time, but must be sufficient to enable the slayer to form a distinct intent to kill, Stokes v. State, 44 So. 759, 54 Fla. 109.

[18] Philip Schneider Brewing Co. v. American Ice-Mach. Co. (C. C. A. Colo.) 77 F. 138, 23 C. C. A. 89; Morse v. Gilman, 18 Wis. 373.

[19] Reeves v. H. C. Allgood & Co., 67 S. E. 82, 133 Ga. 835.

[20] Metropolitan Redwood Lumber Co. v. Davis (C. C. A. Cal.) 205 F. 486, 123 C. C. A. 554.

[21] James v. Hamil, 78 S. E. 721, 140 Ga. 168.

[22] Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264; Eddy v. Howard, 23 Iowa, 175; Haun v. Rio Grande W. Ry. Co., 62 P. 908, 22 Utah, 346.

[23] Melcher v. Beeler, 110 P. 181, 48 Colo. 233, 139 Am. St. Rep. 273.

[24] Everts v. Worrell (Utah) 197 P. 1043.

[25] Hersleb v. Moss, 28 Ind. 354.

§ 523. Exception to each and every part of a charge

The rule in most jurisdictions is that an exception taken indiscriminately to every paragraph of a charge, or to each clause separately, will be treated the same as if one general exception had been taken to the whole charge, and is not effective unless the whole charge is bad,[26] and an exception to every instruction adverse to the exceptant and every part thereof, and the instructions as a whole, is insufficient to bring to the attention of the court any separate paragraph, and will not avail unless the whole charge is erroneous.[27]

In some jurisdictions, however, an exception to "each and every" charge of the court is held to entitle the party so excepting to present his objections to any one of the charges.[28] In one jurisdiction the appellate court will not refuse to review such an exception at the close of a written charge duly paragraphed and numbered, if allowed in that form by the trial court,[29] although in this jurisdiction, as elsewhere, it is considered the better practice to minutely specify objections at the trial, and where the instructions are oral and in the nature of a general charge, such an exception is not sufficient.[30]

§ 524. Exception directed against several instructions designated by certain numbers

In some jurisdictions an exception to the giving of instructions designated by certain numbers "and to the giving of each of said instructions" is held to be a separate and specific exception to

[26] **Ala.** Savage v. Milum, 54 So. 180, 170 Ala. 115.

Mich. Goodsell v. Seeley, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183; People v. Bristol, 23 Mich. 118.

Okl. Duroderigo v. Culwell, 152 P. 605, 52 Okl. 6; Remund v. McCool, 150 P. 1055, 50 Okl. 69; Eisminger v. Beman, 124 P. 289, 32 Okl. 818.

Utah. Scoville v. Salt Lake City, 11 Utah, 60, 39 P. 481.

Wis. Nisbet v. Gill, 38 Wis. 657.

Illustrations of exceptions insufficient within rule. Where an instruction stated the rule of damages in other respects correctly, and added that interest might be allowed from the date of the injury, an exception "to said instruction, and to each and every part thereof," is not sufficiently specific to raise the question whether the time for which interest might be allowed was correctly stated. Dean v. Chicago & N. W. Ry. Co., 43 Wis. 305.

In Oklahoma, in an early case the court vigorously condemned such an exception holding it to amount merely to a general exception, although feeling itself bound under the statute to consider it. Buck v. Territory, 98 P. 1017, 1 Okl. Cr. 517. See Dunham v. Holloway, 3 Okl. 244, 41 P. 140.

[27] Isnard v. Edgar Zinc Co., 106 P. 1003, 81 Kan. 765.

[28] Ellis v. Leonard, 78 N. W. 246, 107 Iowa, 487; Eikenberry v. Edwards, 67 Iowa, 14, 24 N. W. 570; Hawes v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 315, 20 N. W. 717.

[29] Ritchey v. People, 47 P. 272, 23 Colo. 314, Id., 47 P. 384, 23 Colo. 314. See Beals v. Cone, 62 P. 948, 27 Colo. 473, 83 Am. St. Rep. 92.

[30] Miller v. People, 46 P. 111, 23 Colo. 95.

each of said paragraphs of the charge and to be sufficient,[31] and in one jurisdiction an exception to the giving of instructions requested by a party and designated by certain numbers is held to be a specific exception to each instruction.[32]

§ 525. Exceptions to refusals to instruct

The general rule that exceptions to the giving of instructions should be specific applies also to the refusal of requests to charge,[33]

[31] Phœnix Ins. Co. v. Moog, 81 Ala. 335, 1 So. 108; Geary v. Parker, 47 S. W. 238, 53 S. W. 567, 65 Ark. 521; Rice v. Williams, 71 P. 483, 18 Colo. App. 330; City of Omaha v. Richards, 68 N. W. 528, 49 Neb. 244, overruling Brooks v. Dutcher, 36 N. W. 128, 22 Neb. 644, and Walker v. Turner, 42 N. W. 918, 27 Neb. 103.

Exception to requests. In Minnesota, it has been held, disapproving, so far as inconsistent, the cases of Steffenson v. Chicago, M. & St. P. R. Co., 53 N. W. 800, 51 Minn. 531, and Rosquist v. D. M. Gilmore Furniture Co., 52 N. W. 385, 50 Minn. 192, that where several separate and distinct "requests," each containing but a single proposition of law, are given, an exception "to each and all of them" is sufficient. Van Doren v. Wright, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22.

[32] Coley v. City of Statesville, 28 S. E. 482, 121 N. C. 301; Witsell v. West Asheville & S. S. Ry. Co., 27 S. E. 125, 120 N. C. 557.

[33] **U. S.** Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. Ed. 510; Burton v. West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215; Connecticut Mut. Life Ins. Co. v. Union Trust Co. of New York, 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708; (C. C. A. Ill.) Cleveland, C., C. & St. L. Ry. Co. v. Zider, 61 Fed. 908, 10 C. C. A. 151; (C. C. A. Va.) Anderson v. Avis, 62 Fed. 227, 10 C. C. A. 347.

Ill. Razor v. Razor, 142 Ill. 375, 31 N. E. 678.

Ind. Baker v. McGinniss, 22 Ind. 257; State v. Bartlett, 9 Ind. 569; Jolly v. Terre Haute Drawbridge Co., 9 Ind. 417.

Kan. Fleming v. L. D. Latham & Co., 48 Kan. 773, 30 P. 166; Bailey v. Dodge, 28 Kan. 72.

Mass. Murphy v. McNulty, 145 Mass. 464, 14 N. E. 532.

Neb. City of Omaha v. McGavock, 47 Neb. 313, 66 N. W. 415; Hedrick v. Strauss, 42 Neb. 485, 60 N. W. 928.

N. Y. People v. Katz, 103 N. E. 305, 209 N. Y. 311, Ann. Cas. 1915A, 501, affirming judgment 139 N. Y. S. 137, 154 App. Div. 44; Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; Rehberg v. City of New York, 99 N. Y. 652, 2 N. E. 11; Yale v. Curtiss, 71 Hun, 436, 24 N. Y. S. 981.

S. C. Jones v. Swearingen, 42 S. C. 58, 19 S. E. 947.

Vt. Goodwin v. Perkins, 39 Vt. 598.

Illustrations of exceptions to refusals to charge held too general. An exception to refusals to charge, which states that the "court refused to give any of the foregoing requests and the counsel for defendant in due time and form excepted to each refusal." Pound v. Port Huron & S. W. Ry. Co., 19 N. W. 570, 54 Mich. 13. The objection to refusal of a request to instruct the jury to return a verdict for defendant, because plaintiff's evidence is insufficient to sustain a verdict, is too general, if it does not point out wherein the evidence is insufficient. Cleburne St. Ry. Co. v. Barnes (Tex. Civ. App.) 168 S. W. 991. Where defendant made four requests to charge, three of which the court modified and gave, and the fourth refused, to which defendant excepted in these words: "Defendant now excepts to each and every part of the charge, and also to the refusal of the court to give the requests of defendant, as requested," it was held that the exception failed to point out which of the charges given was claimed to be erroneous, and

and the court may properly disallow an exception to its refusal to give a large number of instructions as requested, and require every error in omitting to cover requested instructions to be specifically pointed out.[34] Where, of a number of requests to charge, some are given and others are refused or modified, a general exception to the refusal of instructions asked, not calling the attention of the court to the particular omission or modification complained of,[35] or an exception to the refusals to charge as requested in so far as the court did refuse, and to each of the refusals to charge,[36]

was therefore bad. Shull v. Raymond, 23 Minn. 66. Where, in the charge to the jury, the court gave almost verbatim four out of plaintiff's nine requests to charge, and all of defendant's seven, and the exception taken was that plaintiff "excepts to the refusal of the court to give plaintiff's fourth, sixth, seventh, eighth, and ninth requests, and to the modification of the first and second of plaintiff's requests as given. Plaintiff also excepts to the giving of each of defendant's requests," the exception was held not sufficiently specific. Rosquist v. D. M. Gilmore Furniture Co., 50 Minn. 192, 52 N. W. 385. An exception at the close of the charge to the court's "refusal to charge in the language stated," and to his "modification of the respective requests as stated," is too general to be considered. Heath v. Glens Falls, S. H. & Ft. E. St. R. Co., 90 Hun, 560, 36 N. Y. S. 22. A mere general exception to the failure of the court to give nine separate propositions, requested before the argument and charge, and not afterwards called to the attention of the court, is too vague to require any action by an appellate court. Pittsburgh & W. Ry. Co. v. Thompson (C. C. A. Ohio) 82 F. 720, 27 C. C. A. 333.

Exceptions held sufficiently specific. Where a bill of exceptions recited that the defendants asked the trial court to give "each" of several charges set out, but that the court refused to give "either of said charges," and that to such refusal the defendants excepted, it was held that the exception brought up for revision each of the charges named. Lehman v. Bibb, 55 Ala. 411. Where, following certain instructions given by the court to the jury contained in a bill of exceptions are other instructions signed by counsel immediately preceded by a statement that they were asked by defendant and refused by the court, and containing after the instructions refused the statement, "to the giving of each of which instructions and the refusal to give those asked defendant at the time objected and excepted," such exception is properly taken, and is neither too general nor indefinite. Robb v. State, 52 Ind. 218. Where five distinct requests to charge, separately numbered, were submitted to the court, who ruled upon—denying or modifying—each separately, and counsel "excepted to said refusals and modifications of said instructions, as given," it was held that such exception was sufficiently specific, and would be understood as applying to the ruling on each proposition. Schurmeier v. Johnson, 10 Minn. 319 (Gil. 250).

[34] Herrick v. Waitt, 113 N. E. 205, 224 Mass. 415; Randall v. Peerless Motor Car Co., 99 N. E. 221, 212 Mass. 352; Luce v. Hassam, 58 A. 725, 76 Vt. 450.

[35] **Mich.** Edgell v. Francis, 86 Mich. 232, 48 N. W. 1095.

Minn. Delude v. St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Carroll v. Williston, 44 Minn. 287, 46 N. W. 352.

N. Y. Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990; Roe v. City of New York, 56 N. Y. Super. Ct. (24 Jones & S.) 298, 4 N. Y. S. 447; Smedis v. Brooklyn & R. B. R. Co., 88 N. Y. 13.

[36] Read v. Nicholas, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130.

is unavailing to present any question for review, and a general exception to a refusal to give a number of requests, except so far as they are included in the main charge to the jury,[37] or an exception to such parts of the charge of the court as are variant from the requests of the exceptant,[38] the variances not being pointed out, is too general. So, where a party requests numerous instructions, and the court gives a general charge purporting to cover the instructions asked, an objection to the refusal of the court to give the instructions, on the ground that they were proper and that they were not covered by the charge, is too general.[39] So an exception to the modification by the court in its general charge of a particular proposition submitted by one of the parties, without stating specifically the modification to which objection is made, is too indefinite,[40] and an exception taken to the ruling of the court in refusing to give an instruction asked will not embrace a ruling modifying the instruction,[41] and a general exception to the refusal to charge as requested, and "severally to each refusal to charge and to the charge," presents nothing for review.[42]

Where the court refuses to give a certain number of instructions, an exception to the failure to give a certain less number, not specifying which requests of the larger number are objected to, is not good,[43] and a general exception to the refusal of a number of requests to charge presents no question on appeal, if any one of such requests is improper.[44] An exception, however, to the refusal

[37] Walker v. Windsor Nat. Bank (C. C. A. N. H.) 56 F. 76, 5 C. C. A. 421; Lane v. Minnesota State Agricultural Soc., 69 N. W. 463, 67 Minn. 65; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Welcome v. Mitchell, 81 Wis. 566, 51 N. W. 1080, 29 Am. St. Rep. 913.

[38] Beaver v. Taylor, 93 U. S. 46, 23 L. Ed. 797; Chamberlain v. Pratt, 33 N. Y. 47.

[39] Boyd v. Oddous, 97 Cal. 510, 32 P. 569.

[40] Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708; Washington Ry. & Electric Co. v. Washington Terminal Co., 44 App. D. C. 470; Thompson v. Security Trust & Life Ins. Co., 41 S. E. 464, 63 S. C. 290.

[41] Chicago City Ry. Co. v. Mumford, 97 Ill. 560; State v. Robinson, 12 Wash. 491, 41 P. 884.

[42] Dodge v. Alger, 53 N. Y. Super. Ct. (21 Jones & S.) 107.

[43] Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.

[44] U. S. Union Pac. Ry. Co. v. Callaghan, 161 U. S. 91, 16 S. Ct. 493, 40 L. Ed. 628; Thiede v. Territory of Utah, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237; Newport News & M. V. Co. v. Pace, 158 U. S. 36, 15 S. Ct. 743, 39 L. Ed. 887; Bogk v. Gassert, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631; Union Ins. Co. v. Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497; Moulor v. American Life Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447; Beaver v. Taylor, 93 U. S. 46, 23 L. Ed. 797; (C. C. A. Colo.) Morgan v. United States, 169 F. 242, 94 C. C. A. 518; (C. C. A. Ill.) Illinois Car & Equipment Co. v. Linstroth Wagon Co., 112 F. 737, 50 C. C. A. 504; Linehan Ry. Transfer Co. v. Morris, 87 F. 127, 30 C. C. A. 575; (C. C. A. Ind. T.) Waples-Platter Co. v. Turner, 83 F 64, 27 C. C. A. 439; (C. C. A. Mich.)

to give a number of instructions having certain designated numbers, has been held to be sufficient,[45] and it has been held that the

Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co., 131 F. 215, 65 C. C. A. 201; (C. C. A. N. Y.) Erie R. Co. v. Littell, 128 F. 546, 63 C. C. A. 44; (C. C. A. Or.) Otis Elevator Co. v. Luck, 202 F. 452, 120 C. C. A. 558; (C. C. A. S. D.) New England Furniture & Carpet Co. v. Catholicon Co., 79 F. 294, 24 C. C. A. 595.

Ala. Tombigbee Valley R. Co. v. Morris, 65 So. 207, 10 Ala. App. 322; Johnson v. State, 37 So. 456, 141 Ala. 37; Pearson v. Adams, 29 So. 977, 129 Ala. 157; Milliken v. Maund, 110 Ala. 332, 20 So. 310; Alston v. State, 109 Ala. 51, 20 So. 81; Nelson v. Warren, 93 Ala. 408, 8 So. 413; Goley v. State, 87 Ala. 57, 6 So. 287; Adams v. State, 87 Ala. 89, 6 So. 270; Black v. Pratt Coal & Coke Co., 85 Ala. 504, 5 So. 89; Bedwell v. Bedwell, 77 Ala. 587; Stovall v. Fowler, 72 Ala. 77; Williams v. State, 68 Ala. 551; Kilpatrick v. Pickens County, 66 Ala. 422; McGehee v. State, 52 Ala. 224.

Fla. Lee v. State, 67 So. 883, 69 Fla. 255, Ann. Cas. 1917D, 236; Telfair v. State, 50 So. 573, 58 Fla. 110; Ewert v. State, 37 So. 334, 48 Fla. 36; Griffin v. State, 37 So. 209, 48 Fla. 42; King v. State, 31 So. 254, 43 Fla. 211.

Ind. Cotner v. State, 89 N. E. 847, 173 Ind. 168; Rastetter v. Reynolds, 66 N. E. 612, 160 Ind. 133; Kluse v. Sparks, 10 Ind. App. 444, 37 N. E. 1047; Garrigus v. Burnett, 9 Ind. 528.

Ind. T. Hall v. Needles, 38 S. W. 671, 1 Ind. T. 146.

Kan. Murray v. Board of Com'rs of Woodson County, 48 P. 554, 58 Kan. 1; Hayes v. Farwell, 45 P. 910, 4 Kan. App. 387; Sumner v. Blair, 9 Kan. 521.

Minn. McNamara v. Pengilly, 64 Minn. 543, 67 N. W. 661; Webb v. Fisher, 57 Minn. 441, 59 N. W. 537; Ferson v. Wilcox, 19 Minn. 449 (Gil. 388).

Neb. City of South Omaha v. Powell, 70 N. W. 391, 50 Neb. 798.

N. J. Gardner v. State, 55 N. J. Law (26 Vroom) 17, 26 A. 30.

N. Y. Barker v. Cunard S. S. Co., 51 N. E. 1089, 157 N. Y. 693, affirming judgment 36 N. Y. S. 256, 91 Hun, 495; Patton v. Royal Baking Powder Co., 114 N. Y. 1, 20 N. E. 621; Barker v. Cunard S. S. Co., 91 Hun, 495, 36 N. Y. S. 256; Willetts v. Sun Mut. Ins. Co., 45 N. Y. 45, 6 Am. Rep. 31; Magee v. Badger, 34 N. Y. 247, 90 Am. Dec. 691; affirming 30 Barb. 246; Myers v. Dixon, 45 How. Prac. 48, 35 N. Y. Super. Ct. (3 Jones & S.) 390.

Ohio. Hills v. Ludwig, 46 Ohio St. 373, 24 N. E. 596; Shaffer v. Cincinnati, H. & D. R. R. Co., 14 Ohio Cir. Ct. R. 488, 8 O. C. D. 60; Voelckel v. Banner Brewing Co., 9 Ohio Cir. Ct. R. 318.

Or. Salomon v. Cress, 22 Or. 177, 29 P. 439; Murray v. Murray, 6 Or. 17.

Utah. Marks v. Tomkins, 7 Utah, 421, 27 P. 6.

Vt. White v. Lumiere North American Co., 64 A. 1121, 79 Vt. 206, 6 L. R. A. (N. S.) 807.

W. Va. Ocheltree v. McClung, 7 W. Va. 232.

Wis. Elwell v. Bosshard, 138 N. W. 46, 151 Wis. 46; Haueter v. Marty, 137 N. W. 761, 150 Wis. 490; Racine Basket Mfg. Co. v. Konst, 51 Wis. 156, 7 N. W. 254; Harrison v. Crocker, 39 Wis. 68; Hamlin v. Haight, 32 Wis. 237.

Illustrations of insufficient exceptions within rule. Where the bill of exceptions recites that the defendant asked the court to give "the following charges," which the court refused to do, and that the defendant separately and severally excepted to the refusal of the court to give each of said charges, and then sets out a number of charges, it will be assumed that the charges were requested as a whole, and hence refusal to give them is not error, if any one of them is erroneous. Town of Vernon v. Edgeworth, 42 So. 749, 148 Ala. 490.

[45] Bell v. Washington Cedar Shingle Co., 8 Wash. 27, 35 P. 405.

Contra, Holman v. Herscher (Tex.) 16 S. W. 984.

rulings of the court on prayers for instructions presented at the same time and forming a series of consecutive propositions is a single act, and that one exception will embrace the whole.[46]

In some jurisdictions it is not necessary to take an exception to the reason given by the court for refusing an instruction.[47] An exception to the refusal to give a requested instruction is sufficient to raise the question of the propriety of that portion of the general charge which affirms the contrary of such request.[48] Where instructions are asked as an entirety, but the refusals to give them are several, and the exceptions are also several, consideration thereof will not be refused on appeal because of the absence of an exception to the refusal to give them as an entirety.[49]

§ 526. Limitations of rule

A general exception to the whole charge will raise the question whether as an entirety it is not manifestly wrong and injurious to the exceptant,[50] and such an exception may be sufficient, where the charge consists of a single proposition, or where the whole scope of the charge asserts and explains a single question or principle,[51] or where the whole charge proceeds on a false theory and there is no reason to suppose that the error is inadvertent.[52] Thus an exception "to the court's measure of damages" as stated in the charge is sufficiently specific, where the error, if any, is fundamental in giving a rule of damages inapplicable to the case, and which affects the entire charge relating to that subject.[53] As stated in one jurisdiction, the rule is that to challenge the correctness of a charge because of its inapplicability to the facts, or because it does not state the law with sufficient fullness, the respects in which it is deficient must be specified,[54] but that in order to challenge the correctness of a legal proposition involved in a charge it is sufficient to point out the particular part objected to, and to say that it is not a legal charge.[55] A general objection to an in-

[46] McCosker v. Banks, 35 A. 935, 84 Md. 292.

[47] Maxwell v. Massachusetts Title Ins. Co., 92 N. E. 42, 206 Mass. 197; Chessman v. Hale, 79 P. 254, 31 Mont. 577, 68 L. R. A. 410, 3 Ann. Cas. 1038.

[48] Connecticut Mut. Life Ins. Co. v. Hillmon, 23 S. Ct. 294, 188 U. S. 208, 47 L. Ed. 446, reversing judgment (C. C. A. Kan.) 107 F. 834, 46 C. C. A. 668.

[49] Pennsylvania Co. v. Ebaugh, 144 Ind. 687, 43 N. E. 936.

[50] See Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51).

[51] Nickum v. Gaston, 24 Or. 380, 33 P. 671, 35 P. 31. See Robinson v. New York & E. R. Co., 27 Barb. (N. Y.) 512.

[52] Snyder v. Viola Mining & Smelting Co., 3 Idaho (Hasb.) 28, 26 P. 127.

[53] Hindman v. First Nat. Bank (C. C. A. Ky.) 112 F. 931, 50 C. C. A. 623, 57 L. R. A. 108; Denver & R. G. R. Co. v. Young, 70 P. 688, 30 Colo. 349.

[54] State v. Weston, 31 So. 383, 107 La. 45.

[55] State v. Weston, 31 So. 383, 107 La. 45.

struction is sufficient to raise the point that it invades the province of the jury,[56] and it has been held that a more liberal rule with respect to giving effect to a general exception will be applied in the case of an oral charge than where the instructions are written.[57] The rule that exceptions to instructions should be precise and pointed, so as not to require the court to search for errors through long passages does not apply, when it is necessary or useful to cite an entire passage in order to form a just view of the error complained of,[58] and an exception to a court's charge which is merely a quotation therefrom is not fatally defective for that reason, if it sets forth a distinct proposition and is definite and specific as to the error therein.[59]

Exceptions to a charge are sufficiently explicit if they fairly direct the attention of the court to that part of the charge considered objectionable.[60] Where instructions in writing are separately paragraphed and numbered, an exception to the giving of one of such instructions designated by its number is sufficient.[61] In some

[56] Union Seed & Fertilizer Co. v. St. Louis, I. M. & S. Ry. Co., 181 S. W. 898, 121 Ark. 585.

[57] Lichty v. Tannatt, 11 Wash. 37, 39 P. 260.

[58] Hicks v. United States, 150 U. S. 442, 14 S. Ct. 144, 37 L. Ed. 1137.

[59] Norris v. Clinkscales, 37 S. E. 821, 59 S. C. 232.

[60] Rogers v. Mahoney, 62 Cal. 611.

Exceptions held sufficient. An exception "to so much of the charge as relates to smooth, level, and slippery ice not being a defect under the conditions named" sufficiently indicates the statement of legal propositions to which objection is made. Adams v. Town of Chicopee, 147 Mass. 440, 18 N. E. 231.

Illustrations of insufficient exceptions. An exception to the charge "commencing with the words, * * * and from there to the end," is bad, where such portion of the charge contains distinct propositions. Calkins v. Seabury-Calkins Consol. Min. Co., 5 S. D. 299, 58 N. W. 797. On trial for malicious trespass, where the court in its charge has defined "malicious trespass" as the entering on another's property with a malicious intent to do injury, an exception to "that part of the charge defining trespass as the entering on land of another with malicious intent" is not sufficiently definite and specific to entitle defendant to a review of the charge. People v. Upton, 55 Hun, 612, 9 N. Y. S. 684. An exception to the charges as given on the request of plaintiff, and particularly his requests numbered 1, 2, 3, 5, 6, 7, and "to the refusal to charge as requested by the defendant and each and every one of the same, and particularly his requests numbered 2, 3, 5, etc.," where several of the plaintiff's requests referred to were in fact modified essentially, if not even favorable to defendant, and one at least of defendant's requests referred to was in fact given in substance in his general charge, will not be considered. Such an exception, in pointing at everything, specifies nothing, and is about equivalent to a general objection to the judge's charging at all. Danielson v. Dyckman, 26 Mich. 169. An exception to the charge "so far as it is inconsistent with the rulings requested" was too indefinite. Letchworth v. Boston & M. R. R., 108 N. E. 500, 220 Mass. 560.

[61] Big Hatchet Consol. Min. Co. v. Colvin, 75 P. 605, 19 Colo. App. 405;

jurisdictions a party excepting to a particular instruction need not state the reasons why it is bad,[62] and in some jurisdictions a general exception, although insufficient as to instructions given by the court of its own motion, is sufficient as to instructions given at the request of the other party.[63] That an exception is ambiguous as to which portion of the charge it refers furnishes no ground for reversal.[64]

F. Effect of Failure to Object or Except

§ 527. General rule

The general rule is that errors in instructions, other than those of a fundamental character,[65] are waived by the failure to object to them at the trial of the cause;[66] such instructions becoming,

McClellan v. Hein, 77 N. W. 120, 56 Neb. 600.

Oral charge. Where an instruction is given orally, and the division thereof into paragraphs in the abstract was subsequently and arbitrarily made by counsel, a general objection to a paragraph of the instruction, referring to it as "Instruction No. 7," is insufficient. Edwards v. People, 59 P. 56, 26 Colo. 539.

[62] Denver & R. G. R. Co. v. Young, 70 P. 688, 30 Colo. 349; Bradbury v. Alden, 57 P. 490, 13 Colo. App. 208; Farnsworth v. Union Pac. Coal Co., 89 P. 74, 32 Utah, 112; Sextorf v. School Dist. No. 34 of Spokane County, 9 Wash. 5, 36 P. 1052. See, also, ante, § 519, note 76.

In Iowa, the grounds for exceptions to instructions need not be stated, where the exceptions are taken at the time the instructions are given. Johnson v. Chicago, R. I. & P. R. Co., 51 Iowa, 25, 50 N. W. 543; Williams v. Barrett, 52 Iowa, 637, 3 N. W. 690; Hawes v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 315, 20 N. W. 717.

[63] Waldteufel v. Pacific Vineyard Co., 92 P. 747, 6 Cal. App. 624; Miller v. Fireman's Fund Ins. Co. of San Francisco, 92 P. 332, 6 Cal. App. 395; Williams v. Casebeer, 58 P. 380, 126 Cal. 77; Robinson v. Western Pac. R. Co., 48 Cal. 409.

[64] McGinley v. United States Life Ins. Co., 77 N. Y. 495; Schmalz v. Hauseman, 7 N. Y. Civ. Proc. R. 414.

[65] Jeffries' Ex'r v. Ferree, 193 S. W. 646, 175 Ky. 18; Gowdey v. Robbins, 3 App. Div. 353, 38 N. Y. S. 280; Cooper & Jones v. Hall (Tex. Civ. App.) 168 S. W. 465; Beazley v. Denson, 40 Tex. 416; Stude v. Saunders, 2 Posey, Unrep. Cas. (Tex.) 122.

[66] **U. S.** Reagan v. Aiken, 138 U. S. 109, 11 Sup. Ct. 283, 34 L. Ed. 892; (C. C. A. Mich.) Standard Oil Co. v. Sutherland, 247 F. 309, 159 C. C. A. 403; (C. C. N. Y.) Emerson v. Hogg, Fed. Cas. No. 4,440, 2 Blatchf. 1, 1 Fish. Pat. Rep. 77; (C. C. A. Pa.) Barnes & Tucker Coal Co. v. Vozar, 227 F. 25, 141 C. C. A. 579.

Ark. Evins v. St. Louis & S. F. R. Co., 147 S. W. 452, 104 Ark. 79; St. Louis, I. M. & S. Ry. Co. v. Lamb, 128 S. W. 1030, 95 Ark. 209.

Cal. Los Angeles County v. Reyes, 32 P. 233, 3 Cal. Unrep. Cas. 77; Wilkinson v. Parrott, 32 Cal. 102.

Colo. Brewster v. Crossland, 2 Colo. App. 446, 31 P. 236.

Ind. Parker v. Clayton, 51 Ind. 126.

Iowa. Joyner v. Interurban Ry. Co., 154 N. W. 936, 172 Iowa, 727; Eldridge v. Stewart, 97 Iowa, 689, 66 N. W. 891; Hall v. Town of Manson, 90 Iowa, 585, 58 N. W. 881; Fritz v. Kansas City, C. B. & St. J. Ry. Co., 61 Iowa, 323, 16 N. W. 144; Kirk v. Woodbury County, 55 Iowa, 190, 7 N. W. 498; Talty v. Lusk, 4 Iowa, 469.

Kan. Kansas Farmers' Fire Ins.

in the absence of any objection or exception taken to them, and in the absence of any request for contrary instructions, the law of the case,[67] and in many cases the failure of a party to ask an in-

Co. v. Hawley, 46 Kan. 746, 27 P. 176; State v. Probasco, 46 Kan. 310, 26 P. 749; City of Wyandotte v. Noble, 8 Kan. 444.

Minn. Bork v. Keller Mfg. Co., 148 N. W. 113, 126 Minn. 203; Town of Wells v. Sullivan, 147 N. W. 244, 125 Minn. 353.

Mo. Carlton v. Monroe, 115 S. W. 1057, 135 Mo. App. 172.

Neb. Holloway v. Schooley, 27 Neb. 553, 43 N. W. 346; Chicago, B. & Q. R. Co. v. Starner, 26 Neb. 630, 42 N. W. 706; Schroeder v. Rinehard, 25 Neb. 75, 40 N. W. 593.

N. Y. Schaff v. Miles (Com. Pl.) 10 Misc. Rep. 395, 31 N. Y. S. 134.

N. C. White v. Clark, 82 N. C. 6.

Okl. Carter v. Missouri Mining & Lumber Co., 41 P. 356, 6 Okl. 11.

Or. Hurst v. Burnside, 12 Or. 520, 8 P. 888.

Wash. State v. Bringgold, 82 P. 132, 40 Wash. 12, 5 Ann. Cas. 716; Johnson v. Tacoma Cedar Lumber Co., 3 Wash. 722, 29 P. 451.

Wis. Thomas v. Paul, 87 Wis. 607, 58 N. W. 1031; Firmels v. State, 61 Wis. 140, 20 N. W. 663; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468.

Illustrations of waivers by reason of failure to object or except. Where, at the close of the charge, plaintiff's counsel only requested a modification of the instructions on the burden of proof, and on this being allowed defendant's counsel asked if he was through, whereupon plaintiff's counsel said "I have nothing more to say," he thereby waived any objection to an instruction on the degree of care required of defendant. Cucciarre v. New York Cent. & H. R. R. Co. (C. C. A. Ill.) 163 F. 38, 90 C. C. A. 220. Where, on the trial in an action by a shipper against a carrier for the burning of the goods in transit, both parties proceeded on the theory that if the fire originated from the act of the shipper's agent in handling a lantern such act was negligence, and no objection was made to the use of the word "negligence" in the instructions, given at plaintiff's request, that defendant was liable if it had not proved the loss was by reason of the alleged neglect of the plaintiff, and that it had the burden of proving its defense that the fire was caused by the negligence of plaintiff's agent, objection on that account was waived. St. Louis, I. M. & S. R. Co. v. Pape, 140 S. W. 265, 100 Ark. 269. If the charge states a certain condition of affairs as being contended for by a party, when there is no evidence to support the contention, it is the duty of counsel to call the court's attention thereto. Jeffress v. Norfolk-Southern R. Co., 73 S. E. 1013, 158 N. C. 215. In an action against connecting carriers for injury to cattle the failure of defendants to except to the refusal to give a request to apportion the damages was a waiver of an objection to the general charge on the same point. Quanah, A. & P. Ry. Co. v. Galloway (Tex. Civ. App.) 165 S. W. 546. A party who presents requests for rulings, saying that he proposes to except if they are not given, and then agrees that the judge may charge the jury, reserving the right to except if the requests are not covered by the charge, waives the right to except if, after the charge is given, he makes no objection to the omission to cover the rulings requested. Boutelle v. Dean, 148 Mass. 89, 18 N. E. 681. When, during the argument of the last counsel for the defendant, the judge announced that he intended to submit to the jury issues different from those originally agreed upon by counsel, and the new issues were examined and commented on to the jury by defendant's counsel, and no exceptions were taken, any objection to such change must be considered to have been waived. Phifer v. Alexander, 97 N. C. 335, 2 S. E. 530.

[67] **Iowa.** Almon v. Chicago & N. W. Ry. Co., 144 N. W. 997, 163 Iowa, 449.

N. Y. Smith v. Appleton, 140 N.

struction on a particular subject, or to except to the refusal of the court to give such instruction, operates as a waiver of any objection to the omission to give it.[68]

§ 528. Limitations of rule

The mere failure to object to a general charge does not amount to an approval of it, so as to estop a party from requesting instructions and excepting to their refusal,[69] and where the charge of the court is susceptible of a construction unfavorable to a party, but it is so ambiguous as to mislead him into omitting to except thereto, supposing that no such construction was intended, his failure to except will not operate against him on appeal.[70]

§ 529. Specific applications of rule

The above rule applies to the giving of contradictory instructions,[71] to a misstatement of the contentions of counsel,[72] to misstatements of the evidence,[73] to the giving of abstract instructions,[74] to a charge on the weight of the evidence,[75] to the assumption of disputed facts,[76] to the modification of an instruction or of a request to charge,[77] or to the failure to indorse a charge asked as "given."[78] The objection that the charge of the court was given orally, instead of in writing, will not be considered by the appellate court, where it was not made in the trial court.[79]

Y. S. 565, 155 App. Div. 520; Grimm v. Wandell, 140 N. Y. S. 391; Schweinburg v. Altman, 130 N. Y. S. 37, 145 App. Div. 377; Gillan v. O'Larry, 108 N. Y. S. 1024, 124 App. Div. 498.

S. D. Lallier v. Pacific Elevator Co., 127 N. W. 558, 25 S. D. 572.

[68] Marks v. Jacobs, 76 Ind. 216; Davis v. Keen, 55 S. E. 359, 142 N. C. 496.

[69] Rabinowitz v. Smith Co. (Tex. Civ. App.) 190 S. W. 197.

[70] Gougar v. Morse (C. C. Mass.) 66 F. 702.

[71] Williams v. Southern Pac. R. Co., 110 Cal. 457, 42 P. 974.

[72] State v. Blackwell, 78 S. E. 316, 162 N. C. 672.

[73] Corcoran v. Lehigh & Franklin Coal Co., 37 Ill. App. 577, reversed 138 Ill. 390, 28 N. E. 759; Naumann v. Brewers' Ice Co., 53 N. Y. Super. Ct. 121; Krepps v. Carlisle, 157 Pa. 358, 27 A. 741, 33 Wkly. Notes Cas. 192.

[74] Stoner v. Devilbiss, 70 Md. 144, 16 A. 440.

[75] Martin v. State, 83 S. W. 390, 47 Tex. Cr. R. 29, affirmed 26 S. Ct. 338, 200 U. S. 316, 50 L. Ed. 497.

[76] Ryan v. Conroy, 85 Hun, 544, 33 N. Y. S. 330.

[77] Torkelson v. Minneapolis & St. L. R. Co., 134 N. W. 307, 117 Minn. 73; Greene v. Duncan, 37 S. C. 239, 15 S. E. 956; State v. Huffman, 73 S. E. 292, 69 W. Va. 770.

[78] Tyree v. Parham's Ex'r, 66 Ala. 424.

[79] **U. S.** (C. C. A. Okl.) Williams v. United States, 158 F. 30, 88 C. C. A. 296, reversing 87 P. 647, 17 Okl. 28.

Colo. Doyle v. Nesting, 88 P. 862, 37 Colo. 522.

Fla. West v. Blackshear, 20 Fla. 457.

Ind. Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 79 Am. Dec. 430; Taber v. Hutson, 5 Ind. 322, 61 Am. Dec. 96.

Neb. Gibson v. Sullivan, 18 Neb. 558, 26 N. W. 368.

N. D. Boss v. Northern Pac. R.

Where instructions are presented to the court at the close of the evidence, and either party waives objections to any request of the opposite party, which the court thereupon gives, the party so waiving objection may not afterwards reserve an exception to the giving of such request without leave of court first obtained.[80] By confining an objection to an instruction to a particular part thereof, or to a specific ground, a party waives all other objections,[81] and if an exception to a part of an instruction is stated to be upon a ground which cannot be sustained, it will not be extended, so as to serve as an exception upon a different ground, which might have been sustained.[82]

Co., 2 N. D. 128, 49 N. W. 655, 33 Am. St. Rep. 756.

S. D. Frye v. Ferguson, 6 S. D. 392, 61 N. W. 161.

Wash. Collins v. Terminal Transfer Co., 168 P. 174, 98 Wash. 597; Taylor v. Kidd, 129 P. 406, 72 Wash. 18.

Waiver of request for written instructions. Where a judge, instead of giving his instructions in writing, as requested, directed his oral instructions to be taken down by a stenographer, it was that failure to object to this mode of preserving the evidence of the charge was no waiver of the request. Shafer v. Stinson, 76 Ind. 374.

[80] Oddie v. Mendenhall, 86 N. W. 881, 84 Minn. 58.

[81] Stein v. Ashby, 30 Ala. 363; St. Louis, I. M. & S. Ry. Co. v. Richardson, 112 S. W. 212, 87 Ark. 101; Price v. Burlington, C. R. & M. R. Co., 42 Iowa, 16; Coddington v. Brooklyn Crosstown R. Co., 102 N. Y. 66, 5 N. E. 797; Edmunds v. Black, 15 Wash. 73, 45 P. 639.

[82] Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468.

CHAPTER XXXVIII

CONSTRUCTION AND OPERATION

A. GENERAL RULES OF CONSTRUCTION

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539. Cure of erroneous instruction by its withdrawal.

A. GENERAL RULES OF CONSTRUCTION

§ 530. In general

In interpreting an instruction which may be susceptible of more than one construction, a hypercritical one should not be given to it,[1] but it must be given a reasonable construction,[2] and that mean-

[1] Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624; Addington v. State, 74 So. 846, 16 Ala. App. 10; Galpin v. Wilson, 40 Iowa, 90; St. Louis & S. F. R. Co. v. Ault, 58 So. 102, 101 Miss. 341.

[2] Coffman v. State, 165 S. W. 939, 73 Tex. Cr. R. 295; Graham v. State, 163 S. W. 726, 73 Tex. Cr. R. 28; Christian v. State, 161 S. W. 101, 71 Tex. Cr. R. 566.

Instructions on reasonable doubt. Where, on trial under an indictment for murder in the first degree, the court charged that: "Defendant is presumed to be innocent of the offense charged. Before you can convict him, the state must overcome that presumption by proving him guilty beyond a reasonable doubt. If you have a reasonable doubt of defendant's guilt, you must acquit him,"—the use of the words "of the offense charged" does not limit the requirement of proof of guilt beyond a reasonable doubt to murder in the first degree, but applies to all offenses of which defendant could be convicted under such indictment. State v. Smith, 65 S. W. 270, 164 Mo. 567. An instruction that, if certain testimony be true, defendant "is not guilty, and you should say so; or, if you have a reasonable doubt about it, you should say so,"—is equivalent to a statement that, if the jury have a reasonable doubt, they should acquit. People v. Pichette, 69 N. W. 739, 111 Mich. 461. An instruction that the jury cannot convict unless all the

ing should be adopted which the trial court and the jury, in the exercise of common sense, evidently intended it to have.[3] Words employed in an instruction must be taken in the ordinary and popular acceptation,[4] and in the sense in which they would be understood by men of ordinary intelligence,[5] and it will be presumed that an instruction was understood by the jury in the way it would naturally impress the mind.[6]

Particular instructions, or particular sentences used in instructions, must be considered, in determining their correctness, in connection with the other instructions or with the context.[7] The subsequent language of an instruction controls that previously used.[8]

It is error in a criminal case to tell the jury that they are not bound by any particular instruction or part of an instruction giv-

material averments of the information are established beyond a reasonable doubt. does not by implication authorize a conviction without presumption or proof of defendant's sanity. Schwartz v. State, 91 N. W. 190, 65 Neb. 196.

"Ought not to convict." An instruction using the words, "ought not to convict," has the same meaning and effect as if the jury had been told "not to convict." State v. Nelson, 52 P. 868, 59 Kan. 776.

Effect of attempt to escape. An instruction in a homicide case that an attempt by defendant to escape is a circumstance which may be considered, in connection with all other evidence, as bearing on his guilt, but is insufficient itself to determine his guilt, is not subject to the objection that it is an instruction that the slightest evidence in addition to the attempt to escape will authorize a conviction. State v. Haworth, 68 P. 155, 24 Utah, 398.

Effect of instruction referring to certain enumerated facts. An instruction, "If you find" certain enumerated facts, "then you might find him guilty," does not limit the jury to the facts stated therein, but states facts which they must find in order to convict, and these facts, if found, are to be considered in connection with other facts which were either admitted or not disputed. Commonwealth v. Light, 45 A. 933, 195 Pa. 220.

[3] Green v. Lewis, 13 Ill. 642; Orange Lumber Co. v. Ellis, 150 S. W. 582, 105 Tex. 363: Bank of Huntington v. Napier, 41 W. Va. 481, 23 S. E. 800.

[4] Yazoo & M. V. R. Co. v. Williams, 39 So. 489, 87 Miss. 344; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

[5] Kingan & Co. v. King, 100 N. E. 1044, 179 Ind. 285; Harris v. Harris, 100 S. E. 125, 178 N. C. 7.

Instruction that jury must be governed solely by the evidence. The charge of the court must be construed with reference to the evidence before the jury, and to the presumption that the jurors are possessed of ordinary intelligence, and will so understand and apply it, where they are charged that they must be governed solely by the evidence in determining all questions submitted to them. Southern Pac. Co. v. Hall (C. C. A. Cal.) 100 F. 760, 41 C. C. A. 50.

[6] Massachusetts Mut. Life Ins. Co. v. Robinson, 98 Ill. 324.

[7] City of Wyandotte v. White, 13 Kan. 191; Welch v. Ware, 32 Mich. 77: Kahn v. Minthorn, 144 N. W. 859, 178 Mich. 312; Commonwealth v. Washington, 51 A. 759, 202 Pa. 148.

[8] Freedman v. Metropolitan St. Ry. Co., 85 N. Y. S. 986, 89 App. Div. 486.

en; the jury being absolutely bound by the instruction on reasonable doubt.[9]

§ 531. Construction with reference to pleadings and evidence

In determining whether instructions are misleading or erroneous, their language must be construed with reference to the pleadings[10] and the evidence,[11] and in the light of the issues raised

[9] Hobbs v. State, 132 P. 822, 9 Okl. Cr. 598.

[10] Windham v. Hydrick, 72 So. 403, 197 Ala. 125; Smith v. Carr, 16 Conn. 450; Winfield v. Truitt, 70 So. 775, 71 Fla. 38; City of Chicago v. McDonough, 112 Ill. 85, 1 N. E. 337; M. E. Smith & Co. v. Kimble, 162 N. W. 162, 38 S. D. 511.

Effect of withdrawal of count of declaration. Where one count of the declaration was withdrawn in the presence of the jury, and no evidence was introduced relating thereto, all references in the instructions to the pleadings are to be understood as referring to the pleadings as they were at the time of the trial. Judgment, 101 Ill. App. 527, affirmed. Slack v. Harris, 65 N. E. 669, 200 Ill. 96.

Request not referring to pleadings. The correctness of a prayer, which does not refer to the pleadings, and is not affected by any other prayer referring to the pleadings, must be determined with reference to the evidence without consideration of the pleadings. Richardson v. Anderson, 72 A. 485, 109 Md. 641, 25 L. R. A. (N. S.) 393, 130 Am. St. Rep. 543.

[11] **U. S.** (C. C. A. Alaska) Hall v. McKinnon, 193 F. 572, 113 C. C. A. 440; (C. C. Mass.) Willis v. Carpenter, Fed. Cas. No. 17,770.

Ala. Higdon v. Fields, 60 So. 594, 6 Ala. App. 281; Central of Georgia Ry. Co. v. Chicago Varnish Co., 53 So. 832, 169 Ala. 287; Meighan v. Birmingham Terminal Co., 51 So. 775, 165 Ala. 591: Miller v. Jones' Adm'r, 29 Ala. 174; Kirkland v. Oates, 25 Ala. 465; Waters v. Spencer, 22 Ala. 460; Berry v. Hardman, 12 Ala. 604.

Ga. Adams v. Governor, 22 Ga. 417; King v. State, 21 Ga. 220.

Ind. Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Iowa. Yeager v. Chicago, R. I. & P. Ry. Co., 123 N. W. 974, 148 Iowa, 231; Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co., 119 N. W. 532, 141 Iowa, 121.

Me. Casco Bank v. Keene, 53 Me. 103; Lyman v. Redman, 23 Me. 289; Blake v. Irish, 21 Me. 450.

Mich. Sword v. Keith, 31 Mich. 247; People v. Scott, 6 Mich. 287.

Mo. Esstman v. United Rys. Co. of St. Louis, 216 S. W. 526.

Mont. Surman v. Cruse, 187 P. 890, 57 Mont. 253.

N. H. Hooksett v. Amoskeag Mfg. Co., 44 N. H. 105; Gerrish v. New Market Mfg. Co., 30 N. H. 478.

N. C. Penn v. Standard Life Ins. Co., 76 S. E. 262, 160 N. C. 399, 42 L. R. A. (N. S.) 597, dismissing petition for rehearing Same v. Standard Life & Accidental Ins. Co., 73 S. E. 99, 158 N. C. 29, 42 L. R. A. (N. S.) 593.

Ohio. Maumee Valley Rys. & Light Co. v. Hanaway, 7 Ohio App. 99.

Okl. Missouri, K. & T. Ry. Co. v. Taylor, 170 P. 1148.

Tenn. Hale v. Darter, 10 Humph. 92.

Tex. Thompson v. Shannon, 9 Tex. 536; Davis v. Loftin, 6 Tex. 489; Peck v. State, 9 Tex. App. 70.

Va. Williams Printing Co. v. Saunders, 73 S. E. 472, 113 Va. 156, Ann. Cas. 1913E, 693.

Wash. Wheeler v. Hotel Stevens Co., 127 P. 840, 71 Wash. 142, Ann. Cas. 1914C, 576; Harkins v. Seattle Electric Co., 101 P. 836, 53 Wash. 184.

Instructions incorrect as abstract propositions. Instructions, which, standing alone, would seem to assert that a promise to pay for improvements made on a farm of another by one in possession, for his own benefit, would be valid, though the improvements should be of no value or benefit to the owner, are not erroneous, though incorrect as abstract propositions, in a case where

thereby.[12] Thus, an expression used in an instruction, or a special issue submitted, although in itself susceptible of two meanings, is not misleading when, as applied to the evidence, only one meaning can be given to it.[13]

§ 532. Construction against party asking instruction

When a charge given on request is ambiguous, that construction will be adopted which is least favorable to the party making the request.[14]

B. Construction and Effect of Charge as a Whole

§ 533. General rule

In determining the sufficiency of a particular instruction, or part of a charge, it is not to be considered apart from its context, or the rest of the charge.[15] Both in civil[16] and in criminal cases[17]

the improvements referred to are shown by the evidence to be of a permanent character, which would add to the value of the premises, and did actually increase their price on a subsequent sale, and where the promise referred to would naturally be understood to mean a promise made at or before the time the improvements were made. Sword v. Keith, 31 Mich. 247. Instructions are to be interpreted in the light of the evidence, and an instruction that a jury might consider other fires caused by the engines of a railroad company, as bearing on the question of negligence in causing the one complained of, without limiting the inquiry as to time, is not erroneous when the evidence before the jury is within the proper limits. New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264.

[12] **Ala.** Empire Life Ins. Co. v. Gee, 55 So. 166, 171 Ala. 435.

Iowa. Hart v. Cedar Rapids & M. C. Ry. Co., 80 N. W. 662, 109 Iowa, 631.

Mich. Botsford v. Kleinhans, 29 Mich. 332.

Tex. East Line & R. R. Ry. Co. v. Smith, 65 Tex. 167; Mitchell v. Zimmerman, 4 Tex. 75, 51 Am. Dec. 717.

Va. Richmond Granite Co. v. Bailey, 24 S. E. 232, 92 Va. 554.

Wis. Neumann v. City of La Crosse, 68 N. W. 654, 94 Wis. 103.

[13] National Bank of Asheville v. Fidelity & Casualty Co. of New York (C. C. A. N. C.) 89 F. 819, 32 C. C. A. 355.

[14] Carter v. Chambers, 79 Ala. 223.

[15] **U. S.** (C. C. A. Iowa) Chicago Great Western Ry. Co. v. McDonough, 161 F. 657, 88 C. C. A. 517.

Cal. De Witt v. Floriston Pulp & Paper Co., 96 P. 397, 7 Cal. App. 774.

Colo. In re Hayes' Estate, 135 P. 449, 55 Colo. 340, Ann. Cas. 1914C, 531; Bailey v. Carlton, 95 P. 542, 43 Colo. 4.

Conn. Appeal of Wheeler, 100 A. 13, 91 Conn. 388.

Fla. Florala Sawmill Co. v. Smith, 46 So. 332, 55 Fla. 447; Stearns & Culver Lumber Co. v. Adams, 46 So. 156, 55 Fla. 394.

Idaho. Barrow v. B. R. Lewis Lumber Co., 95 P. 682, 14 Idaho, 698.

Ill. Klofski v. Railroad Supply Co., 85 N. E. 274, 235 Ill. 146, affirming judgment Railroad Supply Co. v. Klofski, 138 Ill. App. 468; Helbig v. Citizens' Ins. Co., 84 N. E. 897, 234 Ill. 251, affirming judgment Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115; Atchison v. McKinnie, 84 N. E. 208, 233 Ill. 106; Brew v. Seymour, 133 Ill. App. 225; Varney v. Taylor, 133 Ill. App. 154; East St. Louis & S. Ry. Co. v. Zink, 133 Ill. App. 127, judg-

[16] See note 16 on page 975.

[17] See note 17 on page 979.

the instructions of the court must be read together as one con-

ment affirmed 82 N. E. 283, 229 Ill. 180; Chicago Consol. Traction Co. v. Mahoney, 131 Ill. App. 591, judgment affirmed 82 N. E. 868, 230 Ill. 562; Chicago, R. I. & P. Ry. Co. v. Turck, 131 Ill. App. 128.

Ind. Pittsburgh, C., C. & St. L. Ry. Co. v. Wood, 84 N. E. 1009, 45 Ind. App. 1.

Kan. Chicago, R. I. & P. Ry. Co. v. Brandon, 95 P. 573, 77 Kan. 612.

Mass. Plummer v. Boston Elevated Ry. Co., 84 N. E. 849, 198 Mass. 499; Whitney v. Wellesley & B. St. Ry. Co., 84 N. E. 95, 197 Mass. 495.

Mich. Anderson Carriage Co. v. Pungs, 117 N. W. 162, 153 Mich. 580; Croze v. St. Mary's Canal Mineral Land Co., 117 N. W. 81, 153 Mich. 363.

Minn. McCusky v. Kuhlman, 179 N. W. 1000.

Miss. Hitt v. Terry, 46 So. 829, 92 Miss. 671.

Mo. Young v. Lanznar, 112 S. W. 17, 133 Mo. App. 130; Batten v. Modern Woodmen of America, 111 S. W. 513, 131 Mo. App. 381.

Neb. Sheibley v. Fales, 116 N. W. 1035, 81 Neb. 795; Morrow v. Barnes, 116 N. W. 657, 81 Neb. 688; Maxson v. J. I. Case Threshing Mach. Co., 116 N. W. 281, 81 Neb. 546, 16 L. R. A. (N. S.) 963.

N. D. Buchanan v. Minneapolis Threshing Mach. Co., 116 N. W. 335, 17 N. D. 343.

S. C. Columbia, N. & L. R. Co. v. Laurens Cotton Mills, 61 S. E. 1089, 82 S. C. 24, rehearing denied 62 S. E. 1119, 82 S. C. 24; Cannon v. Dean, 61 S. E. 1012, 80 S. C. 557.

Tex. Galveston, H. & N. Ry. Co. v. Cochran (Civ. App.) 109 S. W. 261.

Wash. Jensen v. Schlenz, 154 P. 159, 89 Wash. 268; Davis v. City of Wenatchee, 149 P. 337, 86 Wash. 13.

16 **U. S.** Seaboard Air Line Ry. v. Padgett, 35 S. Ct. 481, 236 U. S. 668, 59 L. Ed. 777, affirming judgment Padgett v. Seaboard Air Line Ry., 83 S. E. 633, 99 S. C. 364; (C. C. A. Ark.) Kansas City Southern Ry. Co. v. Clinton, 224 F. 896, 140 C. C. A. 340; Trulock v. Willey, 187 F. 956, 112 C. C. A. 1; (C. C. A. Cal.) Southern Pac. Co. v. Ward, 208 F. 385, 125 C. C. A. 601; (C. C. A. Colo.) City of Denver v. Porter, 126 F. 288, 61 C. C. A. 168; (C. C. A. Pa.) Pittsburgh Rys. Co. v. Givens, 211 F. 885, 128 C. C. A. 263; Pressed Steel Car Co. v. Nist, 176 F. 919, 100 C. C. A. 273; (C. C. A. Tenn.) Memphis St. Ry. Co. v. Pierce, 257 F. 659, 168 C. C. A. 609; (C. C. A. Tex.) Texas & P. Ry. Co. v. Wineland, 102 F. 673, 42 C. C. A. 588.

Ala. Anders v. Wallace, 82 So. 644, 17 Ala. App. 154; Thrasher v. Neely, 72 So. 115, 196 Ala. 576; Seaboard Air Line Ry. Co. v. Mobley, 69 So. 614, 194 Ala. 211; Western Union Telegraph Co. v. Holland, 66 So. 926, 11 Ala. App. 510; Fowlkes v. Lewis, 65 So. 724, 10 Ala. App. 543; Birmingham Ry., Light & Power Co. v. Mayo, 61 So. 289, 181 Ala. 525; Louisville & N. R. Co. v. Bogue, 58 So. 392, 177 Ala. 349; Central of Georgia Ry. Co. v. Knight, 57 So. 253, 3 Ala. App. 436; Alabama Consol. Coal & Iron Co. v. Cowden, 56 So. 984, 175 Ala. 108; Birmingham Southern Ry. Co. v. Craig, 55 So. 950, 1 Ala. App. 329; Alabama Consol. Coal & Iron Co. v. Heald, 53 So. 162, 168 Ala. 626; Birmingham Ry., Light & Power Co. v. King, 42 So. 612, 149 Ala. 504; Reiter-Conley Mfg. Co. v. Hamlin, 40 So. 280, 144 Ala. 192.

Ariz. Phœnix Ry. Co. of Arizona v. Beals, 181 P. 379, 20 Ariz. 386.

Ark. St. Louis Southwestern Ry. Co. v. Wyman, 178 S. W. 423, 119 Ark. 530; Dunman v. Raney, 176 S. W. 339, 118 Ark. 337; St. Louis, I. M. & S. Ry. Co. v. Brown, 140 S. W. 279, 100 Ark. 107; Arkansas Lumber Co. v. Wallace, 139 S. W. 534, 99 Ark. 537; Western Union Telegraph Co. v. Gillis, 133 S. W. 833, 97 Ark. 226; St. Louis, I. M. & S. Ry. Co. v. Lamb, 128 S. W. 1030, 95 Ark. 209; Lowe v. Hart, 125 S. W. 1030, 93 Ark. 548; Southern Anthracite Coal Co. v. Bowen, 124 S. W. 1048, 93 Ark. 140; Rock Island Plow Co. v. Rankin Bros. & Winn, 115 S. W. 943, 89 Ark. 24; St. Louis, I. M. & S. Ry. Co. v. Puckett, 114 S. W. 224, 88 Ark. 204; Taylor v. McClintock, 112 S. W. 405, 87 Ark. 243.

Cal. Freiburg v. Israel (App.) 187 P. 130; Baillargeon v. Myers, 182 P.

nected whole, to ascertain whether they correctly declare the law.

37; Taylor v. Pacific Electric Ry. Co., 158 P. 119, 172 Cal. 638; Fountain v. Connecticut Fire Ins. Co. of Hartford (App.) 117 P. 630; Peters v. Southern Pac. Co., 116 P. 400, 160 Cal. 48; Parkin v. Grayson-Owen Co., 106 P. 210. 157 Cal. 41.

Colo. National Fuel Co. v. Maccia, 139 P. 22, 25 Colo. App. 441; In re Burnham's Will, 134 P. 254, 24 Colo. App. 131; First National Bank of Ouray v. Shank, 128 P. 56, 53 Colo. 446; Starrett v. Ruth, 119 P. 690, 51 Colo. 583; Denver City Tramway Co. v. Brumley, 116 P. 1051, 51 Colo. 251; Keefer v. Amicone, 100 P. 594, 45 Colo. 110; Denver City Tramway Co. v. Martin, 98 P. 836, 44 Colo. 324; Blackman v. Edsall, 68 P. 790, 17 Colo. App. 429.

Conn. Anthony v. Connecticut Co., 92 A. 672, 88 Conn. 700; Bernier v. Woodstock Agr. Society, 92 A. 160, 88 Conn. 558; Brodie v. Connecticut Co., 87 A. 798, 87 Conn. 363.

Del. Spahn v. People's Ry. Co., 92 A. 727, 3 Boyce, 302.

Fla. Key v. Moore. 82 So. 810, 78 Fla. 205; Gracy v. Atlantic Coast Line R. Co., 42 So. 903, 53 Fla. 350; Seaboard Air Line Ry. v. Scarborough, 42 So. 706, 52 Fla. 425; Jacksonville Electric Co. v. Sloan, 42 So. 516, 52 Fla. 257.

Ga. Brooks v. Goodin, 99 S. E. 540, 23 Ga. App. 800; City of Atlanta v. Williams, 84 S. E. 139, 15 Ga. App. 654; Lyon v. Cedartown Lumber Co., 79 S. E. 236, 13 Ga. App. 450.

Idaho. Lyons v. Lambrix, 190 P. 356; Cady v. Keller, 154 P. 629, 28 Idaho, 368.

Ill. McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476, affirming judgment 212 Ill. App. 664; Zeman v. North American Union, 105 N. E. 22, 263 Ill. 304, affirming judgment 181 Ill. App. 551; Wilkinson v. Service, 94 N. E. 50, 249 Ill. 146, Ann. Cas. 1912A, 41; Dady v. Condit, 70 N. E. 1088, 209 Ill. 488, affirming judgment 104 Ill. App. 507; Baker v. Baker, 67 N. E. 410, 202 Ill. 595; McCormick v. Decker, 204 Ill. App. 554; Gillette v. Chicago, M. & St. P. Ry. Co., 193 Ill. App. 304; Olcese v. Val Blatz Brewing Co., 144 Ill. App. 597; Chicago City Ry. Co. v. Hyndshaw, 116 Ill. App. 367; Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8; Mobile & O. R. Co. v. Vallowe, 115 Ill. App. 621, judgment affirmed 73 N. E. 416, 214 Ill. 124; United States Brewing Co. v. Stoltenberg, 113 Ill. App. 435, judgment affirmed 71 N. E. 1081, 211 Ill. 531; Grayville Waterworks v. Burdick, 109 Ill. App. 520; Thompson v. Koperlski, 109 Ill. App. 466; Witte Hardware Co. v. Air Line Transfer Co., 109 Ill. App. 428; Chicago Screw Co. v. Weiss, 107 Ill. App. 39, judgment affirmed 68 N. E. 54, 203 Ill. 536.

Ind. Laws v. Hammon, W. & E. C. Ry. Co. (App.) 128 N. E. 52; Indianapolis Traction & Terminal Co. v. Thornburg (App.) 125 N. E. 57; Naparala v. Chicago, S. B. & N. I. Ry. Co., 115 N. E. 694, 64 Ind. App. 169; American Maize Products Co. v. Widiger, 114 N. E. 457, 186 Ind. 227; Merchants' Nat. Bank of Massillon, Ohio, v. Nees, 110 N. E. 73, 62 Ind. App. 290; rehearing denied 112 N. E. 904, 62 Ind. App. 290; Terre Haute, I. & E. Traction Co. v. Frischman, 107 N. E. 296, 57 Ind. App. 452; Chicago & E. R. Co. v. Dinius, 103 N. E. 652, 180 Ind. 596; Southern Ry. Co. v. Friedley, 100 N. E. 481, 52 Ind. App. 192; Terre Haute, I. & E. Traction Co. v. Maberry, 100 N. E. 401, 52 Ind. App. 114; Reddick v. Young, 98 N. E. 813, 177 Ind. 632; Steele v. Spanhurst, 98 N. E. 733, 50 Ind. App. 564; Cleveland, C., C. & St. L. Ry. Co. v. Clark, 97 N. E. 822, 51 Ind. App. 392; I. F. Force Handle Co. v. Hisey, 96 N. E. 643, 52 Ind. App. 235; Metropolitan Life Ins. Co. v. Johnson, 94 N. E. 785, 49 Ind. App. 233; Snow v. Indianapolis & E. Ry. Co., 93 N. E. 1089, 47 Ind. App. 189; Indiana Union Traction Co. v. Myers, 93 N. E. 888, 47 Ind. App. 646; City of Logansport v. Smith, 93 N. E. 883, 47 Ind. App. 64; Indiana Union Traction Co. v. Schwinge, 93 N. E. 35, 46 Ind. App. 525; Bicknese v. Brandl, 91 N. E. 41, 46 Ind. App. 269; Cleveland, C., C. & St. L. Ry. Co. v. Heineman, 90 N. E. 899, 46 Ind. App. 388; Indiana Natural Gas & Oil Co. v. Wilhelm, 86 N. E. 86, 44 Ind. App. 100; Sterling v.

The omissions or inaccuracies of one instruction may be cured by

Frick, 86 N. E. 65, 171 Ind. 710, judgment affirmed on rehearing 87 N. E. 237, 171 Ind. 710; Allyn v. Burns, 76 N. E. 636, 37 Ind. App. 223; Robinson v. Shanks, 20 N. E. 713, 118 Ind. 125; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Fischer v. Bell, 91 Ind. 243; Babb v. Babb, 89 Ind. 281; Branstetter v. Dorrough, 81 Ind. 527.

Ind. T. Swofford Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co., 37 S. W. 103, 1 Ind. T. 314.

Iowa. Fletcher v. Ketcham, 176 N. W. 245, 188 Iowa, 340; Fuller v. Illinois Cent. R. Co., 173 N. W. 137, 186 Iowa, 686; In re Workman's Estate, 156 N. W. 438, 174 Iowa, 222; Crawford v. McElhinney, 154 N. W. 310, 171 Iowa, 606, Ann. Cas. 1917E, 221; Doran v. Waterloo, C. F. & N. Ry. Co., 147 N. W. 1100; Stotts v. Fairfield, 145 N. W. 61, 163 Iowa, 726; Moore v. Pearson, 141 N. W. 1048, 160 Iowa, 449; Mitchell v. Des Moines City Ry. Co., 141 N. W. 43, 161 Iowa, 100; Lauer v. Banning, 131 N. W. 783, 152 Iowa, 99; McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689; Brusseau v. Lower Brick Co., 110 N. W. 577, 133 Iowa, 245.

Kan. Zuspann v. Roy, 170 P. 387, 102 Kan. 188; Murphy v. Ludowici Gas & Oil Co., 150 P. 581, 96 Kan. 321; John V. Farwell Co. v. Thomas, 56 P. 151, 8 Kan. App. 614.

Ky. Borderland Coal Co. v. Miller, 201 S. W. 299, 179 Ky. 769; Wiltshire's Adm'x v. Kister, 160 S. W. 743, 156 Ky. 168; White v. Jouett, 144 S. W. 55, 147 Ky. 197; Paducah Commission Co. v. Boswell, 83 S. W. 144, 26 Ky. Law Rep. 1062; Kentucky Nat. Bank v. O'Neal, 11 Ky. Law Rep. (abstract) 763.

Me. Nielson v. International Textbook Co., 75 A. 330, 106 Me. 104, 20 Ann. Cas. 591.

Md. Gosman Ginger Ale Co. of Baltimore City v. Keystone Bottle Mfg. Co., 106 A. 747, 134 Md. 360; Hochschild v. Cecil, 101 A. 700, 131 Md. 70.

Mass. Savageau v. Boston & M. R. R., 96 N. E. 67, 210 Mass. 164; Lockwood v. Boston Elevated Ry. Co., 86 N. E. 934, 200 Mass. 537, 22 L. R. A. (N. S.) 488.

Mich. Interstate Const. Co. v. United States Fidelity & Guaranty Co., 174 N. W. 173, 207 Mich. 265; Jacobs v. Hagenback-Wallace Shows, 164 N. W. 548, 198 Mich. 73, L. R. A. 1918A, 504; In re Rockett's Estate, 158 N. W. 12, 191 Mich. 499; Wegner v. Herkimer, 133 N. W. 623, 167 Mich. 587; Custard v. Hodges, 119 N. W. 583, 155 Mich. 361; Smalley v. Detroit & M. Ry. Co., 91 N. W. 1027, 131 Mich. 560; Manistee Nat. Bank v. Seymour, 31 N. W. 140, 64 Mich. 59; Kuney v. Dutcher, 22 N. W. 806, 56 Mich. 308; Souvais v. Leavitt, 15 N. W. 37, 50 Mich. 108; Russell v. Phelps, 4 N. W. 1, 42 Mich. 377; Wheeler & Wilson Mfg. Co. v. Walker, 1 N. W. 1035, 41 Mich. 239; Lake Superior Iron Co. v. Erickson, 39 Mich. 492, 33 Am. Rep. 423; Eggleston v. Boardman, 37 Mich. 14; Greenlee v. Lowing, 35 Mich. 63.

Miss. Cumberland Telephone & Telegraph Co. v. Jackson, 48 So. 614, 95 Miss. 79.

Mo. Hulse v. St. Joseph Ry. Co., 214 S. W. 150; Rappaport v. Roberts (App.) 203 S. W. 676; Wiley v. Wiley (App.) 182 S. W. 107; Barrett v. Delano, 174 S. W. 181, 187 Mo. App. 501; Tawney v. United Rys. Co. of St. Louis, 172 S. W. 8, 262 Mo. 602; Andrew v. Linebaugh, 169 S. W. 135, 260 Mo. 623; Pendegrass v. St. Louis & S. F. R. Co., 162 S. W. 712, 179 Mo. App. 517; Patterson v. Evans, 162 S. W. 179, 254 Mo. 293; Wilson v. United Rys. Co. of St. Louis, 152 S. W. 426, 169 Mo. App. 405; Dutcher v. Wabash R. Co., 145 S. W. 63, 241 Mo. 137; Michael v. Kansas City Western Ry. Co., 143 S. W. 67, 161 Mo. App. 53; Vanderbeck v. Wabash Ry. Co., 133 S. W. 1178, 154 Mo. App. 321; Hales v. Raines, 130 S. W. 425, 146 Mo. App. 232; Turner v. Snyder, 123 S. W. 1050, 139 Mo. App. 656; McKinstry v. St. Louis Transit Co., 82 S. W. 1108, 108 Mo. App. 12; Copeland v. Wabash R. Co., 175 Mo. 650, 75 S. W. 106; Feary v. O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440; Kitchen

v. Cape Girardeau & S. L. R. Co., 59 Mo. 514; Ritchey v. Huntley, 73 Mo. App. 258; Roos v. Clark, 14 Mo. App. 594, memorandum.

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Neb. Travis v. Omaha & Council Bluffs St. Ry. Co., 152 N. W. 395, 98 Neb. 200; Dore v. Omaha & C. B. St. R. Co., 149 N. W. 792, 97 Neb. 250; Hans v. American Transfer Co., 134 N. W. 943, 90 Neb. 834; Bailey v. Kling, 130 N. W. 439, 88 Neb. 699; Christensen v. Tate, 128 N. W. 622, 87 Neb. 848; Smith v. Lorang, 127 N. W. 873, 87 Neb. 537; Sheridan Coal Co. v. C. W. Hull Co., 127 N. W. 218, 87 Neb. 117, 138 Am. St. Rep. 435; Morris v. Miller, 119 N. W. 458, 83 Neb. 218, 20 L. R. A. (N. S.) 907, 131 Am. St. Rep. 636, 17 Ann. Cas. 1047; Zelenka v. Union Stockyards Co., 118 N. W. 103, 82 Neb. 511; Sloan v. Fist, 89 N. W. 760, 2 Neb. (Unof.) 664; Chicago, B. & Q. R. Co. v. Oyster, 78 N. W. 359, 58 Neb. 1.

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N. M. Victor American Fuel Co. v. Melkusch, 173 P. 198, 24 N. M. 47.

N. Y. Dunn v. Ruppert, 151 N. Y. S. 662, 166 App. Div. 390; Booth v. Litchfield, 114 N. Y. S. 1009, 62 Misc. Rep. 279; Scutt v. Woolsey, 47 N. Y. S. 320, 20 App. Div. 541.

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Okl. Allison v. Bryan, 151 P. 610, 50 Okl. 677; Missouri, O. & G. Ry. Co. v. Collins, 150 P. 142, 47 Okl. 761.

Or. Michellod v. Oregon-Washington R. & Nav. Co., 168 P. 620, 86 Or. 329; Hudson v. Brown Lumber Co., 154 P. 533, 80 Or. 506; Macchi v. Portland Ry., Light & Power Co., 148 P. 72, 76 Or. 215; Powder Valley State Bank v. Hudelson, 144 P. 494, 74 Or. 191; Astoria Southern Ry. Co. v. Pacific Surety Co., 137 P. 857, 68 Or. 569; Wadhams & Co. v. Inman, Poulsen & Co., 63 P. 11, 38 Or. 143.

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S. C. Hair v. Winnsboro Bank, 88 S. E. 26, 103 S. C. 343; Black v. State Co., 83 S. E. 1088, 99 S. C. 432; Singletary v. Seaboard Air Line Ry. Receivers, 71 S. E. 57, 88 S. C. 565; Willoughby v. North Eastern R. Co., 29 S. E. 629, 52 S. C. 166.

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Jenkins (Civ. App.) 163 S. W. 621; Ft. Worth & D. C. Ry. Co. v. Taylor (Civ. App.) 162 S. W. 967; Atchison, T. & S. F. Ry. Co. v. Bryant (Civ. App.) 162 S. W. 400; Vickrey v. Dockray (Civ. App.) 158 S. W. 1160; Carl v. Wolcott (Civ. App.) 156 S. W. 334; Galveston, H. & H. R. Co. v. Hodnett (Civ. App.) 155 S. W. 678; Freeman v. Kennerly (Civ. App.) 151 S. W. 580; Nussbaum & Scharff v. Trinity & Brazos Valley Ry. Co. (Civ. App.) 149 S. W. 1083; Raywood Rice Canal & Milling Co. v. Erp, 146 S. W. 155, 105 Tex. 161, reversing judgment (Civ. App.) Erp v. Raywood Canal & Milling Co., 130 S. W. 897; Marrett v. Herrington (Civ. App.) 145 S. W. 254; Concho, S. S. & L. V. Ry. Co. v. Sanders (Civ. App.) 144 S. W. 693; Stark v. Coe (Civ. App.) 134 S. W. 373; El Paso & S. W. R. Co. v. Eichel & Weikel (Civ. App.) 130 S. W. 922; Gulf, C. & S. F. Ry. Co. v. Shults, 129 S. W. 845, 61 Tex. Civ. App. 93; Houston & T. C. R. Co. v. Maxwell, 128 S. W. 160, 61 Tex. Civ. App. 80; Feigelson v. Brown (Civ. App.) 126 S. W. 17; Posener v. Harvey (Civ. App.) 125 S. W. 356; Houston & T. C. R. Co. v. Haberlin, 125 S. W. 107, 58 Tex. Civ. App. 375; San Antonio Traction Co. v. Higdon, 123 S. W. 732, 58 Tex. Civ. App. 83; St. Louis Southwestern Ry. Co. of Texas v. Taylor, 123 S. W. 714, 58 Tex. Civ. App. 139; Franks v. Harkness (Civ. App.) 117 S. W. 913; International & G. N. Ry. Co. v. Alleman, 115 S. W. 73, 52 Tex. Civ. App. 565; Galveston, H. & N. Ry. Co. v. Olds (Civ. App.) 112 S. W. 787; Texas & P. Ry. Co. v. Cotts (Civ. App.) 95 S. W. 602; Texas Cent. Ry. Co. v. Miller (Civ. App.) 88 S. W. 499; Missouri, K. & T. Ry. Co. of Texas v. Criswell (Civ. App.) 88 S. W. 373.

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Vt. Reed v. Wilmington Savings Bank, 93 A. 265, 89 Vt. 6.

Va. Southern Ry. Co. v. Grubbs, 80 S. E. 749, 115 Va. 876; Peek v. City of Hampton, 80 S. E. 593, 115 Va. 855; Virginia Portland Cement Co. v. Luck's Adm'r, 49 S. E. 577, 103 Va. 427.

Wash. Travis v. Schnebley, 156 P. 400, 90 Wash. 463; Howard v. Washington Water Power Co., 134 P. 927, 75 Wash. 255, 52 L. R. A. (N. S.) 578; Independent Asphalt Paving Co. v. Hein, 131 P. 471, 73 Wash. 127; McIlwaine v. Tacoma Ry. & Power Co., 129 P. 1093, 72 Wash. 184; Morran v. Chicago, M. & P. S. Ry. Co., 126 P. 73, 70 Wash. 114; Myhra v. Chicago, M. & P. S. Ry. Co., 112 P. 939, 62 Wash. 1; Gray v. Washington Water Power Co., 71 P. 206, 30 Wash. 665; Bell v. City of Spokane, 71 P. 31, 30 Wash. 508.

W. Va. Howes v. Baltimore & O. R. Co., 87 S. E. 456, 77 W. Va. 362.

Wyo. Wood v. Wood, 164 P. 844, 25 Wyo. 26.

[17] **U. S.** (C. C. A. La.) Le More v. United States, 253 F. 887, 165 C. C. A. 367, certiorari denied 39 S. Ct. 184, 248 U. S. 586, 63 L. Ed. 434.

Fla. Gadsden v. State, 82 So. 50, 77 Fla. 627.

Ill. People v. Laures, 124 N. E. 585, 289 Ill. 490; People v. Foster, 123 N. E. 534, 288 Ill. 371.

Mich. People v. Sharac, 176 N. W. 431, 209 Mich. 249.

Mo. State v. Reppley, 213 S. W. 477, 278 Mo. 333.

Mont. State v. Smith, 190 P. 107, 57 Mont. 563; Same v. Dunn, 190 P. 121, 57 Mont. 591.

Neb. Francis v. State, 175 N. W. 675, 104 Neb. 5; Parker v. State, 175 N. W. 677, 104 Neb. 12; Mauzy v. State, 174 N. W. 325, 103 Neb. 775; Kirk v. State, 172 N. W. 527, 103 Neb. 484.

N. J. State v. Tachin, 108 A. 318, 93 N. J. Law, 485, affirming judgment 106 A. 145, 92 N. J. Law, 269.

Okl. Gunter v. State, 184 P. 797, 16 Okl. Cr. 476; Mathews v. State, 184 P. 468, 16 Okl. Cr. 466; Wilson v. State (Cr. App.) 183 P. 613; Davis v. State, 182 P. 909, 16 Okl. Cr. 377; January v. State, 181 P. 514, 16 Okl. Cr. 166.

Or. State v. Butler, 186 P. 55, 96 Or. 219.

S. C. Sandel v. State, 104 S. E. 567, 13 A. L. R. 1268.

Tex. Anderson v. State, 217 S. W. 390, 86 Tex. Cr. R. 207; Johnson v. State, 216 S. W. 192, 86 Tex. Cr. R.

the contents of the other instructions, or some of them,[18] and if,

276; Zimmerman v. State, 215 S. W. 101, 85 Tex. Cr. R. 630.

Wash. State v. Sowders, 186 P. 260, 109 Wash. 10.

Wyo. Loy v. State, 185 P. 796, 26 Wyo. 381.

Illustrations of instructions held proper when considered as a whole. In a prosecution for murder, resulting in conviction of manslaughter, instruction that in case of doubt as to whether defendant was guilty of murder or manslaughter, the jury should give him the benefit of the doubt, and find him guilty of something they were certain he was guilty of beyond a reasonable doubt, was not erroneous as requiring the jury to find guilt of some crime, murder, or manslaughter, in view of the following instruction that, if the state failed to convince of guilt beyond a reasonable doubt of any offense charged, the jury should acquit. State v. Brown, 101 S. E. 847, 113 S. C. 513. In trial for grand larceny, instruction that it was not necessary for state to prove that all of property was taken, or that it was taken by defendant, which, taken with other parts of charge, was to be construed as meaning that it was not necessary to prove that defendant took property with his own hands, and that to convict it was only necessary to show that all or any part of property was taken, was not erroneous. State v. Dodds. 160 N. W. 578, 41 N. D. 326. In prosecution for receiving stolen goods, instruction failing to embody in the definition of the crime the element of knowledge, at the time of receiving the goods, that they were stolen goods, but not informing the jury that, if they found the enumerated elements to exist, they could convict, was not error, where another instruction clearly indicated that such knowledge was an essential element; and if accused desired a more specific instruction on the subject, he should have tendered it and requested the court to give it. Partlow v. State (Ind.) 128 N. E. 436.

[18] **Ark.** Russ v. Strickland, 220 S. W. 451, 144 Ark. 642; St. Louis Southwestern Ry. Co. v. Graham, 102 S. W. 700, 83 Ark. 61, 119 Am. St. Rep. 112.

Cal. Hamlin v. Pacific Electric Ry. Co., 89 P. 1109, 150 Cal. 776.

Fla. Jackson v. Citizens' Bank & Trust Co., 44 So. 516, 53 Fla. 265; Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400.

Ga. Bishop v. Georgia Nat. Bank, 78 S. E. 947, 13 Ga. App. 38; City of Macon v. Daley, 58 S. E. 540, 2 Ga. App. 355; Spence v. Morrow, 58 S. E. 356, 128 Ga. 722.

Idaho. Whitney v. Cleveland, 91 P. 176, 13 Idaho, 558.

Ill. Peoria & P. Terminal Ry. v. Schantz, 80 N. E. 1041, 226 Ill. 506, affirming judgment 130 Ill. App. 141; American Car & Foundry Co. v. Hill, 80 N. E. 784, 226 Ill. 227, affirming judgment 128 Ill. App. 176; McConnell v. Chicago Rys. Co., 199 Ill. App. 490; Illinois Steel Co. v. Ziemkowski, 123 Ill. App. 285, judgment affirmed 77 N. E. 190, 220 Ill. 324, 4 L. R. A. (N. S.) 1161; City of Gibson v. Murray, 120 Ill. App. 296, judgment affirmed 75 N. E. 319, 216 Ill. 589.

Ind. Lake Erie & W. R. Co. v. Howarth (App.) 124 N. E. 687, rehearing denied 127 N. E. 804; City of Bloomington v. Woodworth, 81 N. E. 611, 40 Ind. App. 373.

Iowa. Breiner v. Nugent, 111 N. W. 446, 136 Iowa, 322.

Mass. Doe v. Boston & W. St. Ry. Co., 80 N. E. 814, 195 Mass. 168.

Mo. McKinney v. Martin-Holloran-Klaus Laundry Co., 200 S. W. 114, 198 Mo. App. 386; Bell v. Central Electric Ry. Co., 103 S. W. 144, 125 Mo. App. 660; Sipple v. Laclede Gaslight Co., 102 S. W. 608, 125 Mo. App. 81; St. Louis, I. M. & S. Ry. Co. v. Stewart, 100 S. W. 583, 201 Mo. 491.

Neb. Coffey v. Omaha & C. B. St. Ry. Co., 112 N. W. 589, 79 Neb. 286; Vanderveer v. Moran, 112 N. W. 581, 79 Neb. 431; Lincoln Traction Co. v. Brookover, 111 N. W. 357, 77 Neb. 221, reversing judgment on rehearing 109 N. W. 168, 77 Neb. 217.

N. Y. Butler v. Gazette Co., 104 N. Y. S. 637, 119 App. Div. 767.

when the instructions of the court are considered as a whole, they correctly state the law and are not inconsistent or misleading, the fact that a particular instruction or isolated paragraph may be objectionable, as inaccurate or misleading, will not constitute ground for reversal.[19]

Okl. Hawkins v. State, 186 P. 490, 16 Okl. Cr. 382.

Or. Ridings v. Marion County, 91 P. 22, 50 Or. 30.

S. C. Keys v. Winnsboro Granite Co., 56 S. E. 949, 76 S. C. 284.

Tex. Thayer v. Clark, 104 S. W. 196, 47 Tex. Civ. App. 61.

Utah. Rogers v. Rio Grande Western Ry. Co., 90 P. 1075, 32 Utah, 367, 125 Am. St. Rep. 876.

Va. Virginia-Carolina Chemical Co. v. Knight, 56 S. E. 725, 106 Va. 674.

Wash. Buckley v. Massachusetts Bonding & Insurance Co., 192 P. 924.

Wis. Pelton v. Spider Lake Sawmill & Lumber Co., 112 N. W. 29, 132 Wis. 219, 122 Am. St. Rep. 963.

Charges on contributory negligence. Where the court correctly charged on contributory negligence and declared that all the instructions must be taken as a whole, an instruction omitting all reference to contributory negligence was not erroneous on that ground. Coors v. Brock, 125 P. 599, 22 Colo. App. 470. In passing on the question whether an instruction, in an action for injuries to a street car passenger, was erroneous for failing to charge on contributory negligence, it was proper to consider other instructions in reference to her negligence, and which covered the law on the subject. Louisville & S. I. Traction Co. v. Worrell, 86 N. E. 78, 44 Ind. App. 480. Where, in an action for injuries to a pedestrian on a bridge over a street, caused by a cinder thrown into his eye by an engine on the street, the court charged that pedestrians had a right to cross on the bridge, but that in crossing they must act as a person of ordinary prudence, with knowledge and experience of such pedestrians, a charge that a pedestrian must not blindly and heedlessly rush in a place where danger is likely to be apprehended, and that if plaintiff met this requirement, he was not guilty of contributory negligence, but if he fell short thereof, he was guilty of negligence, was not erroneous on the issue of contributory negligence, for the entire charge, when taken together, required the pedestrian to exercise reasonable care. Coffer v. Erickson, 112 P. 643, 61 Wash. 559.

Error in using phrase "approximate cause." Error in using the expression "approximate cause" in instruction that if kindling of fire by defendant on its premises was the approximate cause of communicating sparks of fire resulting in the destruction of insured's property to find for plaintiffs was cured by general instruction, stating, among other things, that "proximate cause" is the principal cause and is an important matter in cases of this kind. Northwest Door Co. v. Lewis Inv. Co., 180 P. 495, 92 Or. 186.

[19] **U. S.** Northern Pac. R. Co. v. Lynch, 19 S. Ct. 878, 173 U. S. 701, 43 L. Ed. 1185, affirming judgment (C. C. A. Mont.) 79 F. 268, 24 C. C. A. 570; Chicago & N. W. Ry. Co. v. Whitton, 80 U. S. (13 Wall.) 270, 20 L. Ed. 571; (C. C. A. Ark.) Guild v. Andrews, 137 F. 369, 70 C. C. A. 49; (C. C. A. Neb.) Kerr-Murray Mfg. Co. v. Hess, 98 F. 56, 38 C. C. A. 647; (C. C. A. N. J.) North Jersey St. Ry. Co. v. Purdy, 142 F. 955, 74 C. C. A. 125; Camden & S. Ry. Co. v. Burr, 91 F. 351, 33 C. C. A. 557; (C. C. A. Tex.) Texas & P. Ry. Co. v. Holliday, 83 F. 452, 27 C. C. A. 558, writ of error dismissed 18 S. Ct. 947, 42 L. Ed. 1217.

Ala. Ballenger v. Shumate, 65 So. 416, 10 Ala. App. 329; Sheffield Co. v. Harris, 61 So. 88, 183 Ala. 357; Western Union Telegraph Co. v. Snell, 56 So. 854, 3 Ala. App. 263; Decatur Car Wheel & Mfg. Co. v. Mehaffey, 29 So. 646, 128 Ala. 242; Southern

Ry. Co. v. Lynn, 29 So. 573, 128 Ala. 297; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Montgomery & E. Ry. Co. v. Stewart, 91 Ala. 421, 8 So. 708.

Ark. Kansas City Southern Ry. Co. v. Sparks, 222 S. W. 724, 144 Ark. 227; Redman v. Hudson, 186 S. W. 312, 124 Ark. 26; St. Louis, I. M. & S. Ry. Co. v. Hydrick, 160 S. W. 196, 109 Ark. 231; St. Louis, I. M. & S. Ry. Co. v. Plott, 157 S. W. 385, 108 Ark. 292; Standard Life & Accident Ins. Co. v. Schmaltz, 53 S. W. 49, 66 Ark. 588, 74 Am. St. Rep. 112; Burton v. Merrick, 21 Ark. 357.

Cal. Lawrence v. Goodwill (App.) 186 P. 781; Darrell v. Mutual Ben. Life Ins. Co. (App.) 186 P. 620; Randolph v. Hunt, 183 P. 358, 41 Cal. App. 739; Froeming v. Stockton Electric R. Co., 153 P. 712, 171 Cal. 401, Ann. Cas. 1918B, 408; Polkinghorn v. Riverside Portland Cement Co., 142 P. 140, 24 Cal. App. 615; Ingalls v. Monte Cristo Oil & Development Co., 139 P. 97, 23 Cal. App. 652; Moseley v. Los Angeles Packing Co., 134 P. 994, 166 Cal. 59; Rialto Const. Co. v. Reed, 118 P. 473, 17 Cal. App. 29; De Witt v. Floriston Pulp & Paper Co., 96 P. 397, 7 Cal. App. 774; Hayden v. Consolidated Mining & Dredging Co., 84 P. 422, 3 Cal. App. 136; In re Keithley's Estate, 66 P. 5, 134 Cal. 9; Thomas v. Gates, 58 P. 315, 126 Cal. 1; Gray v. Eschen, 57 P. 664, 125 Cal. 1; Brittan v. Oakland Bank of Savings, 57 P. 84, 124 Cal. 282, 71 Am. St. Rep. 58, affirming order 44 P. 339, 112 Cal. 1; Sandell v. Sherman, 107 Cal. 391, 40 P. 493; People v. McDowell, 64 Cal. 467, 3 P. 124.

Colo. Idaho Gold Coin Min. & Mill. Co. v. Colorado Iron Works Co., 111 P. 553, 49 Colo. 66; Grimes v. Greenblatt, 107 P. 1111, 47 Colo. 495, 19 Ann. Cas. 608; Stratton Cripple Creek Mining & Development Co. v. Ellison, 94 P. 303, 42 Colo. 498; Ingemarson v. Coffey, 92 P. 908, 41 Colo. 407; City of Colorado Springs v. May, 77 P. 1093, 20 Colo. App. 204; Denver Dry-Goods Co. v. Martine, 55 P. 743, 12 Colo. App. 299; Curr v. Hundley, 3 Colo. App. 54, 31 P. 939; Hurd v. Atkins, 1 Colo. App. 449, 29 P. 528; Simonton v. Rohm, 14 Colo. 51, 23 P. 86; Dozenback v. Raymer, 13 Colo. 451, 22 P. 787; Finerty v. Fritz, 6 Colo. 136.

Conn. Adams v. Pierce, 110 A. 50, 94 Conn. 613; Appeal of Wheeler, 100 A. 13, 91 Conn. 388; Reed v. Heyman, 66 A. 322, 80 Conn. 311; Benedict v. Everard, 46 A. 870, 73 Conn. 157.

D. C. Turner v. American Security & Trust Co., 29 App. D. C. 460; Georgetown & T. Ry. Co. v. Smith, 25 App. D. C. 259, 5 L. R. A. (N. S.) 274.

Fla. Burnett v. Soule, 83 So. 461, 78 Fla. 507; Bibb v. United Grocery Co., 74 So. 880, 73 Fla. 589; Florida East Coast Ry. Co. v. Knowles, 67 So. 122, 68 Fla. 400; Hartford Fire Ins. Co. v. Brown, 53 So. 838, 60 Fla. 83; Pensacola Electric Co. v. Bissett, 52 So. 367, 59 Fla. 360; Cross v. Aby, 45 So. 820, 55 Fla. 311; Atlantic Coast Line R. Co. v. Beazley, 45 So. 761, 54 Fla. 311; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12.

Ga. Bishop v. Calhoun Nat. Bank, 91 S. E. 1055, 19 Ga. App. 713; Rogers, Cassels & Fleming v. Bennett, 91 S. E. 917, 19 Ga. App. 520; Cordray v. James, 91 S. E. 239, 19 Ga. App. 156; Nessmith Lumber Co. v. Berrien County Bank, 90 S. E. 1039, 18 Ga. App. 788; Southern Ry. Co. v. Chitwood, 82 S. E. 135, 141 Ga. 769; Clark v. Clark, 81 S. E. 129, 141 Ga. 437; Kerr Glass Mfg. Co. v. Americus Grocery Co., 79 S. E. 381, 13 Ga. App. 512; Murdock v. Adamson, 77 S. E. 181, 12 Ga. App. 275; Atlantic Coast Line R. Co. v. Jones, 63 S. E. 834, 132 Ga. 189; Bush v. Fourcher, 59 S. E. 459, 3 Ga. App. 43; Western & A. R. Co. v. Tate, 59 S. E. 266, 129 Ga. 526; Teasley v. Bradley, 47 S. E. 925, 120 Ga. 373; Russell v. Brunswick Grocery Co., 47 S. E. 528, 120 Ga. 38; Farmers' & Merchants' Bank v. Riddle, 41 S. E. 580, 115 Ga. 400; City Council of Augusta v. Tharpe, 38 S. E. 389, 113 Ga. 152; Webb v. Wight & Weslosky Co., 37 S. E. 710, 112 Ga. 432.

Idaho. Kelly v. Lemhi Irrigation & Orchard Co., 168 P. 1076, 30 Idaho, 778; Taylor v. Lytle, 160 P. 942, 29 Idaho, 546; Quirk v. Sunderlin, 130 P. 374, 23 Idaho, 368; Just v. Idaho Canal & Improvement Co., 102 P. 381, 16 Idaho, 639, 133 Am. St. Rep.

140; Tarr v. Oregon Short Line R. Co., 93 P. 957, 14 Idaho, 192, 125 Am. St. Rep. 151.

Ill. Judy v. Judy, 104 N. E. 256, 261 Ill. 470; Greenburg v. S. D. Childs & Co., 89 N. E. 679, 242 Ill. 110; Van Cleef v. City of Chicago, 88 N. E. 815, 240 Ill. 318, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275; Chicago City Ry. Co. v. Hagenback, 81 N. E. 1014, 228 Ill. 290; Chicago City Ry. Co. v. Shreve, 80 N. E. 1049, 226 Ill. 530, affirming judgment 128 Ill. App. 462; Fitzgerald v. Benner, 76 N. E. 709, 219 Ill. 485, affirming judgment 120 Ill. App. 447; West Chicago St. R. Co. v. Schulz, 75 N. E. 495, 217 Ill. 322; Dueber Watch Case Mfg. Co. v. Young, 155 Ill. 226, 40 N. E. 582; Dacey v. People, 116 Ill. 555, 6 N. E. 165; Riggin v. Keck, 203 Ill. App. 87; Smiley v. Barnes, 196 Ill. App. 530; Hitz v. Illinois Cent. R. Co., 183 Ill. App. 558; Swancutt v. W. M. Trout Auto Livery Co., 176 Ill. App. 606; McMaster v. Spencer, 129 Ill. App. 131; Thomas v. Mosher, 128 Ill. App. 479; Chicago City Ry. Co. v. Shreve, 128 Ill. App. 462, judgment affirmed 80 N. E. 1049, 226 Ill. 530; Eldorado Coal & Coke Co. v. Swan, 128 Ill. App. 237, judgment affirmed 81 N. E. 691, 227 Ill. 586; People v. Cook County, 127 Ill. App. 401; Chicago, P. & St. L. Ry. Co. v. Reuter, 119 Ill. App. 232, affirmed 79 N. E. 166, 223 Ill. 387; Kessel v. Mayer, 118 Ill. App. 267; Chicago & E. I. R. Co. v. Crose, 113 Ill. App. 547; Illinois Life Ins. Co. v. Lindley, 110 Ill. App. 161; Grand Lodge, Brotherhood of Locomotive Firemen, v. Orrell, 109 Ill. App. 422; Junction Min. Co. v. Goodwin, 109 Ill. App. 144; City of Macon v. Holcomb, 109 Ill. App. 135; Pungs v. American Brake Beam Co., 102 Ill. App. 76, judgment affirmed 65 N. E. 645, 200 Ill. 306; Chicago & W. I. R. Co. v. Doan, 93 Ill. App. 247, affirmed 62 N. E. 826, 195 Ill. 168; Johnston v. Hirschberg, 85 Ill. App. 47, affirmed 57 N. E. 26, 185 Ill. 445; Gernand v. Heinly, 84 Ill. App. 321.

Ind. Olds v. Lochner, 57 Ind. App. 269, 106 N. E. 889; Evansville & T. H. R. Co. v. Hoffman, 105 N. E. 788, 56 Ind. App. 530; Walley v. Wiley, 104 N. E. 318, 56 Ind. App. 171; Joseph E. Lay Co. v. Mendenhall, 102 N. E. 974, 54 Ind. App. 342; Cohen v. Reichman, 102 N. E. 284, 55 Ind. App. 164; Indianapolis & M. Rapid Transit Co. v. Reeder, 100 N. E. 101, 51 Ind. App. 533; Ft. Wayne Iron & Steel Co. v. Parsell, 94 N. E. 770, 49 Ind. App. 565; Snow v. Indianapolis & E. Ry. Co., 93 N. E. 1089, 47 Ind. App. 189; American Sheet & Tin Plate Co. v. Bucy, 87 N. E. 1051, 43 Ind. App. 501; Brinkman v. Pacholke, 84 N. E. 762, 41 Ind. App. 662; Abney v. Indiana Union Traction Co., 83 N. E. 387, 41 Ind. App. 53; Indianapolis Traction & Terminal Co. v. Miller, 82 N. E. 113, 40 Ind. App. 403; Southern Indiana Ry. Co. v. Baker, 77 N. E. 64, 37 Ind. App. 405; Indianapolis St. Ry. Co. v. James, 74 N. E. 536, 35 Ind. App. 543; Nickey v. Dougan, 73 N. E. 288, 34 Ind. App. 601; Conrad v. Cleveland, C., C. & St. L. Ry. Co., 72 N. E. 489, 34 Ind. App. 133; Cleveland, C., C. & St. L. Ry. Co. v. C. & A. Potts & Co., 71 N. E. 685, 33 Ind. App. 564; Pittsburgh, C., C. & St. L. Ry. Co. v. Collins, 71 N. E. 661, 163 Ind. 569; City of Linton v. Smith, 68 N. E. 617, 31 Ind. App. 546; Southern Indiana Ry. Co. v. Harrell (App.) 66 N. E. 1016, judgment reversed 68 N. E. 262, 161 Ind. 689, 63 L. R. A. 460; Archibald v. Harvey, 54 N. E. 813, 23 Ind. App. 30; White v. Beem, 80 Ind. 239.

Iowa. Adami v. Fowler & Wilson Coal Co., 179 N. W. 422; Spillett v. Clear Lake Boating & Amusement Co., 155 N. W. 822; Rose v. City of Ft. Dodge, 155 N. W. 170, 180 Iowa, 331; Finnane v. City of Perry, 145 N. W. 494, 164 Iowa, 171; Reed v. Rex Fuel Co., 141 N. W. 1056, 160 Iowa, 510; Cooper v. City of Oelwein, 123 N. W. 955, 145 Iowa, 181; Clark v. Johnson County Telephone Co., 123 N. W. 327, 146 Iowa, 428; Hawkins v. Young, 114 N. W. 1041, 137 Iowa, 281; Montrose Sav. Bank v. Claussen, 114 N. W. 547, 137 Iowa, 73; Heath v. Hagan, 113 N. W. 342, 135 Iowa, 495; Templin v. Incorporated City of Boone, 102 N. W. 789, 127 Iowa, 91; Hart v. Cedar Rapids & M. C. Ry. Co., 80 N. W. 662, 109 Iowa,

631; Zimmerman v. Brannon, 72 N. W. 439, 103 Iowa, 144.

Kan. Rapier v. Stockgrowers' State Bank of Maple Hill, 185 P. 888, 105 Kan. 606; Madey v. Swift & Co., 168 P. 1105, 101 Kan. 771; Welliver v. Clark, 155 P. 4, 97 Kan. 246; Root v. Cudahy Packing Co., 147 P. 69, 94 Kan. 339; Grimes v. Emery, 146 P. 1135, 94 Kan. 701, affirming judgment 141 P. 1002, 92 Kan. 911; Meyer v. City of Rosedale, 113 P. 1043, 84 Kan. 302; City of Kansas City v. Smith, 54 P. 329, 8 Kan. App. 82; Gilmore v. Gilmore, 50 P. 97, 6 Kan. App. 453; Sweeney v. Merrill, 16 P. 454, 38 Kan. 216, 5 Am. St. Rep. 734.

Ky. W. M. Ritter Lumber Co. v. Jordan, 128 S. W. 596, 138 Ky. 522; Chesapeake & O. Ry. Co. v. Perkins, 105 S. W. 148, 127 Ky. 110, 31 Ky. Law Rep. 1350; City of Louisville v. McGill, 52 S. W. 1053, 21 Ky. Law Rep. 718; Johnson v. Peak, 50 S. W. 682, 20 Ky. Law Rep. 1937; Louisville & N. R. Co. v. Williams, 15 Ky. Law Rep. (abstract) 31; Kellar v. Edmondson, 14 Ky. Law Rep. (abstract) 894; Kentucky & I. Bridge Co. v. Cecil, 14 Ky. Law Rep. (abstract) 477; Lancaster v. Turpin, 8 Ky. Law Rep. (abstract) 430.

Md. Bishop v. Frantz, 93 A. 412, 125 Md. 183.

Mass. Moulton v. Boston Elevated Ry. Co., 127 N. E. 886, 236 Mass. 234; Cronin v. Boston Elevated Ry. Co., 123 N. E. 686, 233 Mass. 243; McLellan v. Fuller, 115 N. E. 481, 226 Mass. 374; Dewey v. Boston Elevated Ry., 105 N. E. 366, 217 Mass. 599; Maloy v. Boston Elevated Ry. Co., 104 N. E. 459, 217 Mass. 108; Lambeth Rope Co. v. Brigham, 49 N. E. 1022, 170 Mass. 518.

Mich. Jordan v. Wixson, 155 N. W. 387, 189 Mich. 288; Kaaro v. Ahmeek Mining Co., 146 N. W. 149, 178 Mich. 661; Folks v. Burletson, 142 N. W. 1120, 177 Mich. 6; Keenan v. City of Mt. Pleasant, 142 N. W. 1114, 176 Mich. 620; Frohlich v. Independent Glass Co., 139 N. W. 5, 173 Mich. 428; Chapin v. Ann Arbor R. Co., 133 N. W. 512, 167 Mich. 648; Beattie v. City of Detroit, 100 N. W. 574, 137 Mich. 319; Bay City Iron Co. v. Emery, 87 N. W. 652, 128 Mich. 506; Kunst v. Ringold, 74 N. W. 292, 116 Mich. 88; Provost v. Brueck, 67 N. W. 1114, 110 Mich. 136; Pray v. Cadwell, 15 N. W. 92, 50 Mich. 222; Grand Rapids & I. R. Co. v. Cameron, 8 N. W. 99, 45 Mich. 451; Coots v. Chamberlain, 39 Mich. 565; Burdick v. Michael, 32 Mich. 246; Daniels v. Clegg, 28 Mich. 32; McGinnis v. Kempsey, 27 Mich. 363.

Minn. De Vriendt v. Chicago G. W. Ry. Co., 175 N. W. 99, 144 Minn. 467; Jelos v. Oliver Iron Mining Co., 141 N. W. 843, 121 Minn. 473; Korby v. Chesser, 108 N. W. 520, 98 Minn. 509.

Miss. Mississippi Cent. R. Co. v. Hardy, 41 So. 505, 88 Miss. 732; Warren County v. Rand, 40 So. 481, 88 Miss. 395; Yazoo & M. V. R. Co. v. Williams, 39 So. 489, 87 Miss. 344.

Mo. Criswell v. Selecman (App.) 185 S. W. 1145; Richardson v. Touchstone (App.) 180 S. W. 1010; Stoltze v. United Rys. Co. of St. Louis, 166 S. W. 1102, 183 Mo. App. 304; Johnson v. Springfield Traction Co., 161 S. W. 1193, 176 Mo. App. 174; Gabriel v. Metropolitan St. Ry. Co., 148 S. W. 168, 164 Mo. App. 56; Heinzle v. Metropolitan St. Ry. Co., 111 S. W. 536, 213 Mo. 102; Smith v. Wabash R. Co., 107 S. W. 22, 129 Mo. App. 413; Lange v. Missouri Pac. Ry. Co., 106 S. W. 660, 208 Mo. 458; Flaherty v. St. Louis Transit Co., 106 S. W. 15, 207 Mo. 318; Evers v. Wiggins Ferry Co., 105 S. W. 306, 127 Mo. App. 236; Christianson v. McDermott's Estate, 100 S. W. 63, 123 Mo. App. 448; Abbitt v. St. Louis Transit Co., 81 S. W. 484, 106 Mo. App. 640; Hunt v. Desloge Consol. Lead Co., 104 Mo. App. 377, 79 S. W. 710; Heagy v. Irondale Lead Co., 101 Mo. App. 361, 73 S. W. 1006; Chambers v. Chester, 172 Mo. 461, 72 S. W. 904; Liese v. Meyer, 45 S. W. 282, 143 Mo. 547; Hughes v. Chicago & A. R. Co., 127 Mo. 447, 30 S. W. 127; Fugate v. Millar, 109 Mo. 281, 19 S. W. 71; Shortel v. City of St. Joseph, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317; Prewitt v. Martin, 59 Mo. 325; Henschen v. O'Bannon, 56 Mo. 289; Harrison v. Washington Marine Ins. Co., 43 Mo. 590; Bowring v. Wabash Ry. Co., 90 Mo. App. 324;

Fischer v. Heitzeberg Packing & Provision Co., 77 Mo. App. 108; Keen v. Schweigler, 70 Mo. App. 409; Voegeli v. Pickel Marble & Granite Co., 56 Mo. App. 678; Heitzig v. Gruner, 13 Mo. App. 580, memorandum; Singer & Talcott Stone Co. v. Sinclair, 10 Mo. App. 593, memorandum.

Mont. Harrington v. Butte, A. & P. Ry. Co., 93 P. 640, 36 Mont. 478; Stephens v. Elliott, 92 P. 45, 36 Mont. 92.

Neb. Kocar v. Whelan, 167 N. W. 775, 102 Neb. 503; Morrissey v. Wharton, 153 N. W. 564, 98 Neb. 544; Henry v. City of Lincoln, 151 N. W. 933, 97 Neb. 865; Cunningham v. Modern Brotherhood of America, 148 N. W. 918, 96 Neb. 827; Whitney v. Broeder, 143 N. W. 228, 94 Neb. 305; Blakeslee v. Van Der Slice, 142 N. W. 799, 94 Neb. 153; Whelan v. Union Pac. R. Co., 136 N. W. 20, 91 Neb. 238; Armstrong v. City of Auburn, 122 N. W. 43, 84 Neb. 842; Ault v. Nebraska Telephone Co., 118 N. W. 73, 82 Neb. 434, 130 Am. St. Rep. 686; Neeley v. Trautwein, 113 N. W. 141, 79 Neb. 751; Spelts & Klosterman v. Ward, 96 N. W. 56, 2 Neb. Unof. 177; Pledger v. Chicago, B. & Q. R. Co., 95 N. W. 1057, 69 Neb. 456; Williams v. Shepherdson, 95 N. W. 827, 4 Neb. Unof. 608; Tunnicliffe v. Fox, 94 N. W. 1032, 68 Neb. 811; City of South Omaha v. Meyers, 92 N. W. 743, 3 Neb. Unof. 699; Maynard v. Sigman, 91 N. W. 576, 65 Neb. 590; Martin v. Connell, 91 N. W. 516, 3 Neb. Unof. 240; Hoffine v. Ewing, 84 N. W. 93, 60 Neb. 729; Chicago, R. I. & P. Ry. Co. v. Zernecke, 82 N. W. 26, 59 Neb. 689, 55 L. R. A. 610, affirmed 22 S. Ct. 229, 183 U. S. 582, 46 L. Ed. 339; Smith v. Meyers, 71 N. W. 1006, 52 Neb. 70; St. Paul Fire & Marine Ins. Co. v. Gotthelf, 35 Neb. 351, 53 N. W. 137.

Nev. Cutler v. Pittsburg Silver Peak Gold Mining Co., 116 P. 418, 34 Nev. 45; Christensen v. Floriston Pulp & Paper Co., 92 P. 210, 29 Nev. 552.

N. H. Town of Monroe v. Connecticut River Lumber Co., 39 A. 1019, 68 N. H. 89.

N. M. Hubert v. American Surety Co. of New York, 192 P. 487.

N. Y. People v. Abraitis, 178 N. Y. S. 255, 189 App. Div. 312; Green v. Horn, 151 N. Y. S. 215, 165 App. Div. 743; Lawson v. Wells, Fargo & Co., 113 N. Y. S. 647; McAfee v. Dix, 91 N. Y. S. 464, 101 App. Div. 69; Allison v. Long Clove Trap Rock Co., 86 N. Y. S. 833, 92 App. Div. 611; Zimmer v. Third Ave. R. Co., 55 N. Y. S. 308, 30 App. Div. 265; Rosenheimer v. Standard Gaslight Co., 55 N. Y. S. 192, 36 App. Div. 1.

N. C. Kirkpatrick v. Crutchfield, 100 S. E. 602, 178 N. C. 348; McNeill v. Atlantic Coast Line R. Co., 83 S. E. 704, 167 N. C. 390; Bird v. Bell Lumber Co., 79 S. E. 448, 163 N. C. 162; In re Big Cold Water Creek Drainage Dist., 78 S. E. 14, 162 N. C. 127; Madison County Ry. Co. v. Gahagan, 76 S. E. 696, 161 N. C. 190; Aman v. Rowland Lumber Co., 75 S. E. 931, 160 N. C. 369; Wilson v. Atlantic Coast Line R. Co., 55 S. E. 257, 142 N. C. 333; Marcom v. Raleigh & A. Air Line R. Co., 35 S. E. 423, 126 N. C. 200; Crenshaw v. Johnson, 26 S. E. 810, 120 N. C. 270.

N. D. Wyldes v. Patterson, 153 N. W. 630, 31 N. D. 282; Carpenter v. Village of Dickey, 143 N. W. 964, 26 N. D. 176; Gagnier v. City of Fargo, 96 N. W. 841, 12 N. D. 219.

Ohio. Smith v. State, 34 Ohio Cir. Ct. R. 661.

Okl. Chase v. Cable Co., 170 P. 1172; Ponca City Ice Co. v. Robertson, 169 P. 1111; Missouri, O. & G. Ry. Co. v. Smith, 155 P. 233, 55 Okl. 12; Weller v. Dusky, 151 P. 606, 51 Okl. 77; Chickasha St. Ry. Co. v. Marshall, 141 P. 1172, 43 Okl. 192; Curtis & Gartside Co. v. Pigg, 134 P. 1125, 39 Okl. 31; First Nat. Bank v. Ingle, 132 P. 895, 37 Okl. 276; Gulf, C. & S. F. Ry. Co. v. Taylor, 130 P. 574, 37 Okl. 99; Nutt v. State, 128 P. 165, 8 Okl. Cr. 266.

Or. Hinkson v. Kansas City Life Ins. Co., 183 P. 24, 93 Or. 473; Foster v. University Lumber & Shingle Co., 131 P. 736, 65 Or. 46.

Pa. McCormick v. Bickerton, 96 A. 1092, 251 Pa. 466; Swauger v. People's Natural Gas Co., 96 A. 712, 251 Pa. 287; Watson v. Monongahela River Consol. Coal & Coke Co., 93 A. 625, 247 Pa. 469; Powell v. S. Morgan

Smith Co., 85 A. 416, 237 Pa. 272; Greenwich Coal & Coke Co. v. Learn, 83 A. 74, 234 Pa. 180; Karl v. Juniata County, 56 A. 78, 206 Pa. 633; Sharer v. Dobbins, 45 A. 660, 195 Pa. 82; Krause v. Plumb, 45 A. 648, 195 Pa. 65; Spring City Brick Co. v. Henry Martin Brick Mach. Mfg. Co., 39 Pa. Super. Ct. 7; Thomas v. Butler, 24 Pa. Super. Ct. 305; Haydenville Min. & Mfg. Co. v. Steffler, 17 Pa. Super. Ct. 609; H. B. Claflin Co. v. Querns, 15 Pa. Super. Ct. 464; Winans v. Bunnell, 13 Pa. Super. Ct. 445.

S. C. Bennett v. Southern Ry.-Carolina Division, 79 S. E. 710, 98 S. C. 42; Tucker v. Clinton Cotton Mills, 78 S. E. 890, 95 S. C. 302; McCormick v. Columbia Electric St. Ry., Light & Power Co., 67 S. E. 562, 85 S. C. 455, 21 Ann. Cas. 144; Stono Mines v. Southern States Phosphate & Fertilizer Co., 65 S. E. 6, 83 S. C. 119; Horn v. Southern Ry., 58 S. E. 963, 78 S. C. 67; McGhee v. Wells, 35 S. E. 529, 57 S. C. 280, 76 Am. St. Rep. 567; Welch v. Clifton Mfg. Co., 33 S. E. 739, 55 S. C. 568; Pickens v. South Carolina & G. R. Co., 32 S. E. 567, 54 S. C. 498.

Tenn. East Tennessee, V. & G. R. Co. v. Humphreys, 12 Lea, 200; Malone v. Searight, 8 Lea, 91.

Tex. Hermann v. Bailey (Civ. App.) 174 S. W. 865; Missouri, K. & T. Ry. Co. of Texas v. Graham (Civ. App.) 168 S. W. 55; Glover v. Houston Belt & Terminal Ry. Co. (Civ. App.) 163 S. W. 1063; Missouri, K. & T. Ry. Co. of Texas v. State (Civ. App.) 163 S. W. 338; El Paso Electric Ry. Co. v. Mebus (Civ. App.) 157 S. W. 955; Gulf, C. & S. F. Ry. Co. v. Ideus (Civ. App.) 157 S. W. 173; Texas Midland R. R. v. Simmons (Civ. App.) 152 S. W. 1106; Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305; Texas Telegraph & Telephone Co. v. Scott, 127 S. W. 587, 60 Tex. Civ. App. 39; Atchison, T. & S. F. Ry. v. Seeger, 126 S. W. 1170, 59 Tex. Civ. App. 525; Missouri, K. & T. Ry. Co. of Texas v. Snow, 115 S. W. 631, 53 Tex. Civ. App. 184; El Paso Electric Ry. Co. v. Kelly (Civ. App.) 109 S. W. 415; Galveston, H. & N. Ry. Co. v. Cochran, 109 S. W. 261, 49 Tex. Civ. App. 591; St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 108 S. W. 736, 49 Tex. Civ. App. 545; Houston & T. C. R. Co. v. Finn (Civ. App.) 107 S. W. 94, judgment affirmed 109 S. W. 918, 101 Tex. 511; Thompson v. Planters' Compress Co., 106 S. W. 470, 48 Tex. Civ. App. 235; Southern Pac. Co. v. Allen, 106 S. W. 441, 48 Tex. Civ. App. 66; Industrial Lumber Co. v. Bivens, 105 S. W. 831, 47 Tex. Cr. R. 396; Chicago, R. I. & P. Ry. Co. v. Burns (Civ. App.) 104 S. W. 1081, judgment affirmed 107 S. W. 49, 101 Tex. 329; Missouri, K. & T. Ry. Co. of Texas v. Carter, 104 S. W. 910, 47 Tex. Civ. App. 309; City of Austin v. Forbis (Civ. App.) 99 S. W. 132; Kirby Lumber Co. v. Dickerson, 94 S. W. 153, 42 Tex. Civ. App. 504; Galveston, H. & S. A. Ry. Co. v. McAdams, 84 S. W. 1076, 37 Tex. Civ. App. 575; El Paso & N. W. Ry. Co. v. McComas, 81 S. W. 760, 36 Tex. Civ. App. 170; International & G. N. R. Co. v. Hawes (Civ. App.) 54 S. W. 325; City Railway Co. v. Wiggins (Civ. App.) 52 S. W. 577; Houston, E. & W. T. Ry. Co. v. Runnels (Civ. App.) 46 S. W. 394, reversed 47 S. W. 971, 92 Tex. 305.

Utah. Ryan v. Curlew Irrigation & Reservoir Co., 104 P. 218, 36 Utah, 382; Smith v. San Pedro, L. A. & S. L. R. Co., 100 P. 673, 35 Utah, 390; Rogers v. Rio Grande Western Ry. Co., 90 P. 1075, 32 Utah, 367, 125 Am. St. Rep. 876; Loofborrow v. Utah Light & Ry. Co., 88 P. 19, 31 Utah, 355; Morgan v. Mammoth Min. Co., 72 P. 688, 26 Utah, 174; Anderson v. Daly Min. Co., 50 P. 815, 16 Utah, 28.

Vt. Bonazzi v. Fortney, 110 A. 439, 94 Vt. 263.

Va. Pocahontas Consol. Collieries Co. v. Hairston, 83 S. E. 1041, 117 Va. 118; Chesapeake & O. Ry. Co. v. McCarthy, 76 S. E. 319, 114 Va. 181; Adamson's Adm'r v. Norfolk & P. Traction Co., 69 S. E. 1055, 111 Va. 556; Truckers' Mfg. & Supply Co. v. White, 60 S. E. 630, 108 Va. 147; Virginia Portland Cement Co. v. Lucks' Adm'r, 49 S. E. 577, 103 Va. 427; Norfolk & W. R. Co. v. Cheatwood's Adm'r, 49 S. E. 489, 103 Va. 356; Southern Ry. Co. v. Oliver, 47 S. E. 862, 102 Va. 710; Miller & Meyers v. City of Newport News, 44 S. E. 712,

101 Va. 432; Dingee v. Unrue's Adm'x, 35 S. E. 794, 98 Va. 247; Richmond Traction Co. v. Hildebrand, 34 S. E. 888, 98 Va. 22, 99 Va. 48; Kimball v. Borden, 34 S. E. 45, 97 Va. 477.

Wash. Pierce v. General Fire Assur. Co., 182 P. 588, 107 Wash. 700; Pierce v. Security Ins. Co., 182 P. 588, 107 Wash. 699; Pierce v. Globe & Rutgers Fire Ins. Co., 182 P. 586, 107 Wash. 501; State v. Emonds, 182 P. 584, 107 Wash. 688; McDorman v. Dunn, 172 P. 244, 101 Wash. 120; Munson v. Johnson, 142 P. 18, 80 Wash. 628; Gosky v. Seattle Taxicab & Transfer Co., 140 P. 342, 79 Wash. 425; Alaska S. S. Co. v. Pacific Coast Gypsum Co., 138 P. 875, 78 Wash. 247; Murphy v. Chicago, M. & St. P. Ry. Co., 120 P. 525, 66 Wash. 663; Sudden & Christenson v. Morse, 104 P. 645, 55 Wash. 372; St. John v. Cascade Lumber & Shingle Co., 101 P. 833, 53 Wash. 193; Hoseth v. Preston Mill Co., 96 P. 423, 49 Wash. 682; Portland & S. Ry. Co. v. Clarke County, 93 P. 1083, 48 Wash. 509; Barclay v. Puget Sound Lumber Co., 93 P. 430, 48 Wash. 241, 16 L. R. A. (N. S.) 140; Wikstrom v. Preston Mill Co., 93 P. 213, 48 Wash. 164; Starr v. Ætna Life Ins. Co., 87 P. 1119, 45 Wash. 128; Burns v. Woolery, 45 P. 894, 15 Wash. 134.

W. Va. Karr v. Baltimore & O. R. Co., 86 S. E. 43, 76 W. Va. 526; Roberts v. Baltimore & O. R. Co., 78 S. E. 357, 72 W. Va. 370; Lay v. Elk Ridge Coal & Coke Co., 61 S. E. 156, 64 W. Va. 288; Styles v. Chesapeake & O. Ry. Co., 59 S. E. 609, 62 W. Va. 650; Huffman v. Alderson's Adm'r, 9 W. Va. 616.

Wis. Gussart v. Greenleaf Stone Co., 114 N. W. 799, 134 Wis. 418; Morrison v. Superior Water, Light & Power Co., 114 N. W. 434, 134 Wis. 167; Kohl v. Bradley, Clark & Co., 110 N. W. 265, 130 Wis. 301; Kiekhoefer v. Hidershide, 89 N. W. 189, 113 Wis. 280; Kenyon v. City of Mondovi, 73 N. W. 314, 98 Wis. 50; Hinkley v. Town of Rosendale, 70 N. W. 158, 95 Wis. 271.

Illustrations of instructions held unobjectionable when considered as a whole. Where the charge as a whole instructed that plaintiff must make out his case by the greater weight of the evidence, the fact that the charge in some places also required that he prove his case by a clear preponderance of the evidence did not render it erroneous, as requiring too high a degree of proof. Mullaly v. Smyth, 79 S. E. 634, 96 S. C. 14. In an action on a note, instructions that, if the preponderance of the evidence showed that the note had not been paid, plaintiff could recover, and that, if it appeared in the same way that payment had been made, the verdict should be for defendant, were not improper as placing the burden on plaintiff to show nonpayment, and for failing to instruct what the jury should do if the evidence were evenly balanced, where other instructions stated that the burden was on defendant, and that plaintiff's possession of the note was prima facie evidence of nonpayment. McCauley v. Darrow, 91 P. 1059, 36 Mont. 13. Where the court in its charge fully defines to the jury the meaning of the contract, and fully and fairly explains to them the contentions of both parties, as embodied in their respective understanding of its contents, the omission to further instruct the jury specially that they must determine what the contract was, its exact terms, the consideration, and the respective obligations, liability, and undertakings of each of the parties thereunder, was immaterial. Schofield v. Little, 58 S. E. 666, 2 Ga. App. 286. In an action to set aside a contract and a transfer of property thereunder alleged to have been obtained from M., a person of unsound mind, by the undue influence of his niece, a charge that, if the donation was unjust or unreasonable, that fact was evidence to be considered on the issues of sanity and undue influence, but that it was not of itself a cause for revising what had been done, unless it was of such an extent as to convince the jury of the existence of undue influence or of unsound mind, was not objectionable as allowing the jury, if they thought the transaction unjust or unreasonable, to find from that fact alone, unsoundness of mind, or undue influence, or

both, where the jury were told in the same charge that one in disposing of his property had a right to disregard all natural ties and all moral obligations and that the right of disposal did not depend upon the condition that the gift be reasonable, and that the transaction in question was one that M. could lawfully enter into if he saw fit, etc., and that the sole question was whether the gift was really his. Curtice v. Dixon, 68 A. 587, 74 N. H. 386. An instruction in a personal injury action that plaintiff could recover reasonable compensation for his fright, shock, suffering, anxiety, nervous prostration, sickness caused by the accident, mental strain and mortification through being required to use crutches or other inconveniences; and, if plaintiff was permanently injured, such further compensation for pain, etc., as he might be required to endure thereafter, and compensation for his loss of capacity and prospects of life, was not improper as authorizing recovery for loss of time or for diminished earning capacity, where the court instructed that there being no evidence of the value of plaintiff's loss of time, nor as to how much he could earn before the injury, he could not recover for time lost nor for diminished earning capacity; it appearing from the smallness of the verdict that the jury was not misled. Buxton v. Ainsworth, 116 N. W. 1094, 153 Mich. 315. An instruction on exemplary damages for assault, that the jury "should" consider defendant's wealth, and that the damages "should" be proportionate to his ability to respond, is harmless error, where the jury were further instructed that they could not award exemplary damages, unless the acts in question were done maliciously, and that even then the matter of exemplary damages was in their discretion, and were told the reason for considering defendant's wealth. Thomas v. Williams, 121 N. W. 148, 139 Wis. 467. The giving of an instruction that the presumption that deceased was exercising due care exists in the absence of evidence to the contrary, and, until it is overthrown by a preponderance of the evidence, is harmless, where from the entire charge the jury might have understood that the presumption may counterbalance evidence of contributory negligence. Sorensen v. Selden-Breck Const. Co., 154 N. W. 222, 98 Neb. 689. An instruction that a husband might recover of his wife's estate for work done on her property, if it was done under an implied contract, is cured by a statement that by this was meant, if the work was done under an understanding between them, that he should be paid therefor, though the exact terms of their agreement could not be proved. Westra v. Westra's Estate, 101 Mich. 526, 60 N. W. 55. In an action by a wife for alienation of her husband's affections, where an instruction stated that defendant had no right to interfere, and by any chance cut off the possibility of future affection between plaintiff and her husband, the use of the expression "by any chance cut off," instead of the expression "cut off any chance," was cured by the rest of the instruction, which clearly indicated its meaning. Claxton v. Pool, 167 S. W. 623, 182 Mo. App. 18. An instruction, under a lease of agricultural lands which required the lessor to maintain the drainage of the lands, that the drainage should be maintained so that the lands would be in the ordinary condition of uplands or flat lands not needing drainage, was not error, where the court also instructed as to the lessee's duty to maintain ditches on the land and to cultivate his crops properly, and denied recovery if the jury found negligence by the lessee. Columbia Agricultural Co. v. Seid Pak Sing (C. C. A. Or.) 267 F. 1. Though an instruction in a libel case charging the jury as to the effect of the libelous publication did not clearly show that it was a jury question, whether the article complained of was false, the error was cured by another instruction expressly stating that truth was a defense. Arizona Pub. Co. v. Harris, 181 P. 373, 20 Ariz. 446. In an action against a livery stable keeper for injuries to one who had hired a team from him, due to the insufficiency of the harness, an instruction that "a livery stable keeper is freed from lia-

bility for an accident by showing that he exercised the usual skill, care, and diligence ordinarily exercised by livery stable keepers," though not entirely accurate, the care required of livery stable keepers being that "usually exercised by persons of ordinary prudence in the conduct of such livery stable business," was not ground for granting plaintiff a new trial, where the court both before and after giving such instruction charged as requested by plaintiff that it was defendant's duty to use reasonable care in the selection of a safe harness for plaintiff's use, and that reasonable care meant that degree of care exercised by an ordinarily careful and prudent person acting in similar relations, and where the instruction complained of began with the words "on the contrary," showing that the judge was merely pointing out that defendant was not a public but a private carrier. Deming v. Johnson, 69 A. 347, 80 Conn. 553. In an action for damages for the willful burning of a house, an instruction that the jury must be satisfied by the greater weight of the evidence is not erroneous for using the word "satisfied," if the whole charge places on the plaintiff only the burden of a showing by a preponderance of the evidence. Champion v. Daniel, 87 S. E. 214, 170 N. C. 331. In an action against a railroad for injuries to an employé through a defective car step, an instruction that if defendant, through its inspectors and repairers, exercised ordinary care to see that the equipment of the car was in reasonably safe condition, "and were not guilty of negligence," the verdict must be for defendant, was not misleading as adding, by the use of the words "and were not guilty of negligence," something to defendant's duty beyond the exercise of ordinary care; the court having clearly defined "negligence" as the failure to use ordinary care. El Paso & S. W. R. Co. v. O'Keefe, 110 S. W. 1002, 50 Tex. Civ. App. 579. In an action for injuries to a servant, defendant cannot complain of an instruction defining contributory negligence as "the want of ordinary care on the part of the person injured—that is to say, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances—which, concurring with the negligence of defendant, if any, proximately caused the injuries," where the court, in another part of the charge, directed the jury to find for defendant if they believed from the evidence that plaintiff was guilty of negligence which caused or contributed to his injuries. Galveston, H. & S. A. Ry. Co. v. Worth, 116 S. W. 365, 53 Tex. Cr. R. 351. An instruction using the term "due care" in connection with the exercise thereof by the person injured was not erroneous because it did not define the term, or state what measure of care the law required of the person injured, or that the care required of him must be continually exercised up to the time of his injury, where by taking the instruction in connection with other instructions given which fully defined negligence and contributory negligence and the character of the care required of the person injured the jury could not have been misled by the instruction complained of. Brinkman v. Pacholke, 84 N. E. 762, 41 Ind. App. 662. Where the court had previously charged that a person would not be liable unless his negligence was the proximate cause of the injury, an instruction that, if negligence of defendant's agent caused the injury, the principal would be liable, was not erroneous for failure to charge that such liability would occur only for injuries which were proximately caused by the agent's negligence. Rochester v. Bull, 58 S. E. 766, 78 S. C. 249. Where, in an action for repairs to an automobile, the question of defendant's ratification of the work was otherwise fully explained, an instruction, that if the charge was reasonable and authority for the repairs was given, or if authority was not given that the work was ratified by defendant, that he, after knowing it, agreed to it and accepted the property, then he would be liable, was not error. Bush v. Fourcher, 59 S. E. 459, 3 Ga. App. 43. Where, in an action for the death of a traveler struck by a train at a crossing, the evidence showed that

§ 534. Further discussion of rule—Cure of deficiencies and objectionable matters, not amounting to a positive misstatement of the law, by other instructions

Where an instruction states the law correctly so far as it goes, and is merely insufficient, ambiguous or uncertain, the defect may

the engineer could not see on account of the obstruction of the boiler, an instruction that if those in charge of the engine "negligently" failed to keep a lookout, etc., a recovery was authorized, was not erroneous because of the use of the word "negligently," when considered in connection with another instruction that those in charge of the train must use ordinary care in discovering whether decedent was ignorant of the approach of the train and was about to go on the track. Hummer's Ex'x v. Louisville & N. R. Co., 108 S. W. 885, 128 Ky. 486, 32 Ky. Law Rep. 1315. An instruction, in an action against a railroad company for the death of plaintiff's daughter, that, notwithstanding the parent may have been negligent, such fact did not relieve the company from using ordinary care to avoid injuring the child, and that the company was bound to use such care, and that if the child was in a position of danger it must be the greatest care, and that a failure to exercise such care, where it might reasonably be inferred that an injury would follow as a result of such failure, amounted to wanton and reckless conduct, though in somewhat stronger language than generally used in such connection, was not erroneous when construed in connection with instructions that precaution was a duty only so far as there was reason for apprehension, and that the exercise of ordinary care to prevent injury arose only after the company became aware of the child's danger. Anderson v. Great Northern Ry. Co., 99 P. 91, 15 Idaho, 513. Where the court charged that use of a highway by the public must have been adverse, continuous, uninterrupted, and under a claim of right for the necessary period in order to make it a public highway, another instruction that 20 years' user of a road by the public as a highway under claim of right creates a highway by prescription was not objectionable for failure to require that the use must have been continuous and uninterrupted. Road Dist. No. 1 v. Beebe, 83 N. E. 131, 231 Ill. 147. Instructions, in an action for injuries to a bicyclist in a collision with an automobile, that if defendant was on the left-hand side of the street when the collision occurred, he failed to perform a duty which he owed by statute to plaintiff, and should be found negligent, unless he was coming from an intersecting street, and had not had time to get to the right-hand side, and that when a collision occurs, the fact that a person is on the wrong side is prima facie evidence of negligence, are not open to the criticism that they stated that one may not lawfully drive upon the left-hand side of the road, where the court had previously instructed that the law did not require a person to drive on his right side, but did require him to turn to his right when meeting another, and since such instructions were expressly confined to the position of defendant at the time of the collision. Irwin v. Judge, 71 A. 572, 81 Conn. 492. Where, in an action for injuries to a traveler by an automobile, the court instructed as to the rights of the parties on the highway, and as to the degree of care required of defendant in running his automobile, and charged that defendant had the right to operate his automobile, and was bound only to use ordinary care to prevent injury to others, an instruction that the running of the automobile on the highway was not of itself negligence, but that defendant was bound to use reasonable care so as not to injure plaintiff, was not objectionable as singling plaintiff out as an object of special care, but applied the rule previously announced to the facts. Erks v. Ewers (Iowa) 119 N. W. 603.

be cured by other instructions upon the same subject embraced in the charge,[20] and it is further true that, as a general rule, errors

[20] **Ala.** Langston v. State, 75 So. 715, 16 Ala. App. 123.

Ariz. Southern Pac. Co. v. Hogan, 108 P. 240, 13 Ariz. 34, 29 L. R. A. (N. S.) 813.

Ark. Paxton v. State, 157 S. W. 396, 108 Ark. 316.

Cal. People v. Griesheimer, 167 P. 521, 176 Cal. 44; People v. Wong Hing, 151 P. 1159, 28 Cal. App. 230; People v. Dunlop, 150 P. 389, 27 Cal. App. 460; People v. Senegram, 149 P. 786, 27 Cal. App. 301; People v. Harris, 145 P. 520, 169 Cal. 53; People v. Bowman, 142 P. 495, 24 Cal. App. 781; People v. Lillard, 123 P. 221, 18 Cal. App. 343; People v. Richardson, 120 P. 20, 161 Cal. 552; Big Three Min. & Mill. Co. v. Hamilton, 107 P. 301, 157 Cal. 130, 137 Am. St. Rep. 118; People v. Del Cerro, 100 P. 887, 9 Cal. App. 764.

Colo. Pouppirt v. Greenwood, 110 P. 195, 48 Colo. 405; Gill v. Schneider, 110 P. 62, 48 Colo. 382; Stratton Cripple Creek Mining & Development Co. v. Ellison, 94 P. 303, 42 Colo. 498.

Conn. Worden v. Gore-Meehan Co., 78 A. 422, 83 Conn. 642; Bogudsky v. Backes, 76 A. 540, 83 Conn. 208; State v. Campbell, 74 A. 927, 82 Conn. 671, 135 Am. St. Rep. 293, 18 Ann. Cas. 236.

D. C. Robinson v. United States, 42 App. D. C. 186; Woodward v. United States, 38 App. D. C. 323.

Ga. Thomas v. State, 91 S. E. 109, 146 Ga. 346; Clonts v. State, 90 S. E. 373, 18 Ga. App. 707; Green v. State, 90 S. E. 284, 18 Ga. App. 677; Tift v. State, 88 S. E. 41, 17 Ga. App. 663; Williams v. State, 85 S. E. 973, 16 Ga. App. 697; Nunn v. State, 85 S. E. 346, 143 Ga. 451; Short v. State, 80 S. E. 8, 140 Ga. 780; McGovern v. State, 74 S. E. 1101, 11 Ga. App. 267; Leonard v. State, 66 S. E. 251, 139 Ga. 435; Atlantic Coast Line R. Co. v. Jones, 63 S. E. 834, 132 Ga. 189; Wholesale Mercantile Co. v. Jackson, 59 S. E. 106, 2 Ga. App. 776.

Ill. East St. Louis & S. Ry. Co. v. Zink, 82 N. E. 283, 229 Ill. 180; Hoge v. People, 117 Ill. 35, 6 N. E. 796; Guminski v. Armour & Co., 156 Ill. App. 503; Etnyre v. Artz, 153 Ill. App. 490; Gorey v. Illinois Cent. R. Co., 153 Ill. App. 17; Colono v. Consolidated Coal Co., 147 Ill. App. 327; Gardner v. Ben Steele Weigher Mfg. Co., 142 Ill. App. 348.

Ind. Flatter v. State, 107 N. E. 9, 182 Ind. 514; Cleveland, C., C. & St. L. Ry. Co. v. Lynn, 95 N. E. 577, 177 Ind. 311; Smurr v. State, 88 Ind. 504.

Iowa. McSpadden v. Axmear, 181 N. W. 4; State v. Harrison, 149 N. W. 452, 167 Iowa, 334; State v. Piernot, 149 N. W. 446, 167 Iowa, 353; State v. Butler, 138 N. W. 383, 157 Iowa, 163; State v. Dean, 126 N. W. 692, 148 Iowa, 566; Marcus v. Omaha & C. B. Ry. & Bridge Co., 120 N. W. 469, 142 Iowa, 84; McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689.

Kan. Every v. Rains, 115 P. 114, 84 Kan. 560, 50 L. R. A. (N. S.) 889.

Ky. McGehee v. Commonwealth, 205 S. W. 577, 181 Ky. 422.

Md. Bannon v. Warfield, 42 Md. 22.

Mich. People v. Schelske, 153 N. W. 781, 187 Mich. 497; People v. Rogulski, 148 N. W. 189, 181 Mich. 481; Borkowski v. American Radiator Co., 130 N. W. 640, 165 Mich. 266; Kryszke v. Kamin, 128 N. W. 190, 163 Mich. 290; Smith v. Hubbell, 114 N. W. 865, 151 Mich. 59.

Minn. Johnson v. McLeod, 127 N. W. 497, 111 Minn. 479, rehearing denied 127 N. W. 1120, 111 Minn. 479; Christiansen v. Chicago, M. & St. P. Ry. Co., 120 N. W. 300, 107 Minn. 341.

Miss. Cumberland Telephone & Telegraph Co. v. Jackson, 48 So. 614, 95 Miss. 79; Mississippi Cent. R. Co. v. Magee, 46 So. 716, 93 Miss. 196.

Mo. State v. Walls, 170 S. W. 1112, 262 Mo. 105; State v. Smith, 157 S. W. 319, 250 Mo. 350; Overstreet v. Street, 136 S. W. 727, 154 Mo. App. 546; Tewksbury v. Metropolitan St. Ry. Co., 134 S. W. 682, 153 Mo. App. 500; Leach v. St. Louis & S. F. R. Co., 118 S. W. 510, 137 Mo. App. 300; State v. Gregory, 30 Mo. App. 582.

Mont. Surman v. Cruse, 187 P.

in instructions, not amounting to positive misstatements of the

890, 57 Mont. 253; Leonard v. City of Butte, 65 P. 425, 25 Mont. 410.

Neb. Parker v. State, 175 N. W. 677, 104 Neb. 12; Francis v. State, 175 N. W. 675, 104 Neb. 5; Bailey v. Kling, 130 N. W. 439, 88 Neb. 699.

Nev. Cutler v. Pittsburg Silver Peak Gold Mining Co., 116 P. 418, 34 Nev. 45.

N. J. State v. Venzio, 87 A. 126, 84 N. J. Law, 418; Corkran v. Taylor, 71 A. 124, 77 N. J. Law, 195.

N. M. State v. Ellison, 144 P. 10, 19 N. M. 428.

N. Y. People v. Smith, 114 N. E. 50, 219 N. Y. 222, affirming judgment 159 N. Y. S. 1073, 172 App. Div. 826; People v. Brown, 96 N. E. 367, 203 N. Y. 44, Ann. Cas. 1913A, 732; Kelleher v. Interurban St. Ry. Co. (Sup.) 102 N. Y. S. 466.

N. D. Zilke v. Johnson, 132 N. W. 640, 22 N. D. 75, Ann. Cas. 1913E, 1005; Boos v. Ætna Ins. Co., 132 N. W. 222, 22 N. D. 11; State v. Winney, 128 N. W. 680, 21 N. D. 72.

Ohio. Cincinnati Gas & Electric Co. v. Coffelder, 31 Ohio Cir. Ct. R. 26; New York, C. & St. L. Ry. Co. v. Roe, 25 Ohio Cir. Ct. R. 628.

Okl. Chicago, R. I. & P. Ry. Co. v. Owens, 186 P. 1092, 78 Okl. 50, certiorari denied 40 S. Ct. 485, 253 U. S. 489, 64 L. Ed. 1027; Chicago, R. I. & P. Ry. Co. v. Johnson, 107 P. 662, 25 Okl. 760, 27 L. R. A. (N. S.) 879.

Or. Blue v. Portland Ry., Light & Power Co., 117 P. 1094, 60 Or. 122.

Pa. Trainer v. McGarrity, 40 Pa. Super. Ct. 57.

R. I. Cardarelli v. Providence Journal Co., 80 A. 583, 33 R. I. 268.

S. C. State v. Martin, 98 S. E. 127, 111 S. C. 352; State v. Milam, 70 S. E. 447, 88 S. C. 127; Martin v. Columbia Electric St. Ry., Light & Power Co., 66 S. E. 993, 84 S. C. 568; Lyles v. Western Union Telegraph Co., 65 S. E. 832, 84 S. C. 1, 137 Am. St. Rep. 829.

Tenn. Fisher v. Travelers' Ins. Co., 138 S. W. 316, 124 Tenn. 450, Ann. Cas. 1912D, 1246.

Tex. Alexander v. State, 204 S. W. 644, 84 Tex. Cr. R. 75; Wood v. State, 189 S. W. 474, 80 Tex. Cr. R. 398; Coker v. State, 160 S. W. 366, 71 Tex. Cr. R. 504; Kirksey v. State, 135 S. W. 577, 61 Tex. Cr. R. 641; Jordan v. State, 131 S. W. 539, 60 Tex. Cr. R. 178; Missouri, K. & T. Ry. Co. of Texas v. Stone, 125 S. W. 587, 58 Tex. Civ. App. 480; St. Louis & S. F. R. Co. v. Franklin, 123 S. W. 1150, 58 Tex. Civ. App. 41; James v. State, 123 S. W. 145, 57 Tex. Cr. R. 342; Montgomery v. State, 116 S. W. 1160, 55 Tex. Cr. R. 502; San Antonio Light Pub. Co. v. Lewy, 113 S. W. 574, 52 Tex. Civ. App. 22; Texas & P. Ry. Co. v. Boleman (Civ. App.) 112 S. W. 805; Consolidated Kansas City Smelting & Refining Co. v. Binkley, 99 S. W. 181, 45 Tex. Civ. App. 100; Galveston, H. & S. A. Ry. Co. v. Cherry, 98 S. W. 898, 44 Tex. Civ. App. 344; Brewin v. State, 92 S. W. 420, 49 Tex. Cr. R. 296; Monticue v. State, 51 S. W. 236, 40 Tex. Cr. R. 528.

Utah. O'Neill v. San Pedro, L. A. & S. L. R. Co., 114 P. 127, 38 Utah, 475; Grow v. Utah Light & Ry. Co., 106 P. 514, 37 Utah, 41; Gimnich Furniture Mfg. Co. v. Sorensen, 96 P. 121, 34 Utah, 109.

Va. Saunders v. Bank of Mecklenburg, 71 S. E. 714, 112 Va. 443, Ann. Cas. 1913B, 982; Norfolk & W. Ry. Co. v. Thomas, 66 S. E. 817, 110 Va. 622.

Wash. James v. Pearson, 116 P. 852, 64 Wash. 263; Myhra v. Chicago, M. & P. S. Ry. Co., 112 P. 939, 62 Wash. 1; Averbuch v. Great Northern Ry. Co., 104 P. 1103, 55 Wash. 633; Behling v. Seattle Electric Co., 96 P. 954, 50 Wash. 150.

W. Va. Connolly v. Bollinger, 67 S. E. 71, 67 W. Va. 30, 20 Ann. Cas. 1350.

Illustrations of defects in instructions cured by other instructions. In an action against A. and B., two of several owners of a steamer, for expenses incurred and services rendered in the superintendence of the building of the steamer, an instruction to the jury "that if the plaintiff rendered the services and incurred the expenses in question at the request of A., acting in his own behalf and representing the defendant

B., and if the plaintiff rendered said services expecting to be paid for them, he would be entitled to recover the value of his services and the expenses incurred by him," not given as the whole law of the case, but to be considered in connection with the other instructions, which required the jury to determine the relation of the plaintiff to the transaction and to the defendant at the time of bringing the suit is correct. Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105. Where, in an action for injuries to a passenger, the defense was a release, and the court in a previous instruction had fully charged on the issue of plaintiff's capacity when she signed the settlement, an instruction that, if plaintiff knowingly signed the agreement, but at the time she signed it she gave little attention to its contents, or did not read it, or ask that it be read to her, then she was bound thereby, while an insufficient presentation of the question itself, was not misleading or erroneous when considered with reference to the entire charge. Whittlesey v. Burlington, C. R. & N. Ry. Co., 90 N. W. 516, 121 Iowa, 597, reversed 97 N. W. 66, 121 Iowa, 597. In an action by passenger for injuries, an instruction that the burden of proving the carrier's affirmative defense that the injuries were caused by the negligence of another was on carrier was not erroneous as requiring carrier to prove such negligence by a preponderance of the evidence, where the court also instructed the jury that throughout plaintiff must prove his case by preponderance of the evidence, and that defendant was not liable unless its negligence was either the sole or contributing cause to the accident. Learned v. Peninsula Rapid Transit Co. (Cal. App.) 193 P. 591. Where, in an action for injuries to a passenger bound for G. in consequence of his alighting at the intermediate point R., believing that he had reached G., it was undisputed that he alighted at R., and the court charged that if he was negligent in not reboarding the train before it started from R., and such negligence contributed to the injuries, there could be no recovery, the error in an instruction that if an ordinarily prudent person would have discovered that he "was at G." before alighting, and the passenger attempted to reboard the train under circumstances constituting contributory negligence, there could be no recovery, etc., arising from the omission of the word "not" before "at" in the quoted phrase, was not prejudicial. Missouri, K. & T. Ry. Co. of Texas v. Redus, 118 S. W. 208, 55 Tex. Civ. App. 205. In an action for injuries to a passenger by the sudden starting of the car as she was alighting, where the court instructed that it was the duty of the carrier to exercise the highest care consistent with its duties of conveying passengers to avoid injuring them, and, on their failure to do so, they would be liable it was not error to instruct that the carrier was required to stop its cars a sufficient time to allow passengers to alight, and to see that they had actually done so. Best v. Columbia Electric St. Ry., Light & Power Co., 67 S. E. 1, 85 S. C. 422. In a death action, tried throughout on the theory that the damages, if any, were such as were suffered by decedent's estate, where there was no testimony as to the existence of any one dependent upon decedent, nor that any one had suffered pecuniary injury from his death, and the jury were plainly charged that the damages to be awarded were those suffered by the estate, a charge that it was not necessary for plaintiff to show the precise money value of decedent's life, or the exact damages suffered by the beneficiaries, to sustain a recovery of substantial damages, was not misleading through the use of the word "beneficiaries," though inappropriate, as allowing a recovery by those dependent upon decedent who had suffered. Phœnix Ry. Co. v. Landis, 108 P. 247, 13 Ariz. 80. An exception to the court's charge on manslaughter as allowing the jury to consider only the provocation arising at the time cannot be sustained, where the court further charged that, in determining the adequacy of the provocation, the jury should consider all the evidence in determining the condition of the

defendant's mind. Jacobs v. State, 213 S. W. 628, 85 Tex. Cr. 505. In suit for false imprisonment against a constable and his sureties, any ambiguity in instructing that, if he unlawfully violated plaintiff's personal liberty, the jury must find for plaintiff, because not restricting the sureties' liability for wrongs committed by the constable in his official capacity, was removed by a subsequent instruction that his sureties would only be liable if he wrongfully restrained plaintiff while acting in his official capacity. Gomez v. Scanlan, 102 P. 12, 155 Cal. 528. An instruction that the jury, in making up its special findings as to the fraud charged to defendants, might "take into consideration the allegation made in the complaint that there was an agreement" between defendants to defraud plaintiff, is not open to objection, where it was evident from the whole instruction that the meaning was that the jury might consider the allegations of the complaint in determining in what manner it was charged that such an agreement had been made, and not that they tended in any manner to establish the fact of an agreement. Limited Inv. Ass'n v. Glendale Inv. Ass'n, 74 N. W. 633, 99 Wis. 54. In an action for injury to an employé a statement in a preamble to the submission of the issues that when one becomes a railway employé he can assume that the company will exercise ordinary care to furnish a reasonably safe place to work was not prejudicial error, where the statement appeared in the paragraph containing explanatory abstract principles applicable to master and servant, and the court charged that plaintiff could not recover unless injured through defendant's negligence in furnishing a defective engine, and where no issue as to defendant's duty to furnish a safe place to work was presented by the charge. Atchison, T. & S. F. Ry. Co. v. Mills, 116 S. W. 852, 53 Tex. Civ. App. 359. Where, in an action for the death of a servant, the court charged that the way to determine whether a person has been negligent is to compare what he had done or left undone with what would have been done or left undone by a man acting with ordinary prudence, and that if a man fails to act as an ordinarily prudent man would under the same circumstances and conditions there is negligence, there was no reversible error in the court's misuse of the word "could" for "would" in certain other of the instructions relating to the acts of a reasonably prudent man, etc. Cox v. Wilkeson Coal & Coke Co., 112 P. 231, 61 Wash. 343. Where an instruction related only to one kind of assumed risk, the ordinary hazards of the service, contention that it ignored the question of assumption of risk, based on patent dangers known to plaintiff brakeman, submitted in another instruction given at defendant's request, cannot be sustained; the instructions not being conflicting, but to be considered in harmony with each other. A. L. Clark Lumber Co. v. Edwards, 216 S. W. 18, 144 Ark. 641. In an action for injuries to plaintiff by the fall of the roof, where it was claimed that the master had promised to remedy the defect in the roof which caused the injury, a charge that if such promise was made, and if the danger was not great and constant, and that if a reasonably prudent person would have remained in the employ and continued to pass under the roof, such promise could be deemed to have relieved plaintiff from the charge of having assumed the risk of employment, was not prejudicial because failing to state the test of negligence to be what a prudent person would have done under the same or similar circumstances; there being nothing in the charge negativing that idea, and the matter being correctly expressed in other instructions, one of which referred directly to plaintiff's contributory negligence. Cotton v. Center Coal Mining Co., 123 N. W. 381, 147 Iowa, 427. In an action for injuries to a servant from the falling of sills of a car, being repaired while the servant was repairing the floor thereunder by directions, where the undisputed evidence showed that the servant was under the general direction of the foreman, a charge that the work of taking apart and repairing cars was

done by sundry skilled mechanics and workmen in the master's employ, that all the work was done under the immediate direction of the master or its servants, and that if the master or his servants knew, or in the exercise of ordinary care ought to have known, that the injured servant was in a dangerous place, notice should have been given him, was not erroneous as placing the duty on every servant to exercise ordinary care in keeping a lookout for him, where the court specifically charged that, if the injury was caused solely or proximately by the negligence of fellow servants, there could be no recovery. Wickham v. Chicago, St. P., M. & O. Ry. Co., 124 N. W. 639, 110 Minn. 74, rehearing denied 124 N. W. 994, 110 Minn. 74. In an action for damages from an alleged nuisance, a charge that, if defendant burned shavings or sawdust from its planing mill in a place where the smoke, cinders, soot, or ashes were blown onto plaintiff's house, so as to reasonably annoy him and his family and disturb them in the peaceful use of the house, plaintiff could recover, if objectionable for uncertainty as using the words "reasonably annoy," instead of the expression "necessarily and materially annoy," was cured by a charge that if the acts complained of were such as "to occasion no unnecessary damage to plaintiff," defendant would not be liable. Junction City Lumber Co. v. Sharp, 123 S. W. 370, 92 Ark. 538. If an instruction, to the effect that persons who desire to cross a railroad track at a point where a highway crosses the same have a right to do so and are only required to use ordinary care in so doing, was too broad in that it failed to state that a railroad had priority where it had given notice of its intention to use a crossing even over a traveler who has used ordinary care, it was harmless, where the jury in a prior instruction had been fully informed as to the railroad's rights. Lake Erie & W. R. Co. v. Howarth (Ind. App.) 124 N. E. 687, rehearing denied 127 N. E. 804. Where the defense in an action for the price on a contract of sale of mining claims is that there were fraudulent representations, and the court at the outset of the general charge states that the burden of proving the fraudulent representations is with defendant, and defines what will constitute such a fraud and deceit as will relieve defendant of his obligation, instructions making no reference to fraud must be read in connection with the general charge. La Grande Inv. Co. v. Shaw, 72 P. 795, 44 Or. 416, reversed 74 P. 919, 44 Or. 416. In an automobile collision case, an instruction to find for defendant if plaintiff approached an intersecting highway above a certain speed did not erroneously preclude the jury from considering the surrounding circumstances, or whether the last clear doctrine applied, or whether plaintiff's negligence proximately caused the collision, where such matters were covered in other portions of the charge. Lawrence v. Goodwill (Cal. App.) 186 P. 781. In an action for destruction of a fish trap by a tug, an instruction as to defendant's negligence that "it is charged" "that the boat was being operated outside of and beyond the channel or course in which vessel should be operated." while insufficient, when standing alone, for omission to allege "negligently operated," the error was cured by another instruction covering negligent operation. Anderson v. Columbia Contract Co., 184 P. 240, 94 Or. 171, 7 A. L. R. 653, rehearing denied 185 P. 231, 94 Or. 171, 7 A. L. R. 653. Where a natural or artificial "stone row" had existed in the bed of the stream on land of defendant for many years, forming, as alleged, a dam which flooded plaintiff's land, it was error to instruct the jury that the "stone row" was not such an obstruction as would create a right in lapse of time; but where, in direct connection therewith, the court charged that, if the stone row did form a dam and raise the water, the question was whether the dam did not swell back the water still further upon plaintiff's land, the error was immaterial. Brown v. Bush, 45 Pa. 61.

law on a material matter, are susceptible of cure by other instructions.[21]

Under the above rule it is not necessary for the court to embody all the issues or every legal proposition applicable to the case in a single instruction, so long as the instructions as a whole do so.[22] It is not necessary that an instruction intended to subserve

[21] **U. S.** Gila Valley, G. & N. Ry. Co. v. Lyon, 27 S. Ct. 145, 203 U. S. 465, 51 L. Ed. 276, affirming judgment 80 P. 337, 9 Ariz. 218; (C. C. A. Minn.) Metropolitan Life Ins. Co. v. Hartman, 183 F. 975, 106 C. C. A. 315; (C. C. A. N. Y.) Morse v. United States, 174 F. 539, 98 C. C. A. 321, 20 Ann. Cas. 938, certiorari denied 30 S. Ct. 406, 215 U. S. 605, 54 L. Ed. 346; (C. C. A. S. C.) Charles v. United States, 213 F. 707, 130 C. C. A. 221, Ann. Cas. 1914D, 1251.

Ark. Banks v. State, 202 S. W. 43, 133 Ark. 169; Smedley v. State, 197 S. W. 275, 130 Ark. 149; Pettus & Buford v. Kerr, 112 S. W. 886, 87 Ark. 396.

Colo. Clarke v. People, 171 P. 69, 64 Colo. 164; Denver N. W. & P. Ry. Co. v. Howe, 112 P. 779, 49 Colo. 256; Petterson v. Payne, 95 P. 301, 43 Colo. 184; Edwards v. People, 59 P. 56, 26 Colo. 539.

Conn. Stevens v. Smoker, 80 A. 788, 84 Conn. 569.

Fla. Johnson v. State, 50 So. 529, 58 Fla. 68; McDuffee v. State, 46 So. 721, 55 Fla. 125.

Ill. Burt v. Garden City Sand Co., 86 N. E. 1055, 237 Ill. 473, affirming judgment 141 Ill. App. 603; Rich v. Lence, 147 Ill. App. 110; City of Rock Island v. Larkin, 136 Ill. App. 579.

Ind. T. Harper v. United States, 104 S. W. 673, 7 Ind. T. 437, judgment reversed (C. C. A. Ind. T.) 170 F. 385, 95 C. C. A. 555.

Ky. Frye's Ex'r v. Bennett, 225 S. W. 499, 189 Ky. 546; Louisville Ry. Co. v. Knocke's Adm'r, 117 S. W. 271.

Miss. Hitt v. Terry, 46 So. 829, 92 Miss. 671.

Mo. Pearman v. Farmers' Mut. Fire Ins. Co. of Charlton County, 214 S. W. 292.

Neb. Turley v. State, 104 N. W. 934, 74 Neb. 471.

N. Y. People v. Jackson, 89 N. E. 924, 196 N. Y. 357; People v. Fitzgerald, 88 N. E. 27, 195 N. Y. 153, affirming judgment 114 N. Y. S. 476, 130 App. Div. 124.

N. C. Lovelace v. Graybeal, 93 S. E. 978, 174 N. C. 503; State v. Foster, 90 S. E. 785, 172 N. C. 960.

N. D. State v. Hoff, 150 N. W. 929, 29 N. D. 412.

Okl. McDonald v. Miller, 186 P. 957, 77 Okl. 97; Missouri, K. & T. Ry. Co. v. Zuber, 184 P. 452, 76 Okl. 146, 7 A. L. R. 840; Middleton v. State, 183 P. 626, 16 Okl. Cr. 320.

S. C. State v. Davis, 31 S. E. 62, 53 S. C. 150, 69 Am. St. Rep. 845.

Tex. Bassett v. State, 204 S. W. 112, 83 Tex. Cr. R. 479; Tucker v. State (Cr. App.) 43 S. W. 106.

[22] **Cal.** Anderson v. Seropian, 81 P. 521, 147 Cal. 201.

Colo. Davis v. Shepherd, 72 P. 57, 31 Colo. 141; Ames v. Patridge, 58 P. 341, 13 Colo. App. 407; Hindry v. McPhee, 53 P. 389, 11 Colo. App. 398.

Fla. Montgomery v. Knox, 23 Fla. 595, 3 So. 211.

Ga. Standard Cotton Mills v. Cheatham, 54 S. E. 650, 125 Ga. 649; Atlanta Consol. St. Ry. Co. v. Jones, 42 S. E. 524, 116 Ga. 369; Central of Georgia Ry. Co. v. Grady, 39 S. E. 441, 113 Ga. 1045; Atlanta Ry. & Power Co. v. Walker, 38 S. E. 107, 112 Ga. 725.

Idaho. Breshears v. Callender, 131 P. 15, 23 Idaho, 348.

Ill. Mobile & O. R. Co. v. Vallowe, 73 N. E. 416, 214 Ill. 124; Catholic Order of Foresters v. Fitz, 54 N. E. 952, 181 Ill. 206, affirming judgment 81 Ill. App. 389; Chicago & E. I. Ry. Co. v. Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Toledo, P. & W. Ry. Co. v. Hammett, 115 Ill. App. 268, reversed 77 N. E. 72, 220 Ill. 9, 5 Ann. Cas. 73; Chicago & N. W. Ry. Co. v. Jamieson, 112 Ill. App.

some particular office, or to declare the law of some particular branch of the case, should have embodied in it every fact or ele-

69; Masonic Fraternity Temple Ass'n v. Collins, 110 Ill. App. 504, judgment affirmed 71 N. E. 396, 210 Ill. 482; O'Leary v. Zindt, 109 Ill. App. 309; Montgomery Coal Co. v. Barringer, 109 Ill. App. 185, reversed 75 N. E. 900, 218 Ill. 327; Springfield Consol. Ry. Co. v. Pintenney, 101 Ill. App. 95, judgment affirmed 65 N. E. 442, 200 Ill. 9; McNulta v. Jenkins, 91 Ill. App. 309.

Ind. Indianapolis Traction & Terminal Co. v. Smith, 128 N. E. 38; Same v. Howard, Id. 35; Grand Trunk Western Ry. Co. v. Poole, 93 N. E. 26, 175 Ind. 567; Pittsburgh, C., C. & St. L. Ry. Co. v. Higgs, 76 N. E. 299, 165 Ind. 694, 41 L. R. A. (N. S.) 1081; Germania Fire Ins. Co. v. Pitcher, 64 N. E. 921, 160 Ind. 392, rehearing denied 66 N. E. 1003, 160 Ind. 392; Pittsburgh, C., C. & St. L. Ry. Co. v. Noftsker, 60 N. E. 372, 26 Ind. App. 614; Maxon v. Clark, 57 N. E. 260, 24 Ind. App. 620; Bowman v. Bowman, 55 N. E. 422, 153 Ind. 498; Hamilton v. Love, 53 N. E. 181, 152 Ind. 641, 71 Am. St. Rep. 384, reversing judgment on rehearing 43 N. E. 873; Mendenhall v. Stewart, 47 N. E. 943, 18 Ind. App. 262; Lofland v. Goben, 16 Ind. App. 67, 44 N. E. 553; White v. New York, C. & St. L. R. Co., 142 Ind. 648, 42 N. E. 456; Craig v. Frazier, 127 Ind. 286, 26 N. E. 842; Cline v. Lindsey, 110 Ind. 337, 11 N. E. 441; Western Union Tel. Co. v. Buskirk, 107 Ind. 549, 8 N. E. 557; Louisville, N. A. & C. Ry. Co. v. Grantham, 104 Ind. 353, 4 N. E. 49; Wright v. Nipple, 92 Ind. 310; Wallace v. Ransdell, 90 Ind. 173.

Iowa. Witt v. Town of Latimer, 117 N. W. 680, 139 Iowa, 273; Mitchell v. Pinckney, 104 N. W. 286, 127 Iowa, 696; Stomme v. Hanford Produce Co., 78 N. W. 841, 108 Iowa, 137; De Goey v. Van Wyk, 97 Iowa, 491, 66 N. W. 787; Tobey v. Burlington, C. R. & N. Ry. Co., 94 Iowa, 256, 62 N. W. 761, 33 L. R. A. 496; Albertson v. Keokuk & D. M. R. Co., 48 Iowa, 292.

Kan. Gillies v. Linscott, 157 P. 423, 98 Kan. 78; City of Atchison v. Acheson, 57 P. 248, 9 Kan. App. 33.

Ky. Lexington & Carter Mining Co. v. Welburn, 11 Ky. Law Rep. (abstract) 307.

Minn. Fruit Dispatch Co. v. Murray, 96 N. W. 83, 90 Minn. 286; Peterson v. Chicago, M. & St. P. Ry. Co., 38 Minn. 511, 39 N. W. 485.

Miss. Clisby v. Mobile & O. R. Co., 29 So. 913, 78 Miss. 937.

Mo. Royle Mining Co. v. Fidelity & Casualty Co. of New York, 142 S. W. 438, 161 Mo. App. 185; Brown v. Globe Printing Co., 112 S. W. 462, 213 Mo. 611, 127 Am. St. Rep. 627; Weston v. Lackawanna Min. Co., 105 Mo. App. 702, 78 S. W. 1044; Mathew v. Wabash R. Co., 78 S. W. 271, 115 Mo. App. 468, affirmed Wabash R. Co. v. Mathew, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Swafford v. Spratt, 67 S. W. 701, 93 Mo. App. 631; Senn v. Southern Ry. Co., 135 Mo. 512, 36 S. W. 367; Crawford v. Doppler, 120 Mo. 362, 25 S. W. 93; Spillane v. Missouri Pac. Ry. Co., 111 Mo. 555, 20 S. W. 293; Harrington v. City of Sedalia, 98 Mo. 583, 12 S. W. 342; First Nat. Bank v. Hatch, 98 Mo. 376, 11 S. W. 739; Schroeder v. Michel, 98 Mo. 43, 11 S. W. 314; Dougherty v. Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; Parton v. McAdoo, 68 Mo. 327; Meyers v. Chicago, R. I. & P. R. Co., 59 Mo. 223; Fullerton v. St. Louis, I. M. & S. Ry. Co., 84 Mo. App 498; Schaaf v. Fries, 77 Mo. App. 346; Pray v. Union Casualty & Surety Co., 73 Mo. App. 679; Benham v. Taylor, 66 Mo. App. 308; Basye v. Kansas City, P. & G. R. Co., 65 Mo. App. 468; Shaw v. Missouri & K. Dairy Co., 56 Mo. App. 521; Fletcher v. Milburn Mfg. Co., 35 Mo. App. 321; Safety Fund Nat. Bank v. Westlake, 21 Mo. App. 565.

Mont. Allen v. Bear Creek Coal Co., 115 P. 673, 43 Mont. 269.

Neb. City of South Omaha v. Burke, 94 N. W. 528, 3 Neb. (Unof.)

ment essential to sustain the cause of action or the prosecution,[23] and the fact that a charge states, independently of each other, rules which must be considered together in applying them, is not error, if the jury are not misled thereby.[24] The court may convey one element of a rule of law in one portion of its charge, disassociated from other portions, if the other elements are in fact presented to the jury as necessary to be found by them.[25] Thus it is not necessary that all exceptions to, or modifications of, a general rule should be stated in connection with such general rule.[26] It is sufficient if

314, affirming judgment 91 N. W. 562, 3 Neb. (Unof.) 309.

N. C. Crampton v. Ivie, 32 S. E. 968, 124 N. C. 591.

Ohio. Ohio & Indiana Torpedo Co. v. Fishburn, 56 N. E. 457, 61 Ohio St. 608, 76 Am. St. Rep. 437; Price v. Coblitz, 21 Ohio Cir. Ct. R. 732, 12 O. C. D. 34.

Okl. Grant v. Milam, 95 P. 424, 20 Okl. 672.

S. C. Humphries v. Union & Glenn Springs R. Co., 65 S. E. 1051, 84 S. C. 202; Lowrimore v. Palmer Mfg. Co., 38 S. E. 430, 60 S. C. 153.

S. D. Davis v. Holy Terror Min. Co., 107 N. W. 374, 20 S. D. 399; Hedlun v. Holy Terror Min. Co., 92 N. W. 31, 16 S. D. 261.

Tex. Texas Cent. R. Co. v. Powell, 86 S. W. 21, 38 Tex. Civ. App. 157; Galveston, H. & S. A. Ry. Co. v. Renz, 59 S. W. 280, 24 Tex. Civ. App. 335; Bomar v. Powers (Civ. App.) 50 S. W. 142.

Utah. Cromeenes v. San Pedro, L. A. & S. L. R. Co., 109 P. 10, 37 Utah, 475, Ann. Cas. 1912C, 307; McCornick v. Queen of Sheba Gold Min. & Mill. Co., 63 P. 820, 23 Utah, 71.

Va. City of Richmond v. Wood, 63 S. E. 449, 109 Va. 75.

Wis. Lathers v. Wyman, 76 Wis. 616, 45 N. W. 669.

Wyo. Wallace v. Skinner, 88 P. 221, 15 Wyo. 233.

[23] Judy v. Sterrett, 38 N. E. 633, 153 Ill. 94; Thrawley v. State, 55 N. E. 95, 153 Ind. 375.

[24] **Conn.** Stevens v. Kelley, 66 Conn. 570, 34 A. 502.

Ga. McCall v. State, 99 S. E. 471, 23 Ga. App. 770; Nail v. State, 54 S. E. 145, 125 Ga. 234; Beacham v. Kennedy, 53 S. E. 589, 125 Ga. 113; Howell v. State, 52 S. E. 649, 124 Ga. 698; Rawlins v. State, 52 S. E. 1, 124 Ga. 31, judgment affirmed 26 S. Ct. 560, 201 U. S. 638, 50 L. Ed. 899, 5 Ann. Cas. 783; Tucker v. Central of Georgia Ry. Co., 50 S. E. 128, 122 Ga. 387; Jenkins v. National Union, 45 S. E. 449, 118 Ga. 587; Anderson v. State, 43 S. E. 835, 117 Ga. 255; Hayes v. State, 40 S. E. 13, 114 Ga. 25; Tucker v. State, 39 S. E. 926, 114 Ga. 61; Lucas v. State, 36 S. E. 87, 110 Ga. 756.

Ill. Gustafson v. Peterson, 203 Ill. App. 242.

Ind. Harrod v. Bisson, 93 N. E. 1093, 48 Ind. App. 549.

Iowa. Deere v. Wolf, 77 Iowa, 115, 41 N. W. 588.

Mo. Norton v. Kramer, 79 S. W. 699, 180 Mo. 536.

Neb. Stull v. Stull, 96 N. W. 196, 1 Neb. (Unof.) 380, 389.

[25] Buchman v. Jeffery, 115 N. W. 372, 135 Wis. 448.

[26] Stratton v. Central City Horse Ry. Co., 95 Ill. 25; Kelley v. School Dist. No. 71 of King County, 173 P. 333, 102 Wash. 343; State v. Dodds, 46 S. E. 228, 54 W. Va. 289.

Contra, Culbertson v. McCullom, 1 Ky. Law Rep. (abstract) 267.

Stating only general rule. An instruction may state the general rule applicable to the case, leaving the opposite party to ask for a statement of any exceptions, limitations, or qualifications that may be deemed relevant in view of the proof. Terre Haute & I. Ry. Co. v. Williams, 69 Ill. App. 392, affirmed 50 N. E. 116, 172 Ill. 379, 64 Am. St. Rep. 44.

such exceptions or qualifications are contained in the charge, and there is nothing in the charge so obscure, absurd, or contradictory as to mislead or confuse the jury.[27]

Where an instruction as far as it goes states a correct proposition of law, but is defective in failing to qualify or explain the proposition it lays down in consonance with the facts of the case, such defect is cured by subsequent instructions containing the required qualifications or exceptions,[28] and where one instruction is aimed to be explanatory of another, the two should be read and considered together.[29]

Ordinarily the omission in an instruction, which does not direct a verdict, of some element it should contain, may be supplied

[27] **U. S.** (C. C. A. Ark.) Western Coal & Mining Co. v. Ingraham, 70 F. 219, 17 C. C. A. 71.

Cal. People v. Welch, 49 Cal. 174.

Ill. Schneider v. Manning, 121 Ill. 376, 12 N. E. 267; Lodge v. Gatz, 76 Ill. 272; Durham v. Goodwin, 54 Ill. 469; Van Buskirk v. Day, 32 Ill. 260.

Ind. Brown v. Anderson, 90 Ind. 93.

Md. Lurssen v. Lloyd, 76 Md. 360, 25 A. 294.

Minn. Simpson v. Krumdick, 28 Minn. 352, 10 N. W. 18; Gates v. Manny, 14 Minn. 21 (Gil. 13).

Miss. Gordon v. Sizer, 39 Miss. 805.

Mo. Underwood v. Metropolitan St. Ry. Co., 102 S. W. 1045, 125 Mo. App. 490; Gamache v. Piquignot, 17 Mo. 310; Ostner v. Lynn, 57 Mo. App. 187.

N. Y. Hickenbottom v. Delaware, L. & W. R. Co., 122 N. Y. 91, 25 N. E. 279.

Pa. Chambers v. Bedell, 2 Watts & S. 225, 37 Am. Dec. 508.

S. C. Lynn v. Thomson, 17 S. C. 129.

Wash. Hammock v. City of Tacoma, 87 P. 924, 44 Wash. 623.

[28] **U. S.** (C. C. A. Ark.) Choctaw, O. & G. R. Co. v. Tennessee, 116 F. 23, 53 C. C. A. 497, affirmed 24 S. Ct. 99, 191 U. S. 326, 48 L. Ed. 201; (C. C. A. Mo.) Chicago, R. I. & P. Ry. Co. v. Linney, 59 F. 45, 7 C. C. A. 656; (C. C. A. Ohio) Toledo, St. L. & W. R. Co. v. Kountz, 168 F. 832, 94 C. C. A. 244.

Cal. Boin v. Spreckels Sugar Co., 102 P. 937, 155 Cal. 612.

Fla. Pensacola Electric Co. v. Bissett, 52 So. 367, 59 Fla. 360; Atlantic Coast Line R. Co. v. Dees, 48 So. 28, 56 Fla. 127; Atlantic Coast Line R. Co. v. Crosby, 43 So. 318, 53 Fla. 400.

Ga. Bagwell v. Milam, 71 S. E. 684, 9 Ga. App. 315.

Ill. Van Cleef v. City of Chicago, 88 N. E. 815, 240 Ill. 318, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275; Cleveland, C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328, 36 N. E. 965; Lake Erie & W. R. Co. v. Morain, 140 Ill. 117, 29 N. E. 869, affirming 36 Ill. App. 632; Chicago, M. & St. P. Ry. Co. v. Halsey, 31 Ill. App. 601; Tomle v. Hampton, 28 Ill. App. 142, affirmed 129 Ill. 379, 21 N. E. 800.

Iowa. Roney v. City of Des Moines, 130 N. W. 396, 150 Iowa, 447; Knott v. Dubuque & S. C. Ry. Co., 84 Iowa, 462, 51 N. W. 57.

Mich. Brogetski v. Detroit United Ry., 131 N. W. 810, 166 Mich. 91.

Miss. Yazoo & M. V. R. Co. v. Kelly, 53 So. 779, 98 Miss. 367.

Mo. Neale v. McKinstry, 7 Mo. 128.

S. C. Dover v. Lockhart Mills, 68 S. E. 525, 86 S. C. 229; Lamb v. Southern Ry. Co., 67 S. E. 958, 86 S. C. 106, 138 Am. St. Rep. 1030.

Wash. Caldwell v. Northern Pac. Ry. Co., 113 P. 1099, 62 Wash. 420; Edwards v. Seattle, R. & S. Ry. Co., 113 P. 563, 62 Wash. 77.

[29] Lake Erie & W. R. Co. v. Douglas (Ind. App.) 125 N. E. 474.

by other instructions which fully cover the omitted element.[30] The omission of certain matters, however, when taken in connection with emphasis placed upon other matters may be of such a character as to be likely to mislead the jury, although such omission is supplied by other instructions, and in such a case it will constitute ground for reversal.[31]

Special charges given at the request of either party are to be construed with the rest of the charge under the above rule,[32] and it is not error to give an instruction at the request of a party submitting his theory of the case only, if the instructions given on behalf of his adversary cover every aspect of his case,[33] and the

[30] **Ark.** A. L. Clark Lumber Co. v. Johns, 135 S. W. 892, 98 Ark. 211.

Cal. Stein v. United Railroads of San Francisco, 113 P. 663, 159 Cal. 368; Winslow v. Glendale Light & Power Co., 107 P. 1020, 12 Cal. App. 530.

Ga. Southern Ry. Co. v. Dean, 57 S. E. 702, 128 Ga. 366.

Ill. Moore v. Aurora, E. & C. R. Co., 92 N. E. 573, 246 Ill. 56; Suehr v. Sanitary Dist. of Chicago, 90 N. E. 197, 242 Ill. 496; East St. Louis & S. Ry. Co. v. Zink, 82 N. E. 283, 229 Ill. 180; Illinois Cent. R. Co. v. Hopkins, 65 N. E. 656, 200 Ill. 122, affirming judgment 100 Ill. App. 594; Donk Bros. Coal & Coke Co. v. Peton, 61 N. E. 330, 192 Ill. 41, affirming judgment 95 Ill. App. 193; Chicago & A. R. Co. v. Johnson, 116 Ill. 206, 4 N. E. 381; Hackett v. Harmon, 155 Ill. App. 55; Dukeman v. Cleveland, C., C. & St. L. Ry. Co., 142 Ill. App. 622, judgment affirmed 86 N. E. 712, 237 Ill. 104; Southern Ry. Co. v. Cullen, 122 Ill. App. 293, judgment affirmed 77 N. E. 470, 221 Ill. 392; City of Highland Park v. Gerkin, 122 Ill. App. 149; Elgin, A. & S. Traction Co. v. Wilson, 120 Ill. App. 371, judgment affirmed 75 N. E. 436, 217 Ill. 47.

Ind. Chicago & E. R. Co. v. Kiracofe, 95 N. E. 1117, 48 Ind. App. 407; New v. Jackson, 95 N. E. 328, 50 Ind. App. 120; South Bend Brick Co. v. Goller, 93 N. E. 37, 46 Ind. App. 531; Pittsburgh, C., C. & St. L. Ry. Co. v. Wood, 84 N. E. 1009, 45 Ind. App. 1.

Ind. T. Waples-Painter Co. v. Bank of Commerce, 97 S. W. 1025, 6 Ind. T. 326.

Kan. Lillard v. Chicago, R. I. & P. Ry. Co., 98 P. 213, 79 Kan. 25.

Mich. Joslin v. Le Baron, 6 N. W. 214, 44 Mich. 160.

Mo. Asbill v. City of Joplin, 124 S. W. 22, 140 Mo. App. 259; Gibler v. Terminal R. Ass'n of St. Louis, 101 S. W. 37, 203 Mo. 208, 11 Ann. Cas. 1194; Deschner v. St. Louis & M. R. R. Co., 98 S. W. 737, 200 Mo. 310.

Neb. Cornelius v. City Water Co., 120 N. W. 944, 84 Neb. 130; In re Wilson's Estate, 111 N. W. 788, 78 Neb. 758.

S. C. Dempsey v. Western Union Telegraph Co., 58 S. E. 9, 77 S. C. 399.

Tex. Houston & T. C. R. Co. v. Mayfield, 124 S. W. 141, 58 Tex. Civ. App. 52; Texas & N. O. R. Co. v. Plummer, 122 S. W. 942, 57 Tex. Civ. App. 563; St. Louis Southwestern Ry. Co. of Texas v. Hawkins, 108 S. W. 736, 49 Tex. Civ. App. 545; Chicago, R. I. & P. Ry. Co. v. Burns (Civ. App.) 104 S. W. 1081, affirmed 107 S. W. 49, 101 Tex. 329.

Va. Marbury v. Jones, 71 S. E. 1124, 112 Va. 389.

[31] Washington, B. & A. R. Co. v. State, 111 A. 164, 136 Md. 103.

[32] Galveston, H. & S. A. Ry. Co. v. Berry (Tex. Civ. App.) 105 S. W. 1019.

An improper qualification by the court of a requested charge is no ground of reversal, if the benefit of the rule of law claimed in such request is secured to the party making it by another instruction. Metcalf v. Little Rock St. Ry. Co. (Ark.) 13 S. W. 729; Lamar v. Williams, 39 Miss. 342.

[33] Meadows v. Pacific Mut. Life Ins.

jury are told that the instructions given are those of the court and must all be read together.[34]

§ 535. Specific instances of defects, omissions, or objectionable matters cured by other instructions

In many jurisdictions the fact that an instruction authorizing a recovery for negligence omits to require the jury to find that the injured person was not guilty of contributory negligence is not error, if the latter question is properly submitted in other instructions.[35] So error in instructions in negligence cases in failing to limit the liability of the defendant to the duty to use ordinary or reasonable care,[36] or in omitting the element of proximate cause,[37] may disappear when the other instructions are considered.

The above rule has been applied to objections to instructions upon contributory negligence,[38] to instructions bearing on the cred-

Co. of California, 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; State ex rel. Robertson v. Hope, 102 Mo. 410, 14 S. W. 985.

[34] City of Danville v. Thornton, 66 S. E. 839, 110 Va. 541.

[35] **Cal.** Stephenson v. Southern Pac. Co., 102 Cal. 143, 36 P. 407, affirming 102 Cal. 143, 34 P. 618.

Ind. Morgantown Mfg. Co. v. Hicks, 92 N. E. 199, 46 Ind. App. 623.

Iowa. Larkin v. Burlington, C. R. & N. Ry. Co., 85 Iowa, 492, 52 N. W. 480.

Minn. Holm v. Village of Carver, 55 Minn. 199, 56 N. W. 826.

Mo. Johnston v. St. Louis & S. F. R. Co., 130 S. W. 413, 150 Mo. App. 304; Shanahan v. St. Louis Transit Co., 83 S. W. 783, 109 Mo. App. 228; Hughes v. Chicago & A. R. Co., 127 Mo. 447, 30 S. W. 127; Dougherty v. Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251.

Neb. Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724.

Tex. Galveston, H. & S. A. Ry. Co. v. Grant, 124 S. W. 145, 58 Tex. Civ. App. 181; Shippers' Compress & Warehouse Co. v. Davidson, 80 S. W. 1032, 35 Tex. Civ. App. 558; Galveston, H. & S. A. Ry. Co. v. Matula, 79 Tex. 577, 15 S. W. 573.

Utah. Olson v. Oregon Short Line R. Co., 68 P. 148, 24 Utah, 460.

Wash. Morrison v. Seattle Electric Co., 115 P. 1076, 63 Wash. 531.

[36] **U. S.** (C. C. A. Mo.) Chicago, R. I. & P. Ry. Co. v. Linney, 59 F. 45, 7 C. C. A. 656.

Cal. Sappenfield v. Main St. & A. P. R. Co., 91 Cal. 48, 27 P. 590.

Ga. East Tennessee, V. & G. Ry. Co. v. Daniel, 91 Ga. 768, 18 S. E. 22.

Ill. City of Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748.

Ind. Pennsylvania Co. v. Ebaugh, 144 Ind. 687, 43 N. E. 936; Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430, 32 N. E. 85, affirming 132 Ind. 430, 31 N. E. 661.

Iowa. Brooke v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 504, 47 N. W. 74

Tex. Texas & P. Ry. Co. v. Nix (Civ. App.) 23 S. W. 328; Galveston, H. & S. A. Ry. Co. v. Davis, 4 Tex. Civ. App. 468, 23 S. W. 301.

[37] Cleveland, C., C. & St. L. Ry. Co. v. Monaghan, 140 Ill. 474, 30 N. E. 869, affirmed 41 Ill. App. 498; Spickelmeir v. Hartman (Ind. App.) 123 N. E. 232; Jones v. Chicago & A. R. Co., 28 Mo. App. 28; Holt v. School Dist. No. 71 of King County, 173 P. 335, 101 Wash. 442.

[38] Boa v. San Francisco-Oakland Terminal Rys., 187 P. 2, 182 Cal. 93; Williams v. Mt. Vernon Car Mfg. Co., 211 Ill. App. 68; Rasten v. Calderwood, 175 N. W. 1007, 145 Minn. 493; Hulse v. St. Joseph Ry. Co. (Mo. App.) 214 S. W. 150; Bullock v. Yakima Valley Transp. Co., 184 P. 641, 108 Wash. 413.

ibility of witnesses,[39] to instructions on the burden of proof or amount of evidence required to find a fact in issue,[40] to instructions upon the measure of damages or the amount of recovery,[41]

[39] Griffin v. State, 216 S. W. 34, 141 Ark. 43; St. Louis Southwestern Ry. Co. v. Johnson, 59 Ark. 122, 26 S. W. 593; Morehouse v. Remson, 59 Conn. 392, 22 A. 427; Roberts v. Morrison, 75 Iowa, 321, 39 N. W. 519; State v. Keys, 53 Kan. 674, 37 P. 167.

Illustrations of errors not cured by other instructions. Error in instructing that where two witnesses directly contradict each other the evidence is balanced unless one is corroborated, was not rendered harmless by a subsequent instruction that two witnesses did not necessarily outweigh one, and that the jury should consider all the circumstances surrounding each witness in determining his credibility. Sickle v. Wolf, 91 Wis. 396, 64 N. W. 1028. An instruction that the jury should consider "the character of the witness, so far as you know it, as bearing upon the question whether a witness would be truthful and reliable, or not. My observation is that pretty good persons sometimes lie, and that pretty bad persons sometimes tell the truth"—is erroneous, and is not cured by another instruction that nothing is to be found "by conjecture," but that the verdict "must be based upon evidence," and facts inferable from the proofs. Johnson v. Superior Rapid Transit Ry. Co., 91 Wis. 233, 64 N. W. 753.

[40] **U. S.** Ætna Life Ins. Co. v. Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371.

Ala. Montgomery v. Crossthwait, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832.

Cal. Foley v. Hornung, 169 P. 705, 35 Cal. App. 304; Beckman v. McKay, 14 Cal. 250.

Conn. Appeal of City Bank of New Haven, 54 Conn. 269, 7 A. 548.

Ga. Postal Telegraph Cable Co. v. Douglass, 96 Ga. 816, 22 S. E. 930.

Ill. Holliday v. O'Gara Coal Co., 203 Ill. App. 89; Smiley v. Barnes, 196 Ill. App. 530; Hinchliff v. Robinson, 118 Ill. App. 450.

Neb. Nye-Schneider-Fowler Co. v. Chicago & N. W. Ry. Co., 179 N. W. 503.

Illustrations of objections cured. A charge that, to sustain a plea of truth in justification of slanderous language, defendant must prove the plaintiff "actually" guilty, while standing alone, was objectionable in that the word "actually" placed too heavy a burden on defendant, yet when taken in connection with other charges, that it was only necessary to sustain the plea by a preponderance of the evidence, was not error. Gilstrap v. Leith, 102 S. E. 169, 24 Ga. App. 720. In an action for death in an accident to which there were no eyewitnesses, an instruction that the law "presumes" that deceased was exercising due care was not objectionable as shifting on defendant the burden of proof as to contributory negligence, where the court subsequently and repeatedly charged that the burden was at all times on plaintiff to prove that decedent exercised ordinary care, in view of the fact that the word "presumption" is frequently used as the equivalent and synonym of the word "inference." Anderson v. Chicago, R. I. & P. Ry. Co. (Iowa) 175 N. W. 583.

[41] **U. S.** Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 14 S. Ct. 579, 38 L. Ed. 422.

Ga. City of Atlanta v. Whitley, 101 S. E. 2, 24 Ga. App. 411.

Ill. McFarlane v. Chicago City Ry. Co., 123 N. E. 638, 288 Ill. 476, affirming judgment 212 Ill. App. 664; Malott v. Crow, 90 Ill. App. 628.

Ind. Otter Creek Coal Co. v. Archer, 115 N. E. 952, 64 Ind. App. 381.

Iowa. Flanagan v. Baltimore & O. R. Co., 83 Iowa, 639, 50 N. W. 60; Davis v. Walter, 70 Iowa, 465, 30 N. W. 804.

Mich. Neely v. Detroit Sugar Co., 101 N. W. 664, 138 Mich. 469.

Mo. Wojciechowski v. Coryell (App.) 217 S. W. 638; Buck v. People's St. Ry. & Electric Light & Power Co., 108 Mo. 179, 18 S. W. 1090; Hulett v. Missouri, K. & T. Ry. Co., 80 Mo.

that an instruction does not confine the jury to the evidence in assessing the damages,[42] to instructions given in connection with the submission of special interrogatories,[43] to objections that instructions given are not applicable to the facts,[44] that the court misstated the evidence or the testimony of a witness,[45] that a mistake was made in giving a date,[46] to the use of the word "plaintiff," instead of "defendant," or vice versa,[47] that instructions are argumentative,[48] that they devolve upon the jury the duty of determining what the issues in the case are, or of deciding what the material allegations of the pleadings are,[49] that they refer the jury to the pleadings to determine their contents or the issue,[50] that they use inappropriate phrases or contain improper definitions or fail

App. 87; Price v. Barnard, 70 Mo. App. 175.

Or. Farmers' & Traders' Nat. Bank v. Woodell, 61 P. 837, 38 Or. 294, affirmed 65 P. 520, 38 Or. 294.

Use of words suggesting bare possibility instead of reasonable certainty. In an action for malpractice, an instruction on the question of reasonable certainty of future operations and suffering, while the use of the word "may" might give the jury the meaning of "bare possibility," instead of "reasonable certainty," yet where the instruction refers to such suffering as the jury "believes she will in the future endure," the word "may" was not likely to mislead, and must be considered as harmless, and not warranting reversal. Krinard v. Westerman, 216 S. W. 938, 279 Mo. 680.

[42] Indianapolis Traction & Terminal Co. v. Thornburg (Ind. App.) 125 N. E. 57; Terre Haute, I. & E. Traction Co. v. Stevenson (Ind.) 123 N. E. 785, rehearing denied 126 N. E. 3; Indianapolis Traction & Terminal Co. v. Beckman, 81 N. E. 82, 40 Ind. App. 100.

[43] McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Chopin v. Badger Paper Co., 83 Wis. 192, 53 N. W. 452.

[44] **U. S.** (C. C. A. Tex.) Texas & P. Ry. Co., v. Nolan, 62 F. 552, 11 C. C. A. 202.

Ark. McNeill v. Arnold, 22 Ark. 477.

Fla. Keech v. Enriquez, 28 Fla. 597, 10 So. 91.

Ill. North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958.

Ind. Evansville & I. R. Co. v. Darting, 6 Ind. App. 375, 33 N. E. 636.

Kan. Burns v. Clark, 185 P. 27, 105 Kan. 454.

Mo. Tillery v. Harvey (App.) 214 S. W. 246; Taylor v. Scherpe & Koken Architectural Iron Co., 133 Mo. 349, 34 S. W. 581.

Tex. Gulf, C. & S. F. Ry. Co. v. Kelly (Civ. App.) 34 S. W. 140.

Vt. Bragg v. Laraway, 65 Vt. 673, 27 A. 492.

[45] Foote v. Brown, 70 A. 699, 81 Conn. 218; Wally v. Clark, 106 A. 542, 263 Pa. 322; Stremme v. Dyer, 72 A. 274, 223 Pa. 7; Senft v. McIlvain, 43 Pa. Super. Ct. 518.

[46] Wilson v. Chicago Heights Terminal Transfer R. Co., 212 Ill. App. 271.

[47] Central of Georgia Ry. Co. v. Hartley (Ga. App.) 103 S. E. 259; Manes v. St. Louis, San Francisco Ry. Co., 220 S. W. 14, 205 Mo. App. 300.

[48] McCormick v. Parriott, 80 P. 1044, 33 Colo. 382.

[49] Stringham v. Parker, 159 Ill. 304, 42 N. E. 794, affirming Stringam v. Same, 56 Ill. App. 36; Boynton v. Chicago City Ry. Co., 155 Ill. App. 448; Robertson v. Monroe, 7 Ind. App. 470, 33 N. E. 1002; Hatfield v. Chicago, R. I. & P. Ry. Co., 61 Iowa, 434, 16 N. W. 336.

[50] Probert v. Anderson, 77 Iowa, 60, 41 N. W. 574; Southern Ry. Co. v. Ganong, 55 So. 355, 99 Miss. 540; Missouri, K. & T. Ry. Co. of Texas v. Aycock (Tex. Civ. App.) 135 S. W. 198.

to define certain terms,[51] and that they apparently leave to the jury a question of law.[52]

In criminal cases the above rule has been applied to objections to sufficiency of instructions on the elements of the offense charged,[53] on the question of the intent of the defendant,[54] on self-defense,[55] on question of defense of insanity or intoxication,[56] to instructions on the issue of the defense of alibi,[57] to instructions criticized as suggesting the interest of defendant on the question of his credibility,[58] to instructions on accomplice testimony,[59] to instructions on inferences arising from flight and concealment,[60] to instructions bearing on the burden of proof,[61] to instructions on the right to convict on circumstantial evidence,[62] on the character

[51] **U. S.** (C. C. A. N. Y.) Texas & P. Ry. Co. v. Coutourie, 135 F. 465, 68 C. C. A. 177.

Colo. Doherty v. Morris, 17 Colo. 105, 28 P. 85.

Ga. Holland v. Durham Coal & Coke Co., 63 S. E. 290, 131 Ga. 715.

Iowa. Collier v. McClintic-Marshall Const. Co., 138 N. W. 522, 157 Iowa, 244; Webber v. Sullivan, 58 Iowa, 260, 12 N. W. 319.

Mich. Smith v. Detroit United Ry., 119 N. W. 640, 155 Mich. 466.

Minn. Witaker v. Chicago, St. P., M. & O. Ry. Co., 131 N. W. 1061, 115 Minn. 140.

Mo. Wamsganz v. Blanke-Wenneker Candy Co. (App.) 216 S. W. 1025; Bond v. Williams (Sup.) 214 S. W. 202; Muehlhausen v. St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Waller v. Missouri, K. & T. Ry. Co., 59 Mo. App. 410.

Tex. Magnolia Motor Sales Corp. v. Chaffee (Civ. App.) 192 S. W. 562; Friedrich v. Geisler (Civ. App.) 141 S. W. 1079; Fordyce v. Chancy, 2 Tex. Civ. App. 24, 21 S. W. 181.

Utah. Downey v. Gemini Min. Co., 68 P. 414, 24 Utah, 431, 91 Am. St. Rep. 798.

[52] Seaboard Air Line Ry. v. Scarborough, 42 So. 706, 52 Fla. 425.

[53] Ayers v. State, 178 P. 782, 20 Ariz. 189; Zinn v. State, 205 S. W. 704, 135 Ark. 342; People v. Wademan, 175 P. 791, 38 Cal. App. 116.

[54] People v. McKeighan, 171 N. W. 500, 205 Mich. 367; State v. Reagan, 217 S. W. 83, 280 Mo. 57.

[55] **Ark.** Mallory v. State, 217 S. W. 482, 141 Ark. 496; Hines v. State, 215 S. W. 735, 140 Ark. 13; Branscum v. State, 203 S. W. 13, 134 Ark. 66.

Cal. People v. Fowler, 174 P. 892, 178 Cal. 657.

Ga. White v. State, 94 S. E. 222, 147 Ga. 377; Swilling v. State, 90 S. E. 78, 18 Ga. App. 618; Cox v. State, 88 S. E. 214, 17 Ga. App. 727.

Ky. Copley v. Commonwealth, 211 S. W. 558, 184 Ky. 185.

S. C. State v. Brown, 101 S. E. 847, 113 S. C. 513; State v. Gandy, 101 S. E. 644, 113 S. C. 147.

Tex. Anderson v. State, 217 S. W. 390, 86 Tex. Cr. R. 207; Swilley v. State, 166 S. W. 733, 73 Tex. Cr. R. 619; Young v. State, 135 S. W. 127, 61 Tex. Cr. R. 303.

[56] Brown v. State, 96 S. E. 435, 148 Ga. 264.

[57] McDonald v. State, 94 S. E. 262, 21 Ga. App. 125; Horton v. State, 93 S. E. 1012, 21 Ga. App. 120.

[58] Murphy v. State, 80 So. 636, 119 Miss. 220.

[59] Lockhead v. State, 213 S. W. 653, 85 Tex. Cr. R. 459.

[60] State v. Ching Lem, 176 P. 590, 91 Or. 611.

[61] State v. Tachin, 108 A. 318, 93 N. J. Law, 485, affirming judgment 106 A. 145, 92 N. J. Law, 269; Lagrone v. State, 209 S. W. 411, 84 Tex. Cr. R. 609.

[62] State v. Arnett (Mo.) 210 S. W. 82.

of the defendant,[63] and on the doctrine of reasonable doubt,[64] to

[63] Commonwealth v. Tenbroeck, 108 A. 635, 265 Pa. 251; Commonwealth v. Stoner, 108 A. 624, 265 Pa. 139.

Illustrations of instructions held not erroneous. Where the court correctly and properly charges as to the consideration to be given evidence of good character, it cannot be convicted of error in further charging as follows: "This does not mean that because a man has behaved well in a certain particular heretofore, and has there and then ceased to behave well and has in fact committed the crime charged, it does not mean that, if he is guilty, he shall be acquitted or have any benefit of the fact that he has heretofore behaved well, but it does mean that in determining whether you are satisfied beyond a reasonable doubt that he is guilty, that he did commit the act, you shall give him the benefit of a full and fair consideration of the evidence of good reputation in connection with all the other evidence in the case." Commonwealth v. Stoner, 70 Pa. Super. Ct. 365. Where the trial judge fully and accurately instructs as to the effect of good character as a defense, it is not error to add, "but where the jury is satisfied beyond a reasonable doubt under all the evidence that defendant is guilty, evidence of previous good character is not to overcome the conclusion which follows from that view of the case." Commonwealth v. Tenbroeck, 108 A. 635, 265 Pa. 251.

[64] **Ala.** Brown v. State, 74 So. 733, 15 Ala. App. 611.

Cal. People v. Hatch, 125 P. 907, 163 Cal. 368; People v. Corey, 97 P. 907, 8 Cal. App. 720; People v. Nunley, 75 P. 676, 142 Cal. 105; Id., 76 P. 45, 142 Cal. 441; People v. Gilmore, 53 P. 806, 121 Cal. xvii; People v. Ross, 46 P. 1059, 115 Cal. 233; People v. Core, 59 Cal. 390.

Conn. State v. Bailey, 65 A. 951, 79 Conn. 589.

Ga. Langston v. State, 97 S. E. 444, 23 Ga. App. 82; Harrison v. State, 92 S. E. 970, 20 Ga. App. 157; Brooks v. State, 90 S. E. 971, 19 Ga. App. 45; Ponder v. State, 90 S. E. 376, 18 Ga. App. 727; Helms v. State, 76 S. E. 353, 138 Ga. 826; Dickens v. State, 73 S. E. 826, 137 Ga. 523.

Ind. Hinshaw v. State, 124 N. E. 458, 188 Ind. 447; Sherer v. State, 121 N. E. 369, 188 Ind. 14.

Iowa. State v. Smith, 99 N. W. 579; State v. Phillips, 92 N. W. 876, 118 Iowa, 660.

Kan. State v. Adams, 20 Kan. 311.

Ky. Daniels v. Commonwealth, 205 S. W. 402, 181 Ky. 392; Long v. Commonwealth, 197 S. W. 843, 177 Ky. 391; O'Day v. Commonwealth, 99 S. W. 937, 30 Ky. Law Rep. 848.

Mich. People v. Williams, 175 N. W. 187, 208 Mich. 586.

Mo. State v. Miles, 98 S. W. 25, 199 Mo. 530.

N. J. State v. Kuehnle, 88 A. 1085, 85 N. J. Law, 220, Ann. Cas. 1916A, 69, affirming judgment 85 A. 1014, 84 N. J. Law, 164.

N. M. Territory v. Caldwell, 98 P. 167, 14 N. M. 535; Faulkner v. Territory, 6 N. M. 464, 30 P. 905.

N. C. State v. Fain, 97 S. E. 716, 177 N. C. 120; State v. Martin, 92 S. E. 597, 173 N. C. 808.

Or. State v. Morris, 163 P. 567, 83 Or. 429.

Pa. Commonwealth v. Rusic, 79 A. 140, 229 Pa. 587.

Tex. Graham v. State, 163 S. W. 726, 73 Tex. Cr. R. 28; Harrolson v. State, 113 S. W. 544, 54 Tex. Cr. R. 452; Stephens v. State, 103 S. W. 904, 51 Tex. Cr. R. 406.

Utah. State v. Vacos, 120 P. 497, 40 Utah, 169.

Wash. State v. Lance, 162 P. 574, 94 Wash. 484; State v. Shea, 139 P. 203, 78 Wash. 342; State v. Wappenstein, 121 P. 989, 67 Wash. 502.

Wis. Till v. State, 111 N. W. 1109, 132 Wis. 242.

Illustrations of defects cured. In a prosecution of a physician for soliciting patients by means of a drummer or solicitor, an instruction that it was not necessary to prove accused guilty by the testimony of witnesses who heard him employ a drummer or solicitor to solicit patients for him, but that such guilt might be established by proof of facts and cir-

instructions criticized as not confining the jury to the evidence,[65]

cumstances from which his guilt might reasonably and satisfactorily be implied beyond a reasonable doubt, while not in apt language, was not misleading when taken in connection with instructions that accused was presumed to be innocent, that the presumption obtained through the trial, and that he was not required to produce evidence of his innocence until every allegation material to the crime charged had been proved beyond a reasonable doubt, and that, before he could be convicted on circumstantial evidence, the testimony should be so strong as to convince the jury of his guilt to such an extent as to exclude every other reasonable hypothesis, and that, if the evidence in any essential point admitted of reasonable doubt, accused should be acquitted. Burrow v. City of Hot Springs, 108 S. W. 823, 85 Ark. 396. An instruction that the term "reasonable doubt" does not mean a "mere possible doubt, a conjectural doubt," nor "a doubt which is merely capricious," when read in connection with a preceding instruction that a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that defendant committed the offense, was entirely correct. People v. Botkin, 98 P. 861, 9 Cal. App. 244. Where the court had charged that the law presumed every man to be innocent until his guilt was established beyond all doubt, which presumption attaches at every stage of the case and to every fact essential to a conviction, and, again, that if the jury entertained any reasonable doubt on any single fact or element necessary to constitute the crime it was their duty to give the defendant the benefit of such doubt, and acquit, defendant was not entitled to object to a further instruction that if the jury entertained a reasonable doubt on any single material fact, which was inconsistent with defendant's guilt, arising from the evidence in the case, it was their duty to acquit, on the ground that such instruction dealt only with facts inconsistent with guilt. People v. Waysman, 81 P. 1087, 1 Cal. App. 246. Where the court charged that the law presumes every man innocent until his guilt is established to a moral certainty, and beyond all reasonable doubt, and that such presumption attaches to every fact essential to a conviction, an instruction that, while every fact essential to prove defendant's guilt to a moral certainty must be fully proven, the law permits this to be done by circumstantial evidence, and where the evidence is circumstantial, but proves every fact essential to sustain the hypothesis of guilt, and to exclude the hypothesis of innocence, and is inconsistent with any other rational conclusion than that of guilt, it is the jury's duty to convict, was not erroneous. People v. Cain, 93 P. 1037, 7 Cal. App. 163. An instruction that an alibi meant that a defendant was elsewhere at the time of the crime, and that if there was a reasonable doubt as to whether the two defendants were present the jury should acquit them, but, if one of defendants was present and the other not, the defendant not present should be acquitted and the one present should be convicted, was not erroneous for failing to state the law of reasonable doubt, burden of proof, and the various ingredients of the offense, stated in other instructions, the court having charged that no one instruction contained all the law, but that the instructions taken together should govern the jury. Van Wyk v. People, 99 P. 1009, 45 Colo. 1. Where, in a trial for homicide, the question of reasonable doubt was fully presented to the jury, an instruction that, if defendant inflicted the wound on deceased which caused, or contributed to, his death, the state would not be required to show that neither the deceased, nor any one in attendance on him, was guilty of negligence in the care of the wound was not objection-

[65] People v. Silver, 122 N. E. 115, 286 Ill. 496.

to the omission of particular words, such as "as charged in the

able as failing to tell the jury that they must find from the testimony, beyond a reasonable doubt, that defendant inflicted the wound. State v. Baker, 121 N. W. 1028, 143 Iowa, 224. A conviction of larceny will not be reversed because the court, in referring to defendant's story, instructed the jury to consider from all the facts whether the defense was probably true, where they were also told that defendant is not required to prove his innocence, and that if, after consideration of all the evidence, there was any reasonable doubt of guilt, he must be acquitted. State v. Wolfley, 89 P. 1046, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412, rehearing denied 93 P. 337, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412. The jury having been instructed that, if on the whole case they had a reasonable doubt of defendant's guilt, they should find him not guilty, they could not find him guilty unless they believed the facts therein set forth beyond a reasonable doubt under an instruction that if at the time defendant killed decedent he believed, and had reasonable grounds to believe, that he was in danger of death or great bodily harm, and that it was necessary to kill decedent, then defendant was not guilty on the ground of self-defense, but if the jury believed beyond a reasonable doubt that defendant when not in danger began the difficulty, or if the combat was voluntarily engaged in by both, then in each event defendant could not be acquitted. Kennedy v. Commonwealth, 109 S. W. 313, 33 Ky. Law Rep. 83. A charge that suspicious circumstances may come to the point where the jury is satisfied of the existence of a fact, and it may be they would go so far as to satisfy the jury beyond a reasonable doubt of some of the facts claimed to have been proved by such evidence, is not erroneous, particularly where taken with other parts of the charge stating that to prove the existence of a fact by circumstances they must be such as will lead the jury to but one conclusion; that is, proof of the fact beyond a reasonable doubt. State v. Ready, 72 A. 445, 77 N. J. Law, 329, judgment reversed 75 A. 564, 78 N. J. Law, 599, 28 L. R. A. (N. S.) 240. An instruction that, when the plea of self-defense is relied on, it must be proved by a preponderance of evidence, is not erroneous, because it was not added that defendant was entitled to every reasonable doubt, where such instruction is afterwards given. State v. Way, 56 S. E. 653, 76 S. C. 91. Where, in a prosecution for homicide, where the trial court repeatedly charged that defendant must show by the weight of the evidence that he acted in self-defense, and that, if there was a doubt as to the preponderance of the evidence on that issue, it should be resolved in favor of defendant, and in one part of the instruction charged that "the law holds one who admits the killing of another to a very strict account, and it requires of him very satisfactory evidence that it was necessary, that is, apparently necessary," it was held that the language could only be understood to mean that accused must show that amount of evidence which would overbalance the state's showing that it was not self-defense, or raise a doubt in accused's favor, and that the instruction was not erroneous. State v. Hibler, 60 S. E. 438, 79 S. C. 170. An instruction that if the jury believed beyond reasonable doubt that accused intentionally and unlawfully killed decedent, and found that the facts did not establish express malice beyond reasonable doubt, and that the facts established beyond reasonable doubt that the homicide was not of the grade of manslaughter and was not justified on the ground of self-defense, as manslaughter and self-defense were thereinafter defined, then the facts did not tend to mitigate or justify the act, and there was nothing to reduce the killing below murder, "as these expressions are used in the above charge on murder in the second degree, and you may find implied malice and that the offense is murder in the second degree," was not erroneous, as infringing the doctrine of reasonable doubt, when con-

indictment,"[66] to the omission of the word "express" before "malice,"[67] to the omission to define "adequate cause,"[68] to the failure to define "heat of passion,"[69] and to the cure of an improper reference to the indictment.[70]

An error in a charge for the state on a particular matter, which is merely calculated to mislead or confuse the jury, is cured by full instructions on the subject given for the defendant.[71] It is not necessary for each instruction in a series given in a homicide case to contain the whole law of the case, or to call the attention of the jury to all the contentions of the respective parties; but it is sufficient if the instructions, considered as a whole, fully and fairly announce the rules of law applicable to the prosecution and the defense,[72] and an instruction, misleading as charging that the plea of insanity must be proven beyond a reasonable doubt, is cured by a further instruction that, if the jury have a reasonable doubt as to any fact necessary to constitute the guilt of defendant, they must acquit.[73]

§ 536. Objection that instructions invade province of jury

In determining whether instructions trench upon the province of the jury by commenting upon the evidence, or expressing an opinion upon the weight thereof, or impairing the right of the jury to determine the credibility of the witnesses,[74] or by the assump-

sidered with other instructions distinguishing murder in the first and second degrees, defining implied malice and manslaughter, and giving accused the benefit of any doubt as to the grade of the offense committed. Dobbs v. State, 113 S. W. 923, 54 Tex. Cr. R. 550. Where the court charged that if accused killed deceased, but at the time or prior thereto, deceased had said or done anything which aroused accused's anger, etc., so as to render his mind incapable of cool reflection when he killed deceased, the jury should find him guilty of manslaughter, but in another charge stated that if they had a reasonable doubt as to whether accused was guilty of first or second degree murder, they should acquit him of the higher offense, and if they believed that accused was guilty of some grade of culpable homicide, but had a reasonable doubt whether it was murder or manslaughter, they should only find him guilty of the latter offense, it was held that the charge as a whole was correct, and was not erroneous because the first part of it did not include the element of reasonable doubt. Mitchell v. State, 114 S. W. 830, 55 Tex. Cr. R. 62.

[66] Uzzell v. People, 173 Ill. App. 257.

[67] Johnson v. State, 138 S. W. 1021, 63 Tex. Cr. R. 50.

[68] Hendricks v. State, 154 S. W. 1005, 69 Tex. Cr. R. 209.

[69] State v. Fox, 207 S. W. 779, 276 Mo. 378.

[70] State v. McLaughlin, 50 S. W. 315, 149 Mo. 19.

[71] Kennard v. State, 28 So. 858, 42 Fla. 581: State v. Steffens, 89 N. W. 974, 116 Iowa, 227; State v. Lackey, 82 P. 527, 72 Kan. 95; Rodgers v. State (Miss.) 21 So. 130.

[72] People v. Strause, 125 N. E. 339, 290 Ill. 259.

[73] Smith v. Commonwealth, 17 S. W. 868, 13 Ky. Law Rep. 612.

[74] U. S. (C. C. A. Ohio) Shea v.

tion of disputed facts,[75] the general rule is that the instructions should be considered as a whole, and that any merely misleading tendencies of one instruction in this regard may be cured by other instructions.

If, however, an instruction clearly and unequivocally invades the province of the jury with respect to any matters of fact, the rule supported by the weight of authority is that such an erroneous instruction cannot be cured by other instructions submitting such questions of fact to the determination of the jury,[76] or by

United States, 251 F. 440, 163 C. C. A. 458, writ of certiorari denied 39 S. Ct. 132, 248 U. S. 581, 63 L. Ed. 431.

Ark. Camp v. State, 215 S. W. 170, 144 Ark. 641.

Cal. People v. Haney (App.) 189 P. 338; People v. Gibson, 178 P. 338, 39 Cal. App. 202.

Ga. Towns v. State, 101 S. E. 678, 149 Ga. 613; Washington v. State, 100 S. E. 31, 24 Ga. App. 65; Scoggins v. State, 98 S. E. 240, 23 Ga. App. 366.

Mich. Labarge v. Pere Marquette R. Co., 95 N. W. 1073, 134 Mich. 139; Henry v. Henry, 80 N. W. 800, 122 Mich. 6; Whelpley v. Stoughton, 78 N. W. 137, 119 Mich. 314.

Mo. Rice v. Jefferson City Bridge & Transit Co. (Sup.) 216 S. W. 746.

N. C. State v. Chambers, 104 S. E. 670, 180 N. C. 705; Neal v. Yates, 104 S. E. 537, 180 N. C. 266; Cochran v. Smith, 88 S. E. 499, 171 N. C. 369.

S. C. Galluchat v. Atlantic Coast Line R. Co., 93 S. E. 241, 108 S. C. 51; Williams v. Greenville, S. & A. R. Co., 88 S. E. 131, 103 S. C. 321.

Wis. Twentieth Century Co. v. Quilling, 117 N. W. 1007, 136 Wis. 481.

[75] **U. S.** Coffin v. United States, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109.

Ala. Birmingham Ry., Light & Power Co. v. Moore, 50 So. 115, 163 Ala. 43.

Ark. Bowden v. Dennis, 217 S. W. 798, 144 Ark. 642; Burke Const. Co. v. St. Louis & S. F. Ry. Co., 214 S. W. 13, 139 Ark. 199; Louisiana & A. Ry. Co. v. Anderson, 213 S. W. 753, 139 Ark. 349.

Colo. Pickett v. Handy, 48 P. 820, 9 Colo. App. 357.

Conn. State v. Perretta, 105 A. 690, 93 Conn. 328.

Ga. City of Atlanta v. Young, 93 Ga. 265, 20 S. E. 317.

Ill. East St. Louis Connecting Ry. Co. v. Enright, 152 Ill. 246, 38 N. E. 553; Cleveland, C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328, 36 N. E. 965; Small v. Roberts, 43 Ill. App. 577.

Ind. Kelley v. Kelley, 8 Ind. App. 606, 34 N. E. 1009; Evansville & T. H. R. Co. v. Talbot, 131 Ind. 221, 29 N. E. 1134; Bishop v. State, 83 Ind. 67.

Ky. Kentucky Cent. R. Co. v. Musselman, 14 Ky. Law Rep. (abstract) 893.

Mich. Pierce v. C. H. Bidwell Thresher Co., 122 N. W. 628, 158 Mich. 356; Rouse v. Michigan United Rys. Co., 122 N. W. 532, 158 Mich. 109.

Minn. Egan v. Faendel, 19 Minn. 231 (Gil. 191).

Mo. Sparks v. Harvey (App.) 214 S. W. 249; La Riviere v. La Riviere, 97 Mo. 80, 10 S. W. 840; Ruth v. Chicago, R. I. & P. Ry. Co., 70 Mo. App. 190.

N. D. Watson v. Nelson, 172 N. W. 823.

Pa. Irvin v. Kutruff, 152 Pa. 609, 25 A. 796, 31 Wkly. Notes Cas. 485.

Tex. Ft. Worth & D. C. Ry. Co. v. Morrison (Civ. App.) 120 S. W. 1159; Missouri, K. & T. Ry. Co. of Texas v. Hood, 120 S. W. 236, 55 Tex. Civ. App. 636.

Wash. State v. Vane, 178 P. 456, 105 Wash. 421.

[76] People v. Harvey, 122 N. E. 138, 286 Ill. 593; Rouden v. Heisler's Estate (Mo. App.) 219 S. W. 691; State v. Herbert, 105 A. 796, 92 N. J. Law,

anything short of an express withdrawal of the objectionable instruction.[77]

C. Conflicting Instructions and Cure of Positive Error in Instructions by Giving Other Instructions

§ 537. General rule

While the instructions must be considered as a series, and may supplement each other, each one must state the law correctly as far as it goes, and there should be such harmony between them that the jury will not be misled;[78] and where instructions are in irreconcilable conflict, or they are so conflicting as to confuse or mislead the jury, the rule requiring them to be read together has no application.[79]

An instruction stating the law incorrectly is seldom remedied by another correct instruction,[80] and the general rule is that an

341; G. W. McNear, Inc., v. American & British Mfg. Co., 107 A. 242, 42 R. I. 302.

Contra, Harvey v. Epes, 12 Grat. (Va.) 153.

See. also, ante, § 31, notes 46. 47.

Cases in which assumption of disputed facts held not to have been cured. Where the evidence is conflicting, and the balance doubtful, an instruction, erroneously assuming a fact in issue, is not cured by other instructions which assume that the question is still open. Illinois Cent. R. Co. v. Sanders, 58 Ill. App. 117. Where instructions assumed that an alleged settlement, which was the question at issue, was not made, other instructions given, stating, "If the settlement had been made," did not cure the error. Bressler v. Schwertferger, 15 Ill. App. 294. In an action by an employé against a railroad company for injuries alleged to have been sustained, in boarding his train, by reason of a pile of cinders negligently allowed to accumulate near the track, an instruction that, "before plaintiff can recover, it must be shown that the negligence of" defendants "concerning the pile of cinders, as alleged, involved him in extra risk, and thereby caused his injuries," is erroneous, because it assumes as a fact that the accumulation of the cinders was negligence, while it is not made so by statute; and the error is not cured by a subsequent instruction, submitting the question to the jury, along with other questions of fact, in such a manner as not to correct the error. Campbell v. Ellsworth (Tex. Sup.) 20 S. W. 120.

[77] Wimberly v. State, 77 S. E. 879, 12 Ga. App. 540.

[78] Funston v. Hoffman, 83 N. E. 917, 232 Ill. 360.

[79] **Ark.** Southern Anthracite Coal Co. v. Bowen, 124 S. W. 1048, 93 Ark. 140.

Cal. Howard v. Worthington (App.) 195 P. 709.

Idaho. Portneuf-Marsh Valley Irr. Co. v. Portneuf Irrigating Co., 114 P. 19, 19 Idaho, 483.

Ill. Baldwin v. Killian, 63 Ill. 550.

Ky. Lexington & E. Ry. Co. v. Fields, 153 S. W. 43, 152 Ky. 19.

Tex. St. Louis Southwestern Ry. Co. of Texas v. Green, 138 S. W. 241.

[80] **Ark.** Doyle & Booth v. Kavanaugh, 112 S. W. 889, 87 Ark. 364.

Cal. People v. Neetens (App.) 184 P. 27; Fogarty v. Southern Pac. Co., 91 P. 650, 151 Cal. 785.

D. C. Baltimore & O. R. Co. v. Morgan, 35 App. D. C. 195.

Ill. Ratner v. Chicago City Ry. Co., 84 N. E. 201, 233 Ill. 169, reversing judgment Chicago City Ry. Co. v.

unambiguous and affirmatively erroneous instruction on a material

Ratner, 133 Ill. App. 628; Sloan v. Cleveland, C., C. & St. L. Ry. Co., 140 Ill. App. 31.

Ind. Chicago & E. R. Co. v. Fretz, 90 N. E. 76, 173 Ind. 519.

Ind. T. Gulf, C. & S. F. R. Co. v. Warlick, 1 Ind. T. 10, 35 S. W. 235.

Iowa. Latta v. Illinois Cent. R. Co., 130 N. W. 1059, 151 Iowa, 244; Parsons v. United States Express Co., 123 N. W. 776, 144 Iowa, 745, 25 L. R. A. (N. S.) 842.

Ky. Burton's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 113 S. W. 442.

Md. Seaboard Air Line Ry. Co. v. Phillips, 70 A. 232, 108 Md. 285; Rosenkovitz v. United Rys. & Electric Co. of Baltimore City, 70 A. 108, 108 Md. 306.

Miss. Mahaffey Co. v. Russell & Butler, 54 So. 945, 100 Miss. 122, overruling suggestion 54 So. 807, 100 Miss. 122.

Mo. Stumpf v. United Rys. Co. of St. Louis (App.) 227 S. W. 852; McGee v. St. Joseph Ry., Light, Heat & Power Co., 133 S. W. 1194, 153 Mo. App. 492; Kirkpatrick v. Metropolitan St. Ry. Co., 109 S. W. 682, 211 Mo. 68, reversing judgment 107 S. W. 1025, 129 Mo. App. 524; Glover v. Atchison, T. & S. F. Ry. Co., 108 S. W. 105, 129 Mo. App. 563; Welch v. Hannibal & St. J. Ry. Co., 20 Mo. App. 477.

Neb. McPherson v. Wiswell, 19 Neb. 117, 26 N. W. 916.

N. H. Gerry v. Kennett, 78 A. 649, 75 N. H. 564.

N. J. State v. Tachin, 108 A. 318, 93 N. J. Law, 485, affirming judgment 106 A. 145, 92 N. J. Law, 269.

N. Y. Goodwin v. Burke, 57 Hun, 592, 10 N. Y. S. 628.

Or. Dalton v. Kelsey, 114 P. 464, 58 Or. 244.

Pa. Arthurs v. Wilson, 40 Pa. Super. Ct. 604.

S. C. Scarborough v. Woodley, 62 S. E. 405, 81 S. C. 329.

Tex. Chicago, R. I. & G. Ry. Co. v. Forrester (Civ. App.) 137 S. W. 162.

Va. American Locomotive Co. v. Whitlock, 63 S. E. 991, 109 Va. 238.

Wash. Rosin v. Danaher Lumber Co., 115 P. 833, 63 Wash. 430, 40 L. R. A. (N. S.) 913.

W. Va. State v. Ringer, 100 S. E. 413, 84 W. Va. 546; Cobb v. Dunlevie, 60 S. E. 384, 63 W. Va. 398.

Wis. Carle v. Nelson, 130 N. W. 467, 145 Wis. 593; Driscoll v. Allis-Chalmers Co., 129 N. W. 401, 144 Wis. 451; Guinard v. Knapp, Stout & Co. Company, 90 Wis. 123, 62 N. W. 625, 48 Am. St. Rep. 901.

Illustrations of errors not cured by other instructions. Error of an instruction in putting on defendant the burden of proof, before plaintiff had made out a prima facie case of negligence, is not cured by an instruction that, if certain facts were found, defendant was not liable. Trotter v. St. Louis & Suburban Ry. Co., 99 S. W. 508, 122 Mo. App. 405. In an action by architects for compensation, an erroneous instruction given at the request of plaintiffs that plaintiffs were entitled to recover if they prepared the plans and specifications for defendant, unless it was "distinctly understood and agreed by the plaintiffs" that they should receive no compensation if the cost of the building proved to be more than their estimate, was not cured by an instruction given at the request of defendant that if plaintiffs undertook to prepare plans and specifications for the building to cost not over a certain sum, and that the lowest bid received was for a sum greatly in excess of the estimate, the jury must find for defendant, since the instructions were contradictory, and it could not be said which instruction the jury observed. Williar v. Nagle, 71 A. 427, 109 Md. 75, 16 Ann. Cas. 928. An instruction that a carrier is required to provide the safest means practicable, the safest means known, in assisting alighting passengers, is not cured by a subsequent instruction that if a carrier failed to provide a safe means of alighting from a train, and plaintiff was injured thereby, to find for plaintiff. Texas & P. Ry. Co. v. Beezley, 120 S. W. 1136, 56 Tex. Civ. App. 245. In an action for carrying a passenger beyond his desti-

matter is not cured by a correct instruction on the same point,[81]

nation, an erroneous instruction that it was the duty of the railroad company to safely carry him from the starting point and deliver him at his destination, and that a failure to do so would be negligence on their part, was not cured by an instruction properly defining the words "negligence" and "ordinary care," and charging that if the passenger was properly on the train and that the employés of defendant negligently, as the term is above defined, carried him past his destination, etc., they should find for plaintiff. Gulf, C. & S. F. Ry. Co. v. Ward, 124 S. W. 130, 58 Tex. Civ. App. 210. In an action for services by a salesman, an instruction that if, at the time when plaintiff was employed and during his employment, the custom existed that salesmen in such business were excused from duty while sick and paid their full salaries, then such custom was a part of the contract, without instructing on the indispensable elements of notoriety and ancientness of the custom, was not cured by the giving of another instruction that a custom was not binding which had not been generally acquiesced in for such length of time as to warrant the jury in finding that such custom entered into the minds of the parties at the time of making the agreement. Sweet v. Leach, 6 Ill. App. 212. Where, in an action for injuries to a servant, the only theory on which a recovery could be had was defendant's failure to supply a pin missing from a machine, error in refusing to charge that plaintiff could not recover unless the jury found that the proximate cause was the failure to supply the pin, and that the accident would not have happened had the pin been in place, was not cured by a subsequent instruction that the failure to supply the pin must have been the proximate cause of the injury. Ladiew v. Sherwood Metal Working Co., 109 N. Y. S. 477, 125 App. Div. 65. The error in an instruction that an employer in supplying materials for a platform was required to exercise reasonable care to inspect the materials, and that if he was negligent, and decedent was injured in consequence thereof, the employer was liable, due to the fact that it ignored evidence that decedent had the exclusive supervision of the construction of the platform, and induced the jury to infer that there was no duty of the employés to inspect the materials, was not cured by an instruction that there could be no recovery if decedent was the foreman directing the details of the work in erecting the platform. Murch Bros. Const. Co. v. Hays, 114 S. W. 697, 88 Ark. 292. Error in an instruction that it is sufficient to charge defendants as partners if it be shown that they were joint owners is not cured by other instructions correctly stating the law, and what is necessary to make them liable as partners. Miller v. Vermurie, 7 Wash. 386, 34 P. 1108. In an action against a street railroad, error in an instruction that defendant was not required to keep its track in a reasonably safe condition and was not required to keep the space between the rails filled, was not cured by the statement that the defendant was only required to use ordinary care to keep the space between the rails in a reasonably safe condition, since such statement was merely a contradiction in terms of the first statement, and rendered the instruction inconsistent and misleading. Huff v. St. Joseph Ry., Light, Heat & Power Co., 111 S. W. 1145, 213 Mo. 495. The error in an instruction that a grantee would, under specified circumstances, be bound by knowledge of the notary of infirmities in the deed acquired in taking the acknowledgment, was not cured by a further instruction that the grantee would not be bound by knowledge or conduct of the notary, unless the notary was authorized to act for him, or unless grantee had knowledge of irregularities and accepted the benefit thereof, where there was no evidence that the grantee had any actual knowledge of any irregularities or in the acknowledgment. Stringfellow v. Braselton, 117 S. W. 204, 54 Tex. Civ. App. 1.

[81] **Ala.** Alabama Consol. Coal & Iron Co. v. Heald, 53 So. 162, 168

which does not give the jury clearly to understand that the erro-

Ala. 626; Alabama City, G. & A. Ry. Co. v. Bates, 46 So. 776, 155 Ala. 347.

Ark. Sweet v. McEwen, 215 S. W. 651, 140 Ark. 162; Goodell v. Bluff City Lumber Co., 57 Ark. 203, 21 S. W. 104.

Cal. Watts v. Murphy, 99 P. 1104, 9 Cal. App. 564; Malone v. Sierra Ry. Co. of California, 91 P. 522, 151 Cal. 113; People v. Maughs, 86 P. 187, 149 Cal. 253; People v. Westlake, 57 P. 465, 124 Cal. 452.

Colo. Harris v. People, 75 P. 427, 32 Colo. 211.

Ga. White v. State, 100 S. E. 9, 24 Ga. App. 122; Beach v. State, 75 S. E. 139, 138 Ga. 265.

Ill. People v. Emmel, 127 N. E. 53, 292 Ill. 477; People v. Dettmering, 116 N. E. 205, 278 Ill. 580; Langan v. Chicago City Ry. Co., 145 Ill. App. 249.

Ind. McEntire v. Brown, 28 Ind. 347.

Iowa. McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689.

La. State v. Ardoin, 22 So. 620, 49 La. Ann. 1145, 62 Am. St. Rep. 678.

Mich. People v. Holmes, 69 N. W. 501, 111 Mich. 364.

Miss. Barnes v. State, 79 So. 815, 118 Miss. 621.

Mo. Doty v. Quincy, O. & K. C. R. Co., 116 S. W. 1126, 136 Mo. App. 254; McKinnon v. Western Coal & Mining Co., 96 S. W. 485, 120 Mo. App. 148; State v. Tatlow, 136 Mo. 678, 38 S. W. 552; State v. Cable, 117 Mo. 380, 22 S. W. 953; State v. Davies, 80 Mo. App. 239.

Mont. State v. Oliver, 50 P. 1018, 20 Mont. 318.

Neb. Howell v. State, 85 N. W. 289, 61 Neb. 391; Thompson v. State, 85 N. W. 62, 61 Neb. 210, 87 Am. St. Rep. 453; Sweenie v. State, 80 N. W. 815, 59 Neb. 269; Bergeron v. State, 74 N. W. 253, 53 Neb. 752; Henry v. State, 70 N. W. 924, 51 Neb. 149, 66 Am. St. Rep. 450; Beck v. State, 70 N. W. 498, 51 Neb. 106; Raker v. State, 69 N. W. 749, 50 Neb. 202; School Dist. of Chadron v. Foster, 31 Neb. 501, 48 N. W. 267; McCleneghan v. Omaha & R. V. R. Co., 25 Neb. 523, 41 N. W. 350, 13 Am. St. Rep. 508.

N. J. State v. Tachin, 106 A. 145, 92 N. J. Law, 269; State v. Clayton, 85 A. 173, 83 N. J. Law, 673.

N. Y. Jacobs v. Katz (Sup.) 176 N. Y. S. 831; Sullivan v. Brooklyn Heights R. Co., 102 N. Y. S. 982, 117 App. Div. 784.

N. C. State v. Morgan, 48 S. C. 670, 136 N. C. 628.

Okl. Davis v. State, 113 P. 220, 4 Okl. Cr. 508.

Or. Anderson v. Columbia Contract Co., 185 P. 231, 94 Or. 171, 7 A. L. R. 653, denying rehearing 184 P. 240, 94 Or. 171, 7 A. L. R. 653.

Tenn. Louisville & N. R. Co. v. Cheatham, 100 S. W. 902, 118 Tenn. 160.

Tex. Patterson v. Williams (Civ. App.) 225 S. W. 89; Galveston, H. & S. A. Ry. Co. v. State (Sup.) 216 S. W. 393, reversing judgment (Civ. App.) 194 S. W. 462, and rehearing denied 218 S. W. 361; St. Louis & S. F. R. Co. v. Brosius & Le Compte, 105 S. W. 1131, 47 Tex. Civ. App. 647; St. Louis, I. M. & S. Ry. Co. v. Moon, 103 S. W. 1176, 47 Tex. Civ. App. 209; Johnson v. Texas & G. Ry. Co., 100 S. W. 206, 45 Tex. Civ. App. 146.

Va. Neal v. Commonwealth, 98 S. E. 629, 124 Va. 842.

Illustrations of errors not cured. An instruction in a murder trial which limits the right of self-defense to actual danger. People v. Scott, 120 N. E. 553, 284 Ill. 465. An erroneous charge, that jury should not acquit unless alibi evidence showed that defendant could not have been at place of crime at time of its commission, was not cured by further charge that, if such proof failed to satisfy the test given, the jury could not convict for such failure, but only if whole evidence established guilt. People v. Montlake, 172 N. Y. S. 102, 184 App. Div. 578. A charge to convict if accused feloniously, willfully, and with malice aforethought, with a deadly weapon, to wit, an ax, did strike at prosecuting witness with intent to murder and kill him, being erroneous, was not cured by the giving for accused of a correct charge that before he could be convicted the jury should be satisfied that he not

neous instruction is intended to be retracted,[82] since, there being in such case a direct conflict in the pronouncements of the court,

only attempted to strike prosecuting witness with an ax, but that he was also at the time sufficiently near prosecuting witness to enable him to strike him and inflict an injury upon his person, since the two charges were inconsistent. Jones v. State, 116 S. W. 230, 89 Ark. 213.

Error in instruction as to credibility of witnesses. Error in an instruction which might have misled the jury to believe that court intended to instruct that plaintiff was entitled to more credit than defendant's witnesses was not cured by other instructions, laying down the rules as to the credibility of witnesses and leaving jury free to decide. Walsh v. Chicago Rys. Co., 128 N. E. 647, 294 Ill. 586. The error in an instruction, authorizing conviction if the jury believed that the evidence of the accomplice tended to show that accused was guilty and that the corroboration of her testimony tended to show the crime, was not cured by a special charge that, before the jury could convict, they must believe beyond a reasonable doubt that the testimony of the prosecutrix was true, and that there was credible independent evidence tending to show that accused was guilty. Barrett v. State, 115 S. W. 1187, 55 Tex. Cr. R. 182. Where court erroneously instructed, "If you should believe that witnesses or a witness has sworn falsely upon some point, then you are not bound to give any credit whatsoever to their testimony, such error was not cured, where the rule was subsequently correctly charged at the request of the defendant; the correction not being charged as a substitute for the previous incorrect charge, to which exception was taken. People v. Parsons, 183 N. Y. S. 100, 192 App. Div. 841.

Instructions tending to mislead jury to disregard proper testimony. Distinct portions of a charge applied in submitting separate issues, and which would naturally tend to mislead the jury to disregard proper testimony in a case wherein it was especially important that the jury should give proper consideration to all the evidence, must be held to necessitate a new trial, regardless of a subsequent correct instruction as to their duty in determining the weight of evidence and the credibility of witnesses. Steber v. Chicago & N. W. Ry. Co., 120 N. W. 502, 139 Wis. 10.

[82] **Ark.** St. Louis Southwestern Ry. Co. v. Jagerman, 59 Ark. 98, 26 S. W. 591.

D. C. Boswell v. District of Columbia, 10 Mackey (21 App. D. C.) 526.

Ga. Rowe v. Spencer, 64 S. E. 468, 132 Ga. 426; Atlanta & B. A. L. Ry. v. McManus, 58 S. E. 258, 1 Ga. App. 302.

Ill. Wilbur v. Wilbur, 129 Ill. 392, 21 N. E. 1076; Counselman v. Collins, 35 Ill. App. 68; Gale v. Rector, 5 Ill. App. 481.

Ind. Abney v. Indiana Union Traction Co., 83 N. E. 387, 41 Ind. App. 53; Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171; Binns v. State, 66 Ind. 428; Toledo, W. & W. Ry. Co. v. Shuckman, 50 Ind. 42.

Ky. Clay v. Miller, 3 T. B. Mon. 146.

Md. Adams v. Capron, 21 Md. 186, 83 Am. Dec. 566.

Mo. Toncrey v. Metropolitan St. Ry. Co., 107 S. W. 1091, 129 Mo. App. 596; Hickman v. Griffin, 6 Mo. 37, 34 Am. Dec. 124; McNichols v. Nelson, 45 Mo. App. 446; Fink v. Algermissen, 25 Mo. App. 186.

Neb. Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077; First Nat. Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568.

N. Y. Sinica v. New York Rys. Co., 180 N. Y. S. 377, 190 App. Div. 727.

N. C. Wilson v. Atlantic Coast Line R. Co., 55 S. E. 257, 142 N. C. 333.

Ohio. Pendleton St. R. Co. v. Stallmann, 22 Ohio St. 1.

Tex. Texas Cent. R. Co. v. Waldie (Civ. App.) 101 S. W. 517; Missouri, K. & T. Ry. Co. of Texas v. Rodgers,

it will ordinarily be impossible to say whether the jury has followed the right or the wrong rule.[88]

Where the instructions of the successful party state an errone-

89 Tex. 675, 36 S. W. 243; Arcia v. State, 28 Tex. App. 198, 12 S. W. 599.

Wash. Peyser v. Western Dry Goods Co., 92 P. 886, 48 Wash. 55; Baxter v. Waite, 2 Wash. T. 228, 6 P. 429.

W. Va. McKelvey v. Chesapeake & O. Ry. Co., 35 W. Va. 500, 14 S. E. 261.

Wis. Jackman v. Inman, 114 N. W. 489, 134 Wis. 297; Imhoff v. Chicago & M. Ry. Co., 20 Wis. 344.

Instructions erroneous within rule. The error in an instruction in an action on a note, arising from the fact that it required plaintiff to prove that the maker knew the contents of the note at the time he signed it by his mark, and that he delivered the same for a valuable consideration, etc., though the law presumes the existence of such facts from the facts proved, is not cured by a charge predicating a right of recovery on facts stated in general terms, without informing the jury that the law presumes the existence of such facts. Dawson v. Wombles, 100 S. W. 547, 123 Mo. App. 340.

[88] **Ala.** Alabama City, G. & A. Ry. Co. v. Bullard, 47 So. 578, 157 Ala. 618.

Ark. St. Louis, I. M. & S. Ry. Co. v. Woods, 131 S. W. 869, 96 Ark. 311, 33 L. R. A. (N. S.) 855; Merchants' Fire Ins. Co. v. McAdams, 115 S. W. 175, 88 Ark. 550.

Cal. Fountain v. Connecticut Fire Ins. Co., 112 P. 546, 158 Cal. 760, 139 Am. St. Rep. 214; Rathbun v. White, 107 P. 309, 157 Cal. 248.

Ga. Pelham Mfg. Co. v. Powell, 64 S. E. 1116, 6 Ga. App. 308.

Ill. Fowler v. Chicago & E. I. R. Co., 85 N. E. 298, 234 Ill. 619, reversing judgment Chicago & E. I. R. Co. v. Fowler, 138 Ill. App. 352; Kath v. East St. Louis & Suburban Ry. Co., 83 N. E. 533, 232 Ill. 126, 15 L. R. A. (N. S.) 1109; Swiercz v. Illinois Steel Co., 83 N. E. 168, 231 Ill. 456; Kankakee Stone & Lime Co. v. City of Kankakee, 128 Ill. 173, 20 N. E. 670; Cleveland, C., C. & St. L. Ry. Co. v. Dukeman, 134 Ill. App. 396; Chicago, M. & St. P. Ry. Co. v. Gill, 132 Ill. App. 310; Chicago, R. I. & P. Ry. Co. v. Turck, 131 Ill. App. 128; Cleveland, C., C. & St. L. Ry. Co. v. Dukeman, 130 Ill. App. 105; Belvidere City Ry. Co. v. Bute, 128 Ill. App. 620; Second Nat. Bank v. Thuet, 124 Ill. App. 501.

Ind. Monongahela River Consol. Coal & Coke Co. v. Hardsaw, 81 N. E. 492, 169 Ind. 147.

Iowa. McDivitt v. Des Moines City Ry. Co., 118 N. W. 459, 141 Iowa, 689.

Mo. Gordy v. Manufacturers' Coal & Coke Co., 132 S. W. 21, 151 Mo. App. 455; Butz v. Murch Bros. Const. Co., 117 S. W. 635, 137 Mo. App. 222.

Mont. Sullivan v. Metropolitan Life Ins. Co., 88 P. 401, 35 Mont. 1.

N. Y. Blumberg v. Sterling Bronze Co., 107 N. Y. S. 142, 56 Misc. Rep. 477.

N. C. Kimbrough v. Hines, 104 S. E. 684, 180 N. C. 274; Jones v. Life Ins. Co. of Virginia, 65 S. E. 602, 151 N. C. 54.

Pa. Commonwealth v. Ross, 110 A. 327, 266 Pa. 580; Commonwealth v. Divomte, 105 A. 821, 262 Pa. 504.

Tex. Petty v. Jordan-Spencer Co. (Civ. App.) 135 S. W. 227.

Va. Atlantic Coast Line R. Co. v. Caple's Adm'x, 66 S. E. 855, 110 Va. 514.

Wyo. Palmer v. State, 59 P. 793, 9 Wyo. 40, 87 Am. St. Rep. 910.

Instructions on insanity as a defense to accusation of crime. An instruction that defendant must prove that at the time of the killing he was laboring under such defect of reason from diseased mind as not to know the nature and quality of the act is correct, but where it is followed by another, erroneously charging that insanity will only excuse crime where the person was so insane as not to know right from wrong, the two are irreconcilable, and constitute reversible error. Bolling v. State, 54 Ark. 588, 16 S. W. 658.

ous rule, and those of the defeated party state the rule correctly, the only presumption permissible is that the jury discarded the true rule for the false.[84] Instructions misleading on a vital issue will not be cured merely by the giving of other correct instructions.[85] Affirmative error in an instruction can only be cured by the withdrawal of the instruction by the court in language so explicit as to preclude an inference that the jury may have been influenced by it.[86] Under the above rule, the error of an instruction in presenting a wrong theory of the entire case is not cured by other instructions announcing the right theory,[87] and an instruction, whether in a civil or criminal case, purporting to state the facts on proof of which the jury may find for one party or the other, but which omits an element essential to such a finding, is not susceptible of cure by any other instructions in the series, or by an instruction given for the other party.[88]

[84] Ross v. Metropolitan St. Ry. Co., 112 S. W. 9, 132 Mo. App. 472.

[85] Walsh v. Henry, 88 P. 449, 38 Colo. 393; Radcliffe v. Hollyfield, 65 A. 789, 216 Pa. 367.

[86] Cleveland, C., C. & St. L. Ry. Co. v. Powers, 88 N. E. 1073, 173 Ind. 105, rehearing denied 89 N. E. 485, 173 Ind. 105; Lake Shore & M. S. Ry. Co. v. Johnson, 88 N. E. 849, 172 Ind. 548, transferred from Appellate Court 84 N. E. 1104; Fuelling v. Fuesse, 87 N. E. 700, 43 Ind. App. 441; Galino v. Fleischmann Realty & Const. Co., 115 N. Y. S. 334, 130 App. Div. 605.

[87] Flucks v. St. Louis, I. M. & S. Ry. Co., 122 S. W. 348, 143 Mo. App. 17.

[88] **Ill.** People v. Israel, 88 N. E. 802, 240 Ill. 375; Mooney v. City of Chicago, 88 N. E. 194, 239 Ill. 414; Herdman-Harrison Milling Co. v. Spehr, 145 Ill. 329, 33 N. E. 944, affirming 46 Ill. App. 24; Lake Shore & M. S. Ry. Co. v. Richards (Sup.) 32 N. E. 402; Belskis v. Dering Coal Co., 146 Ill. App. 124; Winn v. Walker, 145 Ill. App. 333; City of Chicago v. Fields, 139 Ill. App. 250; Baltimore & O. S. W. Ry. Co. v. Schell, 122 Ill. App. 346; Osner v. Zadek, 120 Ill. App. 444; Gregg v. People, 98 Ill. App. 170; Gedney v. Gedney, 61 Ill. App. 511.

Ind. Steele v. Michigan Buggy Co., 95 N. E. 435, 50 Ind. App. 635; Rahke v. State, 81 N. E. 584, 168 Ind. 615.

Iowa. Jackson v. Mott, 76 Iowa, 263, 41 N. W. 12.

Miss. Harper v. State, 35 So. 572, 83 Miss. 402.

Mo. Vaughn v. William F. Davis & Sons (App.) 221 S. W. 782; Low v. Paddock (App.) 220 S. W. 969; Yontz v. McVean, 217 S. W. 1000, 202 Mo. App. 377; Montgomery v. Hammond Packing Co. (App.) 217 S. W. 867; Ward v. Stutzman (App.) 212 S. W. 65; Schneider v. Hawks (App.) 211 S. W. 681; Sullivan v. Hannibal & St. J. R. Co., 88 Mo. 169; Hohstadt v. Daggs, 50 Mo. App. 240; Flynn v. Union Bridge Co., 42 Mo. App. 529.

Mont. State v. Peterson, 92 P. 302, 36 Mont. 109.

Neb. Dobson v. State, 85 N. W. 843, 61 Neb. 584.

Okl. McCarthy v. State, 119 P. 1020, 6 Okl. Cr. 483; Hinchman v. State, 119 P. 1022, 6 Okl. Cr. 700.

S. C. State v. Johnson, 67 S. E. 453, 85 S. C. 265.

Illustrations of errors not cured. In a passenger's action for injuries while alighting from a street car, it was error to instruct for plaintiff if the jury believed that plaintiff, after the car had made a usual stop, got up and was thrown from the platform by a sudden forward movement of the car, as such facts did not demand the inference that plaintiff's

An erroneous specific instruction on a controlling point is not cured by the correctness of the general charge.[89] Error in the last instruction of a series cannot be overcome merely by construing such instruction with the others given,[90] and ordinarily error in a charge given by the court on its own motion will not be cured by a correct charge on the point involved, given in an isolated instruction requested by a party.[91]

§ 538. Limitations of rule

The rule that there is reversible error, if a correct and a wrong instruction are given on the same point, does not apply where the instructions, when taken together, as they must be, make the correct rule of law clear,[92] and although instructions given are apparently conflicting, if from the language used or the relation which the instructions bear to each other it appears that they may be read together as a harmonious whole, and, when so read, are not misleading, any seeming conflict therein is not prejudicial.[93] If two instructions, each improper in itself, amount to a correct statement of the law when taken together, the error in each will be disregarded.[94]

§ 539. Cure of erroneous instruction by its withdrawal

As has already been indicated in the preceding discussion, the action of the court, after calling the attention of the jury thereto,

injury was caused by defendant's negligence, and such error was not cured by an instruction that plaintiff would not be entitled to recover unless the injury was caused by defendant's negligence. Savannah Electric Co. v. Johnson (Ga. App.) 103 S. E. 798. Where plaintiff was injured by the use of pads purchased as a cure for rupture, because of injurious substances contained therein, an instruction attempting to cover the whole case, but omitting the elements that the pads contained injurious ingredients, which caused plaintiff's injuries, and that defendant knew or should have known the character of the pads by the exercise of ordinary care, was erroneous, and could not be cured by any subsequent instruction. Harmon v. Plapao Laboratories (Mo. App.) 218 S. W. 701.

[89] Pittsburgh, C. & St. L. Ry. Co. v. Krouse, 30 Ohio St. 222.

[90] Ackerman v. Stacey, 143 N. Y. S. 227, 157 App. Div. 835.

[91] Burns v. Sennett, 99 Cal. 363, 33 P. 916; Sterling v. Callahan, 94 Mich. 536, 54 N. W. 495.

[92] Escambia County Electric Light & Power Co. v. Sutherland, 55 So. 83, 61 Fla. 167; Piper v. Murray, 115 P. 669, 43 Mont. 230; Taylor v. Houston Electric Co., 85 S. W. 1019, 38 Tex. Civ. App. 432; E. T. & H. K. Ide v. Boston & M. R. R., 74 A. 401, 83 Vt. 66; City of Tacoma v. Nisqually Power Co., 107 P. 199, 57 Wash. 420.

[93] A. L. Clark Lumber Co. v. St. Coner, 133 S. W. 1132, 97 Ark. 358; St. Louis, I. M. & S. Ry. Co. v. Rogers, 126 S. W. 375, 1199, 93 Ark. 564.

[94] Pond v. Wyman, 15 Mo. 175.

in withdrawing an erroneous part of its charge, and giving them the correct rule on the issue covered by it, cures the error.[95]

[95] **Ala.** United States Casualty Co. v. Perryman, 82 So. 462, 203 Ala. 212; Null v. State, 79 So. 678, 16 Ala. App. 542.

Ark. St. Louis, I. M. & S. Ry. Co. v. Stamps, 104 S. W. 1114, 84 Ark. 241.

Ga. Central of Georgia Ry. Co. v. Ray, 65 S. E. 281, 133 Ga. 126; Rawlins v. State, 52 S. E. 1, 124 Ga. 31, judgment affirmed 26 S. Ct. 560, 201 U. S. 638, 50 L. Ed. 899, 5 Ann. Cas. 783.

La. State v. Jones, 36 La. Ann. 204.

Neb. Reed v. State, 92 N. W. 321, 66 Neb. 184.

Tex. International & G. N. R. Co. v. Ford (Civ. App.) 118 S. W. 1137.

Vt. Dyer v. Lalor, 109 A. 30, 94 Vt. 103; Barrell v. Dickinson, 74 A. 234, 82 Vt. 551.

Withdrawal held insufficient within the above rule. Withdrawal by the court of the objectionable portion of its charge, and instructing, at counsel's request, that the law is directly contrary to that previously charged, being qualified by the court's statement that his ideas of the case are entirely different from those of both of the counsel, whose views, however, he has just accepted and charged as the law, does not correct the original error. Orendorf v. New York Cent. & H. R. R. Co., 104 N. Y. S. 222, 119 App. Div. 638. Where, in an action for injuries to a servant, the court charged unfavorably to defendant at length, with reference to the provisions of the labor law, and, when requested to give defendant an exception, withdrew all that portion of the charge from the jury by a single sentence, such withdrawal did not obviate the objection. Ladiew v. Sherwood Metal Working Co., 109 N. Y. S. 477, 125 App. Div. 65.

[END OF VOLUME 1]

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